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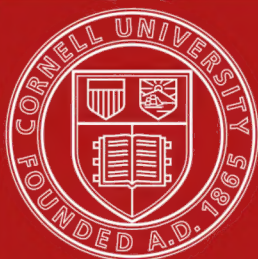
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A digest of railway decisions, comprising



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DIGEST
OF
RAILWAY DECISIONS.

A DIGEST
OF
RAILWAY DECISIONS

COMPRISING

ALL REPORTED AMERICAN CASES IN WHICH A RAILWAY COMPANY
IS A PARTY, AND ALL OTHER CASES IN WHICH
RAILWAY LAW IS DETERMINED.

BY 

JOHN F. LACEY,
OF THE IOWA BAR.

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P R E F A C E .

A DIGEST OF RAILWAY LAW has been much needed by the legal profession of the United States for many years.

The great and rapidly increasing importance of railways, and the vast amount of litigation attendant upon their construction and operation, will suggest, not only the necessity of such a work, but the magnitude of the task undertaken in its preparation.

Railway cases generally involve large sums of money, the best legal talent is employed in their trial, and they are usually tried with a view to their revision by an appellate court. Hence they are highly important as precedents, owing to the skill and care with which they are tried. The original design of this book was simply a Digest of American Railway Law, but it was found upon examination that without very much enlarging its size, it could be made to embrace the principal points of every railway case.

I have therefore included all the reported American cases in which a railway company is a party, and all other cases in which questions are passed upon involving railway law.

The great conflict of the decisions of the courts of last resort in the different States, upon many of the questions embraced in this volume, renders a digest of these decisions all the more needful to the practitioner, for, the weightier reasons given in a single opinion will often outweigh a larger number of less carefully considered decisions.

The difficulty experienced by many members of the bar, in recollecting the abbreviations used in the citation of the reports, has led me to adopt a different plan from that usually employed, and all citations, except those where the reports are known by the name of the State, will be found unabbreviated.

I trust the result of my labors may prove acceptable to those for whom this book was intended. I am aware of its imperfections, and my only excuse is the inherent difficulty of methodically subdividing and arranging so vast a subject.

JOHN F. LACEY.

OSKALOOSA, IOWA,
January 1, 1875.

TO

Hon. C. S. Sampson,

LATE JUDGE OF THE SIXTH JUDICIAL DISTRICT OF IOWA,

AS A TOKEN OF RESPECT

FOR THE EMINENT JUDICIAL ABILITY AND INTEGRITY WHICH HAVE DISTINGUISHED
HIS CAREER UPON THE BENCH,

AND IN TESTIMONY OF

THE MANY GOOD QUALITIES WHICH, IN PRIVATE LIFE, HAVE WON FOR HIM
HOSTS OF FRIENDS,

THIS VOLUME

IS RESPECTFULLY INSCRIBED.

THE AUTHOR.

DIGEST OF RAILWAY DECISIONS.

ABANDONMENT.

1. Of railway fixtures. Some piers built by a railroad company as part of its railroad, on lands over which it has acquired the right of way for its road, do not, though firmly imbedded in the earth, become the property of the owner of the lands as part of the realty. And, on the purpose of completing the railroad being abandoned, the company may remove such structures as personal property. *Wagner v. Cleveland and Toledo R. R. Co.*, 22 Ohio St., 568. 1872.

2. Damages. A railway company when authorized by law to abandon a portion of its route is not liable in damages to the land owners for such abandonment. *Baltimore and Susquehanna R. R. Co. v. Compton*, 2 Gill (Md.), 20. 1844.

ABATEMENT.

I. GROUNDS OF ABATEMENT. II. PLEAS.

I. GROUNDS OF ABATEMENT.

1. Death. Suits for injuries to the person die with the person and may be taken advantage of by the defendant on the trial, without a plea in abatement. *Baltimore and Ohio R. R. Co. v. Ritchie*, 31 Md., 191. 1869.

2. — Actions of trespass for injuries to realty, do not survive, and cannot be sustained by an executor. *Reed v. Peoria and Oquawka R. R. Co.*, 18 Ill., 408. 1857.

3. — An action brought by a passenger against a railroad company, to recover dam-

ages for injuries to her person, does not abate by the death of the plaintiff. *Peebles v. N. C. R. R. Co.*, 63 N. C., 238. 1869.

4. — Section 121 of the Code, which provides that "after a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party," covers the case of a verdict for the plaintiff in an action to recover damages for injuries sustained through the negligence of defendant's servants. Hence, it being unnecessary for the protection of the plaintiff that judgment should be entered, although his health be precarious, an order staying his proceedings will not be so modified as to permit him to enter judgment. *Lyons v. Third Avenue R. R. Co.*, 7 Robertson (N. Y.), 605. 1867.

5. Action in another state. The courts of Delaware will not compel a plaintiff to elect upon which suit he will proceed, he having commenced another action for the same cause in another state. *Howard v. Wilmington and Susquehanna R. R. Co.*, 2 Harrington (Del.), 471. 1838.

II. PLEAS.

6. — Section 200 of the Code of 1843 (p. 706), which requires pleas in abatement to be verified, is continued in force by § 802 of the Code of 1852 (2 G. & H., 336). *Indianapolis, Peru and Chicago R. R. Co. v. Summers*, 28 Ind., 521. 1867.

7. — A plea in abatement to the disability of the plaintiff to sue, concluded with praying "judgment of the writ and declaration, and that the same may be quashed," held bad; it should have concluded, "whether the defendant ought to be compelled to answer," etc.

Assent of plaintiff — Letters of administration — Torts — Public lands.

West Feliciana R. R. Co. v. Johnson, 5 Howard (Miss.), 273. 1840.

8. — An action at law for past trespasses cannot be pleaded in abatement of a bill in equity to prevent future trespasses. *Stewart and Foltz's Appeal*, 56 Penn. St., 413. 1867.

9. — A plea in bar waives all pleas in abatement. *Railroad Co. v. Harris*, 12 Wallace, 65. 1870.

ACTIONS.

See PLEADING.

1. Assent of plaintiff. In the absence of proof that a suit brought in the name of a corporation was not authorized by it, its assent will be presumed, although the corporation is but a nominal party. *Bangor, Oldtown, and Milford R. R. Co. v. Smith*, 47 Me., 35. 1859.

2. To quiet title. A bill of peace to quiet title cannot be maintained where the title has not been called in question in actions at law in the nature of actions of ejectment. *Marmaduke v. Hannibal and St. Joseph R. R. Co.*, 30 Mo., 545. 1860.

3. To recover real property — Judgment. Where an action (under the laws of Iowa), is brought to recover land, the plaintiff claiming possession and the defendant denying the right of possession but not claiming title it is erroneous to enter a judgment that the defendant hath title; the judgment should be, that the plaintiff hath no title. *Litchfield v. R. R. Co.*, 7 Wallace, 270. 1868.

ADMINISTRATION.

1. Letters of administration. Where letters of administration have been granted upon the estate of one dying intestate in the county of the surrogate, the *onus* is upon one disputing the title and authority of the administrator to show a want of jurisdiction in the surrogate to grant the letters. *Welch v. N. Y. Cent. R. R. Co.*, 53 N. Y., 610. 1873.

2. — A railroad company against whom an action is being prosecuted by an administrator to recover damages for an injury caus-

ing the death of the intestate, has such an interest as to make it a competent party to petition the court for a revocation of the letters of administration. *Jeffersonville R. R. Co. v. Swayne's Adm'r*, 26 Ind., 477. 1866.

3. — Where the intestate was not an inhabitant of this state at the time of his death and left no assets in the state, and none came into it afterwards, no jurisdiction is conferred on the court to grant letters of administration in any county of the state, and such letters, if granted, are *coram non iudice* and void. *Ib.*

4. — The term assets as used in the third and fourth clauses of § 7 of the act relating to the settlement of decedents' estates, (2 G. & H., 485,) means assets of the intestate; that is, property, rights or choses in action held by, or belonging to, the intestate at the time of his death, and which are subject to be applied by the administrator to the payment of debts. *Ib.*

5. — A claim for damages for causing the death of a party, under § 784 of the Code, is prosecuted by the administrator for the benefit of the widow and children, or next of kin, of the deceased, and is not assets of the deceased, within the meaning of the statute authorizing the granting of letters of administration in this state. *Ib.*

ADMIRALTY.

1. Torts. The jurisdiction of a court of admiralty in torts depends entirely on the locality. It may extend to places within the body of a county. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Philadelphia and Havre de Grace Steam Tugboat Co.*, 23 Howard, 209. 1859.

ADVERSE POSSESSION.

1. A grant from the state may be presumed from long continued, exclusive and adverse possession. *Tracy v. Norwich and Worcester R. R. Co.*, 39 Conn., 382. 1872.

2. Public lands. No title to public lands can be acquired by prescription or by estoppel *in pais*. *Doran v. Central Pacific R. R. Co.*, 24 Cal., 245. 1864.

Appointment and Powers.

3. Tenants in common. Open, notorious and uninterrupted possession of the whole by a tenant in common for twenty-one years, claiming the lands as his own and taking the whole profits exclusively is evidence from which the jury may draw the conclusion of ouster and adverse possession. *Susquehanna and Wyoming Valley R. R. Co. v. Quick*. 61 Penn. St., 328. 1869.

4. — In cases of express trust the evidence of an adverse holding must be stronger than between co-tenants. *Ib.*

5. A railway company having possession uninterrupted of a portion of its track for thirty years will be presumed to have lawfully acquired the same. *Ogle v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 3 Houston (Del.), 302. 1866.

AGENCY.

See ARBITRATION; BAGGAGE; CONTRACT; CONVEYANCE; EMBEZZLEMENT; ESTOPPEL; EVIDENCE; REAL ESTATE AGENT.

I. APPOINTMENT AND POWERS.

II. RIGHTS, DUTIES AND LIABILITIES OF AGENTS.

III. RIGHTS, DUTIES AND LIABILITIES OF PRINCIPALS.

IV. WRONGFUL ACTS OF AGENTS.

V. RATIFICATION.

I. APPOINTMENT AND POWERS.

1. Agent's appointment. Parol evidence of a contract is properly stricken out, where a letter making the contract of the appointment of an agent is subsequently produced on the trial. *Newkirk v. N. Y. and Harlem R. R. Co.*, 38 N. Y., 158. 1868.

2. — A railroad company has power, independently of any provision of its charter, to appoint an agent in the construction of its road, or in the transportation of its freight. *Ala. and Tenn. Rivers R. R. Co. v. Kidd*, 29 Ala., N. S., 221. 1856.

3. — The appointment of an agent need not be evidenced by the written vote of the corporation or its officers, but may be inferred from their adoption of the agent's acts. *Ib.*

4. — Where the charter of a railway company does not require that the appointment of an agent, or the making of a contract, shall be by written instrument, and it does not appear to have been so made, the appointment or contract may be proved by parol. *Hamilton v. Newcastle and Danville R. R. Co.*, 9 Ind., 359. 1857.

5. — In an action by a carrier against a consignee of goods, to recover the price of transportation in which there is evidence tending to show that the defendant, in bargaining for the same, and in receiving the goods, acted only as agent of a third party, clear proof of notice of such agency is not necessary if the jury are satisfied from the evidence that the plaintiff must have known that he was acting only as an agent. *Boston and Me. R. R. Co. v. Whitchee*, 1 Allen (Mass.), 497. 1861.

6. — A special authority from the owner to look up property mislaid or lost by a common carrier, does not imply any authority to settle for damages resulting from the carrier's neglect. *Congar v. Galena and Chicago Union R. R. Co.*, 17 Wis., 477. 1863.

7. — Where goods are claimed to have been delivered to an agent, at a distance from the line of a railroad, to be carried to the road and thence transported on its line, the authority of the person thus purporting to act as agent, to bind the corporation, must be shown. *Mo. Coal and Oil Co. v. Hannibal and St. Joseph R. R. Co.*, 35 Mo., 84. 1864.

8. — Where the keeper of a boarding house of a railroad company had been in the habit of purchasing provisions from the plaintiff, for the use of the boarding house, and the bills for such provisions had been, from time to time, paid by the company, the plaintiff might properly regard him as an agent *pro tanto* of the company, and would be justified in the absence of any notice to the contrary, in dealing with him as such. *Phila., Wilm., etc., R. R. Co. v. Weaver*, 34 Md., 430. 1871.

9. — Whether the president of a railway company who presented the bill of a creditor of the company to the treasurer and received the payment for the same, and subsequently lost it, was acting for the company or for the creditor, is a question of fact for the jury to determine. *Wright v. Old Colony R. R. Co.*, 9 Gray (Mass.), 413. 1857.

Appointment and Powers.

10. Broker. A broker vested with mere authority to sell, but without authority to deliver property, will not be presumed to be also authorized to receive the purchase money. *Western R. R. Co. v. Roberts*, 4 Philadelphia Rep. (Penn.), 110. 1860.

11. Compensation. Suit by A., as assignee of B., on a promissory note executed by the railway company. Answer: That the note was given for services rendered by B., the payee, as agent of the company to procure subscriptions of stock; that, in the exercise of such agency, he had fraudulently, and without the knowledge of the company, received reward from persons subscribing lands for stock, for procuring their lands to be taken by the company. Held, that the agency in behalf of the subscribers was inconsistent with the agency for the company; was an act of bad faith, and worked a forfeiture of all right to compensation from the company. *Cleveland and St. Louis R. R. Co. v. Pattison*, 15 Ind., 70, 1860.

12. — Where an agent of a railway corporation rendered services in procuring a division of its charter, it is no defense to his claim for compensation, that, to induce another company to withdraw an unreasonable opposition to such division made upon purely private grounds, the agent threatened to cause its unlawful use of part of the route of his principal to be restrained by injunction. *Low v. Conn. and Passumpsic Rivers R. R. Co.*, 46 N. H., 284. 1865.

13. — If the original promoters of the enterprise, although not authorized to bind the corporation, had promised the plaintiff that he should receive compensation from the corporation for his services, and for the injury to his business, and the corporation had, when organized, taken the benefits of these services with notice of such promise, it would be bound to perform it. *Ib.*

14. — The ratification of the assumed authority under which the plaintiff acted, by accepting the benefits of his services with notice of his claim, was equivalent to an antecedent request, even if there was at the time no party empowered to make such request. *Ib.*

15. — Where, in an action upon an agreement, for personal services, the only issue raised by the defendant is, that it did not employ the plaintiff, by itself or its agents, it is

proper to admit proof of payment by the alleged agents; not to prove payment, but to show that the plaintiff considered them, and not the defendant, as his employers. *Gilmore v. Atlantic and Pacific R. R. Co.*, 35 Barbour (N. Y.), 279. 1861.

16. Contract. A contract for fencing a portion of the track of a railroad, made by a general agent of the company will, under the statute of Indiana, bind the corporation. *New Albany and Salem R. R. Co., v. Haskell*, 11 Ind., 301. 1858. *Cincinnati, Logansport and Chicago R. R. Co. v. Knowlton*, *ib.*, 339.

17. — Whatever an agent does or says in making a contract is evidence against the principal, being part of the contract. *Pennsylvania R. R. Co. v. Titusville Plankroad Co.*, 71 Penn. St., 350. 1872.

18. — A writing in the words: "Hired of R. C. the following negroes, to wit., etc., to work on the M. & C. Railroad, from now until the 25th Dec. next; for which I agree to pay said C. \$25 per month each, and I also agree to feed and pay all medical expenses; and the said C. loses all runaway time, if any. Given under my hand and seal;" and signed, "W. H. E., agent for M. & C. R. R. Co., per W. M. N.," is *prima facie*, the contract of the agent, and not binding on the principal personally. *Crutcher v. Memphis and Charleston R. R. Co.*, 38 Ala., 579. 1863.

19. — What contract amounts to a contract as an agent, and what amounts to a contract as a principal — considered. *Milnor v. N. Y. and New Haven R. R. Co.*, 53 N. Y., 363. 1873.

20. — A railroad company is not bound by the contract of its agent for transportation beyond the termini of its road, in the absence of express authority given him in that respect, and where the making of such contracts has not become an established business of the road by the custom of those having general authority in its management. *Wait v. Albany and Susquehanna R. R. Co.*, 5 Lansing (N. Y.), 475. 1871.

21. — The fact that the vice president of a railway company had for years been in the habit of appointing local agents to look after its timbered lands; that these agents had sold stumpage and timber thereon; that the company had brought suit on one of these contracts of sale and obtained judgment, the amount of which was paid to the local agent;

Rights, Duties and Liabilities of Agents.

that the latter was accustomed each year to make a full report in writing to said vice president, and to pay the moneys in his hands to the treasurer of the company — would authorize a jury to find that the company knew and acquiesced in the authority thus exercised, and was bound by such a contract of sale made by its local agent. *Chicago and N. W. R. R. Co. v. James*, 24 Wis., 388. 1869.

22 — The superintendent of a railroad was held, in this case, to have no authority to make a contract that would be binding upon his principal for medical services to be rendered to a child that had been run over on the track. *Stephenson v. N. Y. and Harlem R. R. Co.*, 2 Duer (N. Y.), 342. 1853.

23 — In hiring a machine to a contractor upon a railroad, the owner of the machine should ascertain who is responsible for the charges — the fact that the machine is used in constructing the railroad will not make the company liable. *Chicago and Great Eastern R. R. Co. v. Fox*, 41 Ill., 106. 1866.

24 — A railroad subscription agreement authorized certain persons as agents of the subscribers to enter into a contract with a railroad company for the construction of a certain line of road, whereupon the agents were to deliver to the company the subscription. *Held*, that no assignment by the parties thereto was necessary, but that a mere delivery by the agents was sufficient. *Cedar Rapids and St. Paul R. R. Co. v. Stewart*, 25 Iowa, 115. 1868.

25 — The agreement authorized the agents to enter into a contract with the railway company, according to their discretion, and upon such terms as they, or a majority of them, might deem best for the interest of the subscribers and for the construction of the road. *Held*, that the agents were empowered to bind their principals in covenants to finish depot grounds and provide the right of way, the performance of which, on their part, should be a condition precedent to the completion of the contract by the company. *Ib.*

26 — The agents had the right to stamp the agreement when delivered by them to the company. *Ib.*

27. General agent. Where the corporation has a general agent who is employed by it for the express purpose of receiving and transporting merchandize for hire, and is held

out to the world as invested with authority for this purpose if goods are delivered to him to be transported in the way of his duty, the corporation will be liable for the manner in which that duty is performed, and the contract of the bailment may be regarded as made with it. *Mayall v. Boston and Me. R. R. Co.*, 19 N. H., 122. 1848.

28. Notice. Notice to an agent of a corporation relating to any matter of which he has the management and control, is notice to the corporation. *Pittsburgh, Ft. Wayne and Chi. R. R. Co. v. Ruby*, 38 Ind., 294. 1871.

29. Powers. The authority of an agent to assume the payment of the debt of a third person for his principal, should be clearly proved, or no recovery can be had upon such promise against the principal. *Reading R. R. Co. v. Johnson*, 7 Watts & Sergeant (Penn.), 317. 1844.

30 — An authority to deliver goods to a common carrier for transportation includes all the necessary and usual means of carrying it into effect. It can only be executed by obtaining the consent of the carrier to receive them, and the agent is therefore authorized to stipulate for the terms of transportation. *Nelson v. Hudson River R. R. Co.*, 48 N. Y., 498. 1871.

31 — The consignor of goods to a distant consignee, who is the owner, is the agent of the consignee for the purpose of shipping. *Ib.*

II. RIGHTS, DUTIES AND LIABILITIES OF AGENTS.

32. Foreign factor. It is presumed that credit given to a foreign factor is given personally to him instead of the principal, but this presumption may be rebutted by proof. *New Castle Mfg Co. v. Red River R. R. Co.*, 1 Robinson (La.), 145. 1841.

33. Payments made for principal. Where an agent for and at the request of his principal, purchases land in his own name, pays part of the consideration, and gives his mortgage for the residue, with a bond in which his principal joins; the agent is a surety for his principal in respect of such bond; and equity will decree that he be paid his advance and indemnified against the bond, and mortgage, on his conveying the title to the principal.

Rights, Duties and Liabilities of Principals.

pal. *Mohawk and Hudson R. R. Co. v. Costigan*, 2 Sandford's Ch. (N. Y.), 306. 1845.

34. Profits. All profits made by the agent as an agent belong to the principal. *Minnesota Cent. R. R. Co. v. Morgan*, 52 Barbour (N. Y.), 217. 1868.

35. — An agent cannot appropriate to his own use any portion of the profits arising from the business of the agency and a custom which overrides that rule of law cannot prevail. *Ib.*

36. Robbery. An agent who has been robbed of the money of his principal may show that banks and other custodians of money usually look to their vaults and safes for security, and not to the outside fastenings of the building. *Wright v. Cent. R. R. Co.*, 16 Ga., 38. 1854.

37. — Where a local railroad agent was instructed to remit daily to the headquarters of the company all sums of money received over \$10, it was held, that he would be allowed a reasonable time, in view of his other duties, to make his remittance, and not liable for money stolen from him, which he did not receive in time to remit as instructed. *Robinson v. Ill Cent. R. R. Co.*, 30 Ia., 401. 1870.

38. — The mere fact that he might have procured a sum of money which it was his duty to remit, and in time to do so, from another agent in whose possession it was, and who delivered it to him, but not in time to remit, would not render him liable in the absence of any showing that it was a part of his duty to go to such agent and procure the money received by him. *Ib.*

39. Sub-agents. An action for work, labor and services, done and performed by the plaintiff for the defendant under an agreement made with a sub-agent of the defendant, whose acts, in such cases, to be valid, are subject to the approval of a general agent of the defendant cannot be maintained, where notice has been given to the plaintiff by the general agent of the disapproval of such contract. *McGovern v. Western R. R. Co.*, 28 Howard's Pr. (N. Y.), 493. 1864.

III. RIGHTS, DUTIES AND LIABILITIES OF PRINCIPALS.

40. Acts of agents. The acts of an agent, in the scope of his usual employment, are

binding on the principal, as to third persons, until they have notice of a revocation of the agent's authority. *Lamothe v. St. Louis Marine R. R. Co.*, 17 Mo., 204. 1852.

41. Declarations. The declarations, admissions and representations of the agents of a corporation stand upon the same footing as those of the agent of an individual. *Henderson v. R. R. Co.*, 17 Tex., 560. 1856.

42. Indemnity to agents. The principal is under an implied obligation to indemnify an innocent agent for obeying his orders, where the act would have been lawful in respect to both, if the principal really had the authority which he claimed. *Howe v. Buffalo, N. Y. and Erie R. R. Co.*, 37 N. Y., 297. 1867. *Same v. Same*, 38 Barbour (N. Y.), 124. 1862.

43. Negligence — rafts. Defendants will be liable for any injury sustained by third persons in consequence of negligence in drifting a raft, where it is shown that they had purchased and paid for the raft, and that it had been delivered to their agent. Nor will proof that their agent took upon himself the risk of its safe transportation exonerate them, as owners, from liability to third persons. *Taylor v. Mexican Gulf R. R. Co.*, 2 La. An., 654. 1847.

44. Failure to repudiate acts of agent. When the property of one party has been appropriated by another without a prior contract, a subsequent contract for the same by an apparent ostensible agent, though not having actual authority, is binding on the principal, at least unless the principal, immediately after making the contract, and before the other party is prejudiced by relying on it, repudiates the act of the supposed agent, and puts the other party *in statu quo* by restoring the consideration. *Beecher v. Grand Trunk R. R. Co.*, 43 Vt., 133. 1870.

45. — The original property still being in existence and accessible a recovery may be had in *assumpsit*. *Ib.*

46. Failure to apply to principal for debt. Where a vendor, between whom and the defendant no privity exists, sells to the agents of the latter goods known to be for the use of their principal, but looks to such agents exclusively for payment, and after failure of the latter to pay suffers more than fifteen months to elapse before applying to the principal, during which time he had settled with his agents, the principal will not be liable to

Wrongful Acts of Agents.

such vendor. *New Castle Mfg Co. v. Red River R. R. Co.*, 1 Robinson (La.), 145. 1841.

47. — A corporation, acting within the scope of its legitimate authority, is bound by a parol contract made by its authorized agent, the same as an individual. *Racine and Miss. R. R. Co. v. Farmers' Loan and Trust Co.*, 49 Ill., 331. 1868.

IV. WRONGFUL ACTS OF AGENTS.

48. **Conversion.** Where one receives from an agent money belonging to the principal, knowing that it is the money of the principal, and that the latter holds it in trust for his principal, as a simple depository, the same may be recovered back in an action brought by the principal, for the conversion; where it appears that the money can be identified. *Grand Trunk R. R. Co. v. Edwards*, 56 Barbour (N. Y.), 408. 1868.

49. — The fact that the property converted is bank notes forms no legal objection to the maintenance of such an action; so long as they are capable of being identified. *Ib.*

50. **Embezzlement.** On the trial of an action, brought by a corporation against one of its agents, to recover money fraudulently taken from it by the defendant, when the successor of the defendant in the same office has been called as a witness, and is sought to be impeached on the ground that he committed the acts with which the defendant is charged, evidence that money had been taken from the office while the defendant was employed there, prior to the time embraced in the plaintiff's specification of claim, is admissible for the purpose of sustaining the credit of the witness. *Boston and Worcester R. R. Co. v. Dana*, 1 Gray (Mass.), 83. 1854.

51. — An agent of a corporation, who, on the trial of an action brought against him by the corporation to recover money of the corporation alleged to have been fraudulently taken by him, has expressly admitted the general carefulness and accuracy of the plaintiff's cashier, called as a witness, cannot take exceptions to the refusal of the presiding judge to allow him, at a subsequent stage of the trial, to prove an inaccuracy of said cashier in regard to a particular entry, in no way bearing on the case, except as affecting the cashier's general carefulness and accuracy. *Ib.*

52. — The doctrine of the English law, that for goods feloniously taken no action lies against the felon, before the institution of criminal proceedings against him, is not in force in Massachusetts. *Ib.*

53. **Fraud.** A corporation will be affected by the fraudulent conduct of its agents, in like manner as if such agents had been acting for private employers. *Nugent v. Cincinnati, Harrison, etc. R. R. Co.*, 2 Disney (Ohio), 302. 1858.

54. — The possession, by the transfer agent of a corporation, of the transfer books of stock, and his authority to allow them to be used, do not constitute the *indicia* of an authority to make representations as to the ownership of stock, so as to render the company liable for the falsity of such representations made by him. *Henning v. N. Y. and New Haven R. R. Co.*, 9 Bosworth (N. Y.), 283. 1862.

55. — An individual employed by a railroad company, as its agent, to purchase wood and timber for its use, has no right, while purchasing woodland for the company, as such agent, to receive from the vendor a commission for promoting the sale. *Morrison v. Ogdensburg and Lake Champlain R. R. Co.*, 52 Barbour (N. Y.), 173. 1868.

56. — The company having been compelled, through the agent's negligence of duty, to pay more for the land than it otherwise would have paid, the difference, being the amount of the agent's commissions, in equity belonged to the company. *Ib.*

57. — Such act by an agent is a fraud upon his employer justifying his discharge. *Ib.*

58. **General agent.** The general agent of a corporation, clothed with certain powers by the charter, or the lawful act of the corporation, may use those powers for an unauthorized, or even a prohibited purpose, in his dealings with an innocent third party, and yet the corporation be held liable for his acts. *Madison and Indianapolis R. R. Co. v. Norwich Savings' Society*, 24 Ind., 457. 1865.

59. **Torts.** A railway company may be liable for the torts of its agents committed within the general scope of their employment. *Jeffersonville R. R. Co. v. Rogers*, 38 Ind., 116. 1871.

60. — The responsibility of the principal for the acts of the agent is not limited to

Ratification — Proceedings — Jurat — Pleading.

cases where he is present. *Hart v. N. O. and Carrollton R. R. Co.*, 1 Robinson (La.), 178. 1841.

61. — Where a wagoner took rags from the depot of a railway company to his employer's paper mill, supposing them to be his, where they were used, *held*, that the employer was not, by the act of taking merely, involved in the consequences of a fraud. *Pennsylvania R. R. Co. v. Zug*, 47 Penn. St., 480. 1864.

V. RATIFICATION.

62. **Effect of ratification.** The ratification by the principal of a contract of the agent, amounts to a waiver by the principal of a want of authority in the agent. *Ohio and Miss. R. R. Co. v. Middleton*, 20 Ill., 629. 1858.

63. — If a party use an article furnished under a written contract made by an agent, it will be presumed that it was intended to ratify the contract. *Evans v. Chicago and Rock Island R. R. Co.*, 26 Ill., 189. 1861.

64. — Where the by-laws of a railroad company entrusted the general freight agent with the power of negotiating contracts for the transportation of freight, with the approval of the president; it was *held*, that this restriction should be construed as meaning, subject to the approval of the president, if he should deem it proper to interpose, before the attempted execution or performance of the contract. But that if he did not think fit to interpose, and neglected to apprise the public that every special contract for the transportation of freight must be ratified by him, the company would be liable for the fulfillment of the contract. *Medbury v. N. Y. and Erie R. R. Co.*, 26 Barbour (N. Y.), 564. 1858.

65. — The ratification of part of an agreement made by the agent of a corporation before its incorporation binds a party to other material parts of the contract. *Titus v. Catawissa R. R. Co.*, 5 Phila. Rep. (Penn.), 172. 1863.

AGREED CASES.

1. **Proceedings.** A case stated is like an issue developed by special pleading, and presents the very matter which is up for judgment; the court cannot go beyond the issue. *Philadelphia and Reading R. R. Co. v. Waterman*, 54 Penn. St., 337. 1867.

2. — A decision upon an agreed case, or an agreed statement of facts, is final to the extent to which it goes. If the parties desire the case to be amended or discharged, or the facts to be waived, steps must be taken to affect the object before the decision is announced. *Goodrich v. Eastern R. R. Co.*, 38 N. H., 390. 1859.

3. **Appeal.** Where oral testimony is embodied in a bill of exceptions, an appellate court will indulge presumptions favorable to the decision below; but where a cause was tried upon an agreed case in writing no such presumptions arise. *Indianapolis and Cincinnati R. R. Co. v. Kinney*, 8 Ind., 402. 1856.

AMENDMENTS.

See PLEADINGS.

1. **Jurat.** The jurat of an affidavit, offered in evidence, may be amended by adding thereto a reference to the notarial seal of the notary before whom the affidavit is made, which reference was omitted in the original. *Hallett v. Chicago and N. W. R. R. Co.*, 22 Ia., 259. 1867.

2. **Pleading.** The allowance of an amendment to a petition, increasing the amount of damages claimed, was held not erroneous. *McDonald v. Chicago and N. W. R. R. Co.*, 26 Ia., 124. 1868.

3. — A year after judgment was entered on a verdict the court allowed an amendment in the name of the defendants to be made. *Held*, that such an amendment was not within the acts of assembly. *Pittsburg, Ft. Wayne and Chicago R. R. Co., v. Evans*, 53 Penn. St., 250. 1866.

APPEALS.

See AGREED CASES; EMINENT DOMAIN.

- I. APPEALS TO COURTS OF LAST RESORT.
- II. APPEALS FROM COURTS OF LIMITED JURISDICTION.
- III. GENERAL TERMS.
- IV. PROCEEDINGS FOR THE CONDEMNATION OF REAL ESTATE.
- V. MISCELLANEOUS MATTERS.

Appeals to Courts of Last Resort.

I. APPEALS TO COURTS OF LAST RESORT.

1. **Affirmance.** The judgment or decree of an inferior court, when affirmed in this court, is only conclusive between the parties on the matter involved. *In the Matters of Howard*, 9 Wallace, 175. 1869.

2. — Thus a decree, that the complainant and intervening claimants were entitled to a fund in the hands of a receiver, will not preclude third parties from asserting their rights by proper proceeding. *Ib.*

3. **Chancery.** An appellant in chancery cannot complain of errors not affecting his interests. *Griggs v. Detroit and Milwaukee R. R. Co.*, 10 Mich., 117. 1862.

4. — An order of the chancellor, made at the final hearing, for an issue to be tried by a jury, is appealable. *Newark and N. Y. R. R. Co. v. Newark*, 8 C. E. Green's Ch. (N. J.), 515. 1872.

5. **Damages.** When an appeal is destitute of merit, ten per cent. damages may be awarded. *Shackley v. North Mo. Co.*, 50 Mo., 410. 1872.

6. **Default.** By the R. S. 1852, if the record on appeal does not contain a copy of the summons for the defendant, and show the same to have been properly served, a judgment by default will be reversed. *New Albany and Salem R. R. Co. v. Welsh*, 9 Ind., 479. 1857.

7. **Dismissal.** Plaintiff took an appeal from the commissioners on the estate of W., but neglected to file, in the county court, a certified copy of the proceedings in the probate court, with proper evidence that notice of such appeal had been given to the adverse party, according to the order of the probate court, as provided by statute, and also for the period of about six months no notice was given to the adverse party of such appeal. The county court, on motion, dismissed the cause as being irregularly in court. The court below, in the exercise of a discretionary power, having refused to retain the case, the decision will not be reexamined in the supreme court. *Rutland and Burlington R. R. Co. v. Wales' Adm'r*, 24 Vt., 299. 1852.

8. — The Revised Statutes do not repeal, but expressly continue the laws in force regulating proceedings in the court of appeals, nor does the civil code repeal the provisions

of the act of 1798, allowing damages on dismissal of appeals to the court of appeals when the judgment or decree is for money. *Madison, Indianapolis and Peru R. R. Co. v. Briscoe*, 18 B. Monroe (Ky.), 570. 1857.

9. — The neglect of an appellant who has regularly served notice of appeal, to procure his case to be filed within ten days after it has been settled, confers no right upon the respondent to have the appeal dismissed. *Robinson v. Hudson River R. R. Co.*, 3 Abbott's Pr. (N. Y.), 115. 1856. *Same v. Same*, 1 Hilton (N. Y.), 144. 1856.

10. — Where one of several defendants appeals to the supreme court without serving notice of appeal upon the other defendants, it seems the appeal should be dismissed. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Elliott*, 38 Ind., 153. 1871.

11. — When the clerk does not certify the time when the appeal was taken, nor even the fact that any appeal at all was taken, (Code, §§ 3016, 3022), the appeal will be dismissed on motion. *Ala. and Miss. Rivers R. R. Co. v. Hungerford*, 41 Ala., N. S., 388. 1867.

12. — Where the record of appeal is not filed within three judicial days after the return day, and no extension of time has been obtained, the appeal must be dismissed, if required by the appellee. C. P., 588, 590. *New Orleans and Carrollton R. R. Co. v. Hood*, 3 La. An., 226. 1848.

13. — An appellant whose first appeal to the supreme court was dismissed for want of prosecution, may take a second within the time allowed by the statute for appealing. *Marshall v. Milwaukee and St. Paul R. R. Co.*, 20 Wis., 644. 1866.

14. **Evidence.** The statutes of Ohio furnish no mode for reexamining the decision of a court overruling a motion for a new trial, asked on the ground that the verdict was against the weight of the evidence. *Little Miami R. R. Co. v. Allen*, 12 Ohio St., 428. 1861.

15. — The supreme court will not interfere with a finding in the court below where the evidence is conflicting and the witnesses have testified in the presence of the court. *Butt v. Toledo, Wabash and Western R. R. Co.*, 34 Ind., 162. 1870. *Ohio and Miss. R. R. Co. v. Black*, ib., 553; *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Hume*, ib., 326. 1870. *Jeffer-*

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sonville, Madison and Indianapolis R. R. Co. v. Morgan, 38 ib., 191. 1871.

16. — It is not the province of the supreme court to weigh the evidence and determine the preponderance thereof. Before it will interfere upon the evidence alone, it must appear by the record, not merely that the finding was against the weight of evidence, but that it was wrong beyond any question whatever. *Indianapolis, Cincinnati and La Fayette R. R. Co. v. Trisler*, 30 Ind., 243. 1868. *Sheeran v. Chi. and Mil. R. R. Co.*, 43 Ill., 523. 1868.

17. Exceptions. Where no questions of law are raised, and no bill of exceptions is preserved, the judgment will be affirmed. *Hedges v. North Mo. R. R. Co.*, 48 Mo., 382. 1871. *Toledo, Peoria and Warsaw R. R. Co. v. Miller*, 55 Ill., 448. 1870. *State ex rel. v. Comm'rs, Ripley County*, 9 Ind., 310. 1857. *Coffin v. Evansville and Crawfordsville R. R. Co.*, 7 ib., 413. 1356.

18. Judgment. Irregularities in a judgment, which were known to the counsel before taking an appeal from the judgment, are not ground for setting aside the judgment on a motion subsequently made. *People v. Albany and Susquehanna R. R. Co.*, 3 Abbott's Pr., N. S. (N. Y.), 122. 1870; see *Same v. Same*, 39 Howard's Pr. (N. Y.), 49. 1870. *Same v. Same*, 2 Lansing (N. Y.), 459. 1870. *Same v. Same*, 1 ib., 308. 1869.

19. — Where the appellants cannot be injured by the judgment of the lower court, it will be affirmed. *Langfitt v. Clinton and Port Hudson R. R. Co.*, 7 Robinson (La.), 41. 1844. *Missouri, Kansas and Texas R. R. Co. v. Durkee*, 10 Kan., 128. 1872.

20. — Where, on a verdict for the plaintiff, at circuit, the defendant moved for a new trial at special term of the supreme court, which was denied, and on appeal from that order to the general term, it was affirmed, and the judgment then entered on the verdict, an appeal will not lie from such judgment to this court. Such judgment is not an actual determination made at a general term of the supreme court. *White v. Delaware, Lackawanna and Western R. R. Co.*, 41 N. Y., 520. 1869.

21. — A judgment of the district court which is not regular in form will, on appeal, be annulled, and a proper judgment will be rendered by the supreme court. *Chapman v. New Orleans, Jackson and G. N. R. R. Co.*, 21 La. An., 224. 1869.

22. Mandate. Under § 24 of the judiciary act, when the supreme court reverses the judgment of the court below and issues a mandate directing a judgment to be entered in favor of the defendant, the inferior court must obey the mandate and cannot grant a rule for a new trial. *Ex parte Dubuque and Pacific R. R. Co.*, 1 Wallace, 69. 1863.

23. Notice. A judgment was set aside at the term at which it was rendered, on the defendant's motion, on the ground that it had received no actual notice of the suit, etc.; and the case was left standing on the complaint. Before any further proceedings were had, the plaintiff prosecuted an appeal to the supreme court. Held, that under the R. S. 1852, the appeal would not lie. *Branham v. Ft. Wayne and Southern R. R. Co.*, 7 Ind., 524. 1856.

24. Orders. An order of the supreme court, made at a general term, reversing a judgment rendered at the circuit, before a single justice of that court, and awarding a new trial, is not a judgment within the meaning of the code, and therefore is not appealable to this court. *Duane v. Northern R. R. Co.*, 3 N. Y., 545. 1850.

25. — An appeal lies to the supreme court of Baltimore city, from an order of the Baltimore city court, refusing to strike out a judgment by default rendered therein. *Merrick's Baltimore and Ohio R. R. Co.*, 33 Md., 481. 1870.

26. — An appeal does not lie from an order of the supreme court removing an action commenced therein to the United States court on the ground that the defendant is a citizen of another state. *Illius v. New York and New Haven R. R. Co.*, 13 N. Y., 597. 1856.

27. — It is not correct practice to move in one circuit an order which, in effect, disregards or treats as null and void a previous order made in the same cause in another circuit—the last mentioned order having been made, as alleged, upon a misapprehension of fact, and upon the motion being denied bring the matter by appeal before the supreme court. The matter complained of should, in some way, be made the subject of consideration by the court which made the previous order. *Furman v. Greenville and Columbia R. R. Co.*, 3 So. Car., N. S., 427. 1871.

28. — An appeal lies from an order of the circuit court ascertaining the amount of in-

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terest due on a mortgage, and providing for sale in case of default in payment. *Milwaukee and Minnesota R. R. Co. v. Soutter*, 2 Wallace 440. 1864.

29. — An order granted on terms upon an application to show cause why the defendants should not have thirty days in which to make and serve a case, after default, is not appealable. *Kiersted v. Orange and Alexandria R. R. Co.*, 44 Howard's Pr. (N. Y.), 379. 1873.

30. — An order made by a circuit judge, refusing leave to bring an action against a private corporation, is not one from which an appeal will lie. *State v. Oregon Central R. R. Co.*, 2 Or., 255. 1868.

31. — The right of appealing from orders of the circuit court, which set aside or refuse to set aside judgments or sales made under them, must be considered settled. *Carney v. La Crosse and Milwaukee R. R. Co.*, 15 Wis., 503. 1862.

32. Points not presented below. The objection that there was a trial without an issue, in order to be available in this court as error, must have been properly brought to the attention of the court below. *Peru, etc., R. R. Co. v. Dayton*, 18 Ind., 326. 1862.

33. — The supreme court will not consider objections to the action of the lower court which were not assigned in the motion for a new trial. *Cowen v. St. Louis and Iron Mt. R. R. Co.*, 48 Mo., 556. 1871.

34. Practice. Where there is a verdict or finding of the court for one party, whereupon the other moves in arrest of judgment, upon the ground of defects in the pleadings, and thereupon, in order to cure the alleged defect, an amended pleading is filed, and additional evidence submitted in support of the new allegation, to which a demurrer is interposed, and is sustained by the court, and the judgment against the defendant is arrested, and one is entered against the plaintiff for costs, a motion for a new trial is not necessary in order to present exceptions duly taken on appeal. *Coates v. Galena and Chicago Union R. R. Co.*, 18 Ia., 277. 1865.

35. Presumptions. It is due to the lower court to presume in its favor, unless the pleader shows it by the record to be clearly in error. *New Albany and Salem R. R. Co. v. Callow*, 8 Ind., 471. 1856.

36. — The supreme court will indulge in no presumption against the ruling of the inferior courts. *Id.*

37. Time. The time for taking an appeal is to be computed from the date of the judgment, and not from the adjournment of court. Act of Feb. 16, 1865. *Toledo, Peoria and Warsaw R. R. Co. v. Coomes*, 40 Ill., 37. 1866.

38. Writ of Error. The question as to whether a principle, heretofore decided by the court, is or is not applicable to errors assigned in a case now brought here on writ of error, is one to be discussed on the hearing, and not on motion to docket and dismiss. *Tower v. Detroit and Milwaukee R. R. Co.*, 7 Mich., 10. 1859.

39. — And the question, whether the plaintiff in error appeared and argued the case in the court below, or consented to the judgment there entered, is one which cannot be raised on affidavit, on motion to dismiss the writ of error. *Id.*

II. APPEALS FROM COURTS OF LIMITED JURISDICTION.

40. Justice of the peace. An appeal taken by a party in default, and who has filed no motion to set aside such default, will be dismissed. *Smith v. St. Louis, Kansas City and Northern R. R. Co.*, 53 Mo., 338. 1873. *

41. — Where, in the return of a justice of the peace to an appeal, there is abundant evidence to sustain the verdict of the jury, or the judgment of the justice, the court will not reverse the judgment on account of an improper question being put to a witness and answered. *Spencer v. Saratoga and Washington R. R. Co.*, 12 Barbour (N. Y.), 382. 1852.

42. — The appearance in the circuit court of the appellee on appeal from a justice's court to obtain an affirmance of the judgment, is not such an appearance as will waive or imply notice, and a continued failure to give notice notwithstanding such appearance is a failure to prosecute the appeal. *Purcell v. Hannibal and St. Joseph R. R. Co.*, 50 Mo., 504. 1872.

43. — Where an appeal is allowed from a justice of a peace on a day subsequent that of the judgment, and appellant fails to give

General Term.

the ten days' notice of his appeal required by the statute (2 W. S., 850, § 21), before the second ensuing term of the circuit court, the appellee may appear simply for the purpose of having the judgment affirmed, and will be entitled to such affirmance, by reason of the continued failure of appellant to give such notice. But judgment of affirmance for want of prosecution cannot be taken at the return term of the appeal, unless appellee enter his appearance on or before the second day of the term. *Nay v. Hannibal and St. Joseph R. R. Co.*, 51 Mo., 575. 1873.

44. — Where an action for damages against a railroad company was originally brought before a justice of the peace, under the common law, for negligence in killing stock, and on appeal to the circuit court, an amended statement was filed under the provisions of § 5, ch. 51, R. C., 1855; held, that the whole cause of action was changed, and, under the statute concerning appeals from justices of the peace, the same was properly stricken out on motion. *Hansberger v. Pacific R. R. Co.*, 43 Mo., 196. 1869.

45. — The defendant subscribed for one share of railway stock, for which he agreed to pay plaintiff \$100 in ten equal installments, not payable until the performance of a condition precedent. The plaintiff brought an action before a justice of the peace for one of the installments under an *ad damnum* of ten dollars. Held, that the action was appealable, the amount in controversy in fact exceeding ten dollars. *Connecticut and Passumpsic Rivers R. R. Co. v. Bates*, 32 Vt., 420. 1859.

46. — An action for damages for the killing of stock, against a railway company, should not be dismissed on appeal because the justice has neglected to copy the cause of action upon his docket. *Indianapolis and Cincinnati R. R. Co. v. Toon*, 20 Ind., 230. 1863. *Same v. Smither*, ib., 228.

47. — The decision of the county court on an appeal from a justice is final, and a writ of error will not lie to the High Court of Errors, and appeals to review the decision of the county court on such appeal. *Mississippi Cent. R. R. Co. v. Kennedy*, 41 Miss., 551. 1867.

48. — An appeal from the decision of a justice of the peace, gives the appellate court jurisdiction of the party, although he was not served with process in the case appealed from.

Ohio and Miss. R. R. Co. v. McCutchin, 27 Ill., 9. 1861.

III. GENERAL TERM.

49. Appeals to general term. A decision of a judge at chambers, on a motion under § 247 of the code, for judgment, on account of the frivolousness of the answer; is an order, and not a judgment. But such an order is appealable to the general term. *Western R. R. Co. v. Kortright*, 10 Howard's Pr. (N. Y.), 457. 1854.

50. — An appeal to the general term, under § 349 of the code, relating to appeals from a decision at a special term, directing judgment in favor of the defendant on a demurrer to the whole of a complaint as an order will not lie. *Bauman v. N. Y. Cent. R. R. Co.*, 10 Howard's Pr. (N. Y.), 218. 1854. *Contra*, see *Nolton v. Western R. R. Co.*, ib., 97. 1854.

51. — The effect of an appeal considered with reference to the circumstances of a particular case. *Tracy v. N. Y. and Harlem R. R. Co.*, 9 Bosworth (N. Y.), 615. 1863.

52. — An appeal lies to the court at general term, from an order made at special term, giving a party leave to inspect and examine the books and papers of the parties appealing. *Thompson v. Erie R. R. Co.*, 9 Abbott's Pr., N. S. (N. Y.), 212. 1870.

53. Appeal from general term. The court of appeals will, in the absence of any other error, affirm a judgment of the supreme court, ordered at general term, upon exceptions heard there in the first instance, under the stipulation of the parties, there having been no previous judgment nor direction to suspend it by the judge trying the cause. *Lake Ontario, Auburn and N. Y. R. R. Co. v. Marvine*, 18 N. Y., 585. 1859.

54. — What orders may be appealed from — determined. *Carrington v. Florida R. R. Co.*, 52 N. Y., 583. 1873.

55. — Where a judgment, recovered at a special term of the superior court by a plaintiff, for an injury to his person, is reversed at a general term of said court, and remanded to the special term for a new trial, and thereafter, the plaintiff dies, no appeal lies from such reversal to the supreme court, in favor of the administrator of the deceased. *Stout, Adm'r, v. Indianapolis and St. Louis R. R. Co.*, 41 Ind., 149. 1872.

Proceedings for Condemnation of Real Estate—Miscellaneous Matters.

IV. PROCEEDINGS FOR CONDEMNATION OF REAL ESTATE.

56. Right of appeal and its effect. An appeal does not lie to the court of appeals from an order of the supreme court made at a general term, confirming the report of commissioners to appraise the compensation to be made for lands proposed to be taken under the general railroad act, and refusing to direct a new appraisal. *N. Y. Cent. R. R. Co. v. Marvin*, 11 N. Y., 276. 1854.

57. — The order of the district court dismissing an appeal from an award of damages is a final order from which an appeal will lie. *Warren v. St. Paul and Pacific R. R. Co.*, 18 Minn., 384. 1872.

58. — The effect of an appeal in a proceeding to condemn land—determined. *Minn. Valley R. R. Co. v. Doran*, 15 Minn., 230. 1870. *Same v. Same*, ib., 240. 1870.

V. MISCELLANEOUS MATTERS.

59. Accounting Officer. On appeal from a settlement with the accounting officers of the Commonwealth, no point can be reviewed unless specified in taking the appeal. *Dela-ware Lackawanna and Western R. R. Co. v. The Commonwealth*, 66 Penn. St., 64. 1870.

60. Bond: Supersedeas. An appeal to the general term, from an order under § 319 of the code, is *per se* a stay of proceedings; and no undertaking or security is required. *Stewart v. Saratoga and Whitehall R. R. Co.*, 12 Howard's Pr. (N. Y.), 435. 1855.

61. — The actual allowance of an appeal may be inferred, where the record shows that an appeal was prayed for in open court, and an appeal bond filed and approved by one of the judges. *Railroad Co. v. Bradley*, 7 Wallace, 575. 1868.

62. — Under the act of July 26, 1842, both an affidavit and security are indispensable conditions to be performed by a party appealing to the court in bank on an order of the judge and certificate of the court of *Nisi Prius*. *Stiles v. Westchester R. R. Co.*, 4 Watts and Sergeant, (Penn.), 403. 1842.

63. — An appeal bond will be presumed to have been executed by the parties whose names are attached to it; and this presumption holds equally where the bond is executed

by an attorney in fact. *Carmichael v. West Feliciana R. R. Co.*, 2 Howard (Miss.), 817. 1838.

64. — In a case purporting to have come up from a justice of the peace on appeal, where it does not appear that any transcript of the proceedings before the justice was ever filed; or that he ever rendered any judgment in said cause, or that any appeal was ever taken or attempted, this state of facts will not justify the entry of a judgment against the sureties on the appeal bond. *Seaton v. Chicago, Rock Island and Pacific R. R. Co.*, 51 Mo., 500. 1873.

65. — An appeal from a judgment overruling a motion to quash an execution operates as a supersedeas of the judgment upon which the execution issued, upon the filing of a sufficient bond; and in such case an order could be entered of record, staying the execution till the appeal is determined. But the bond must comply with the requirement of the statute, and be conditioned for the performance of the judgment, as well as the payment of all damages and costs which may be awarded against the appellant in the supreme court. *Parker v. Hannibal and St. Joseph R. R. Co.*, 44 Mo., 415. 1869. *Ruby v. Same*, ib., 443.

66. — Any judge of the supreme court, either in term time or in vacation, has authority to issue writs of *supersedeas*. *Northern Ind. R. R. Co. v. Mich. Cent. R. R. Co.*, 2 Carter (Ind.), 670. 1851.

67. — The supreme court will not hear a motion to discharge or set aside a *supersedeas* while setting at chambers, unless by the consent of both parties to the cause in which it was granted. *Ib.*

68. — Where the amount of an appeal bond has been fixed by an order of the circuit judge and the appeal perfected under it, the cause is removed from the control of the circuit court, and a subsequent order modifying or vacating the former order is a nullity. *Spaulding v. Milwaukee and Horicon R. R. Co.*, 11 Wis., 157. 1860.

69. — The sureties in an undertaking on appeal to the supreme court must be resident householders or freeholders in the state of Wisconsin. *Smith v. Chicago and N. W. R. R. Co.*, 19 Wis., 89. 1865.

70. — Where the appeal bond is insufficient at the time the appeal is brought up, the

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substitution of a new bond will not cure the defect. 12 La. An., 72. *Vicksburg, Shreveport and Texas R. R. Co. v. Hemphkin*, 15 La. An., 523. 1860.

71. — Where the supersedeas bond, in an appeal to the supreme court from a judgment against two defendants recited that one of the defendants, naming him, had appealed, without referring to the other defendant, and the notice of appeal was headed as of the plaintiff against the defendant alone who was mentioned in the supersedeas, but the body of the notice used the plural "defendants," it was held, that the defendant mentioned in the supersedeas and in the heading of the notice, alone appealed. *Webster v. Cedar Rapids and St. Paul R. R. Co.*, 27 Ia, 315. 1869.

72. — A case being in this court by appeal the court has a right to issue any writ which may be necessary to render its appellate jurisdiction effectual. *Ex parte Milwaukee R. R. Co.*, 5 Wallace, 188. 1866.

73. — Accordingly, it will issue the writ of *supersedeas* if such writ be necessary for that purpose. It will issue this writ in preference to obtaining the same end by a *mandamus* to the court below. *Id.*

74. — An appeal bond copied into the record, purported to be executed by the Illinois Central R. R. Co., by an attorney in fact, with a scrawl attached; it was held, on a motion to dismiss for want of the corporate seal, that the court did not know, judicially, that the company had a seal, other than the scrawl, such as appeared in the record. *Ill. Cent. R. R. Co. v. Johnson*, 40 Ill., 35. 1864.

75. — A motion to dismiss the appeal for the reason that the bond was not filed in time, comes too late after an appearance. *Price v. Pittsburgh, Ft. Wayne and Chicago R. R. Co.*, 40 Ill., 44. 1864.

76. — In copying into the transcript of a record an appeal bond purporting to have been executed by a corporation, the corporate seal may be represented by a scrawl; a *fac simile* of the seal or device cannot be made in the copy. *Ill. Cent. R. R. Co. v. Johnson*, 40 Ill., 35. 1864.

77. — When judgment is rendered against several plaintiffs in a court for the trial of small causes, one of them may appeal in the name of all. *Van Buskirk v. Hoboken and N. Y. R. R. Co.*, 2 Vroom. (N. J.), 367. 1865.

78. Conductor. An appeal having been prayed from a judgment against a railroad company for killing cattle, thirty days' time was given to file a bond. Subsequently a motion was made by the plaintiff for a writ requiring a conductor of the company to answer as to funds in his hands. Pending this motion, an appeal bond was filed, and afterwards the writ was issued. Held, that the issuing of the writ was erroneous. *Indianapolis and Cincinnati R. R. Co. v. Kibby*, 28 Ind., 479. 1867.

79. Death of appellant. When a party dies after appeal taken, and before return term, his representatives are entitled to a motion to revive; and a motion to dismiss for want of an assignment of errors will not be granted. *Carmichael v. West Feliciana R. R. Co.*, 2 Howard (Miss.), 817. 1838.

80. Dismissal. The appellant may dismiss his appeal, and when a party, appealing from the inquest of a jury assessing damages, dismisses his appeal, the proceedings of the jury are left in full force. In such case the appellant should pay the costs of appeal. *Mississippi Central R. R. Co. v. Beatty*, 35 Miss., 668. 1858.

81. Errors. In a trial under a *procedendo*, no error can be imputed to the rulings of the court below, based on the terms of a contract and a modification thereof as interpreted by the appellate court on the first appeal. *Baltimore and Ohio R. R. Co. v. Restley*, 14 Md., 424. 1859.

82. Former decision. The supreme court will not revise a former decision made by the same court in the same cause, upon substantially the same state of facts. *Stacy v. Vt. Cent. R. R. Co.*, 32 Vt., 551. 1860.

83. Orders. In controversies respecting railroads no appeal lies from an interlocutory order of the county court. *Trevilian v. Louisa R. R. Co.*, 3 Grattan (Va.), 326. 1846. *Hancock v. Richmond and Petersburg R. R. Co.*, ib., 328.

84. Records and transcripts. The supreme court cannot amend a transcript of a record, even by the original papers, should they be produced by a party for that purpose. *Ill. Cent. R. R. Co. v. Garish*, 40 Ill., 70. 1866.

85. — In county parishes judgments are only signed at the end of the term; and orders of appeal, granted between the time of

Agent — Agreement — Award.

the rendition of the judgment and signing of the district judge, are not premature. *Vicksburg, Shreveport and Tex. R. R. Co. v. Hamilton*, 15 La. An., 521. 1860.

86. — The insertion in the record of an improper name of the clerk will constitute no ground for reversal of the judgment of the inferior court. *Grimball v. Mississippi and Alabama R. R. Co.*, 3 Smedes & Marshall (Miss.), 38. 1844.

87. — The court will adopt that construction of the record of a case which will the more nearly harmonize the whole record; and if, with the record thus harmonized, there is sufficient to support the judgment of the inferior court, it will be permitted to stand. *Union Pacific R. R. Co. v. Horney*, 5 Kansas, 340. 1870.

88. **Reversal.** When the appellate court has sent a case back for the trial of a single remaining question, which belongs to the jury, the special term will order the cause put upon circuit calendar, notwithstanding objections that other issues are involved and unsettled. *Vose v. Florida R. R. Co.*, 46 Howard's Pr. (N. Y.), 424. 1873.

89. **Time.** The power is given to the court, in § 174 of the Code, to enlarge the time for *appealing*. Section 405 relates to the powers of a judge of the court *at chambers*, and has no application to the power of the court. *Haase v. N. Y. Cent. R. R. Co.*, 14 Howard's Pr. (N. Y.), 430. 1857.

APPRAISEMENT LAWS.

1. — Under the laws of Indiana the rents and profits of lands levied upon under an execution must be appraised, or a sale under the execution will be invalid. *Ind. Cent. R. R. Co. v. Bradley*, 15 Ind., 23. 1860.

ARBITRATION.

See CONSTRUCTION OF RAILWAYS; EMINENT DOMAIN; INJUNCTION.

1. **Agent.** An agent cannot submit the cause of his principal to arbitration without express authority from his principal so to do.

Mich. Cent. R. R. Co. v. Gougar, 55 Ill., 503. 1870.

2. **Agreement of submission.** An agreement to submit to arbitration the question of the "amount of damages or compensation to be paid by the defendant for any injury or loss that the plaintiff *may sustain*," is sufficient to justify an award for damages *actually sustained*. *Md. and Del. R. R. Co. v. Porter*, 19 Md., 458. 1862.

3. **Award.** It is too late to urge in the supreme court, as an objection to an award, that the arbitrators were not sworn; the objection should have been made in the court below. *Valle v. North Missouri R. R. Co.*, 37 Mo., 445. 1866.

4. — An award to be of any validity under the statute of Indiana must be signed by an attesting witness, before the expiration of the official existence of the arbitrators. *New Albany and Salem R. R. Co. v. McPheeters*, 12 Ind., 472. 1859.

5. — An award upon a submission in the county, not returned into court, nor submitting questions of law to the decision of the court, is conclusive upon the parties, although the arbitrators, "at the request of" one of the parties, annex "a statement of the facts and principles upon which the foregoing award was made," "to be taken as part of said award;" and the court will not examine the questions of law arising upon that statement, especially if the facts are complicated, and the question of law doubtful. *Smith v. Boston and Me. R. R. Co.*, 16 Gray (Mass.), 521. 1860.

6. — A mistake in a matter of fact, arising from the arbitrator misjudging, either in weighing the evidence or in construing the contract or admissions of the parties, will not invalidate the award; but only such a mistake as shows that he was misled, and deluded, and so far misapprehended the case that he failed to exercise his real judgment upon it. *Vanderwerker v. Vt. Cent. R. R. Co.*, 27 Vt., 130. 1854.

7. — An agreement for arbitration being made in Tennessee, its validity and construction in the courts of Georgia, depend on the laws of Tennessee. By the laws of Tennessee an award in *parol* may be good. *Green v. East Tenn. and Ga. R. R. Co.*, 37 Ga., 456. 1867.

8. — If an arbitrator embraces in his award matter not submitted, and includes the result

Estoppel — Costs — Equity.

in a single conclusion, so as to render it impossible to separate the matters referred from those which have not been, the award is bad. *York and Cumberland R. R. Co. v. Meyers*, 18 Howard, 246. 1855.

9. — But where the averments of the declaration cover the ground on which the award is based the award is final. *Ib.*

10. — Arbitrators who are not restricted by the terms of the submission, are authorized to settle all questions of law and fact arising in the case; and their decision upon questions of law discussed before them, deliberately and fairly made, is conclusive. Their award may be impeached by showing that they have fallen into some mistake of the law by which they are misled, so that their award is not the result of their judgment; but their mistakes in drawing conclusions of fact from evidence, or in adopting erroneous opinions of the law, upon debated questions, are not legal causes for avoiding their award. *White Mountain R. R. Co. v. Beane*, 39 N. H., 107. 1859.

11. — A. contracted to build a railroad for B., to be paid upon monthly estimates to be made by B.'s engineers, of the work done, and made subcontracts with C. for the building of certain sections. As the work progressed the estimates made were too small, and A. having died, C. presented claims against A.'s estate, on account of said underestimates. There being matters in dispute also between A.'s estate and B., they petitioned to the probate court to make an order to refer all said matters to referees, under the statute, which was done. The claim of C. against A.'s estate on account of said underestimates, was also a claim on the part of A.'s estate against B. *Held*, that the submission was broad enough to cover all claims between the parties, A.'s estate and B., including the claim on account of said underestimates. *Barker v. Belknap's Estate and Vt. Cent. R. R. Co.*, 39 Vt., 168. 1866.

12. — *Held*, also, that the claim being within the submission, the award is a bar to any action brought for the recovery thereof, or of any claim that was included in the submission, though it was not in fact brought before the arbitrators; the same rule applying in this respect as if it had been an award by deed. *Ib.*

13. — One of the arbitrators was not present when an award was agreed upon, nor notified of the meeting at which it was made. *Held*, under the R. S. 1843, that the award was invalid. *Jeffersonville R. R. Co. v. Mounts*, 7 Ind., 669. 1856.

14. — An award by the common law, to be valid, must have been concurred in by all the arbitrators. *Ib.*

15. — The power of an arbitrator or referee expires with the return of the award or report into court, and the report cannot afterward be altered. *Ind. Cent. R. R. Co. v. Bradley*, 7 Ind., 49. 1855.

16. — A referee having made his report to the court, in favor of the plaintiff, the defendant, more than two months afterward, filed a package of papers in the court, as containing the evidence which was given before the referee. The affidavits of the persons who took down the evidence were also produced, alleging that it contained substantially all that was given. *Held*, that the package was no part of the report, and that it was not admissible to impeach it. *Ib.*

17. Estoppel. In a suit upon a void award, made under the statute, the defendant is not estopped from denying its validity by not having appealed therefrom. *Jeffersonville R. R. Co. v. Mounts*, 7 Ind., 669. 1856.

18. Costs. Where costs were allowed by the award of arbitrators without authority, that part of the award may be set aside without invalidating the residue of the award. *Porter et al. v. Buckfield Branch R. R. Co.*, 32 Me., 539. 1851.

19. — If the award of arbitrators to whom a case is referred by rule of court, is silent on the subject of costs, the prevailing party is entitled to recover them. *Woolson v. Boston and Worcester R. R. Co.*, 103 Mass., 580. 1870.

20. Engineer as arbitrator. The measurement of the amount of work done under a contract by the person to whom it was referred by the parties, is, in the absence of fraud, conclusive, and neither party is permitted to show it to be erroneous. (See *McAvoy v. Long*, 13 Ill., 147.) *Cent. Military Tract R. R. Co. v. Spurck*, 24 Ill., 587. 1860.

See CONSTRUCTION OF RAILWAYS AND CONTRACTS.

21. Equity. Equity will enforce an award of arbitrators, when the award provides a

Failure to Agree — Injunction — Referees.

specific remedy, or provides the execution of a specific act, other than the payment of money. *Story v. Norwich and Worcester R. R. Co.*, 24 Conn., 95. 1855.

22. Failure to agree. Arbitrators, chosen under § 5, Local Laws 1849, p. 364, having reported to the circuit court that they were unable to agree, etc., *held*, that their duties terminated with such report, and that they could not afterwards proceed to make an award. *Jeffersonville R. R. Co. v. Mounts*, 7 Ind., 669. 1856.

23. Injunction. A case was referred to an arbitrator by consent, under rule of the court in which the suit was pending. While the matter was still before the arbitrator the defendant obtained an injunction restraining the plaintiff from proceeding with the reference. The latter filed an answer and took an appeal from the order granting the injunction, and gave bond as required by law. The arbitrator having filed his award during the pendency of the appeal, on exceptions to it for that cause, *held*, that the arbitrator was not prevented by the pendency of the injunction case from going on with his award. *Northern Central R. R. Co. v. Canton Co.*, 24 Md., 500. 1866.

24. — Unless their acts are manifestly unlawful an injunction will not issue to restrain the proceedings of arbitrators. *West Jersey R. R. Co. v. Thomas*, 7 Philadelphia Rep. (Penn.), 635. 1869.

25. Injury to passengers. If a passenger who is traveling in and seated by an open window of a railroad car receives an injury from the swinging of an unfastened door of a car which has been left by another railroad company standing upon a track parallel with that over which he is riding, an award in his favor against the company by which the stationary car was left in its position which has been returned into the superior court in compliance with the terms of the submission, and is still pending therein, without entry of judgment thereon, is no bar to an action by him for the same injury against the company in whose cars he was riding, although the costs of the arbitration have been paid by the company against whom the award was made. *Todd v. Old Colony and Fall River R. R. Co.*, 3 Allen (Mass.), 18. 1861.

26. Interest of arbitrator. If an agree-

ment is made to submit a cause to two arbitrators, one of whom is interested, and they upon a hearing fail to agree, and notify the parties thereof, and of the determination of each of them, and thereupon, after the interest of the arbitrator has ceased, a new agreement is made, adding another arbitrator, and providing that the decision of a majority of them shall be final, an award by a majority is valid and binding; although the plaintiff did not personally know of the facts in relation to the interest of the arbitrator until after the award was made. *Wilson v. Concord R. R. Co.*, 3 Allen (Mass.), 194. 1861.

27. — Stockholders in a bank which holds shares of a railway company pledged to it as collateral security by a person in good credit are not disqualified by reason of interest from acting as arbitrators in a case in which the railroad company is a party. *Leominster, Inhabitants of, v. Fitchburg and Worcester R. R. Co.*, 7 Allen (Mass.), 38. 1863.

28. Lease. In the indenture in which Railroad B. leased its road, etc., to Railroad A., there was an agreement to refer all matters of dispute that might arise between them upon the lease. *Held*, that this agreement to refer not only did not oust this court of its jurisdiction at law or in equity in a suit between the parties to such contract, but also, that at the instance of a minority of the stockholders in Railroad B., under the circumstances stated, this court might enjoin both said roads from entering into such reference, according to said agreement, in relation to the amount of rents due to said Railroad B.; and if such reference had been entered into, from proceeding with such reference. *March v. Eastern R. R. Co.*, 40 N. H., 548. 1860. *Same v. Same*, 48 *ib.*, 515. 1862.

29. Review. The question whether an award is excessive or unjust cannot be reviewed in a court of equity. But where there are errors enough to set aside an award the court will review them so that an award apparently excessive may be reviewed. *West Jersey R. R. Co. v. Thomas*, 6 C. E. Green's Ch. (N. J.), 205. 1870.

30. Referees. The construction of a contract by referees, appointed under a submission at common law, cannot be reexamined by this court. *Porter et al. v. Buckfield Branch R. R. Co.*, 32 Me., 539. 1851.

Bond — Pleading — Rights of Assignee.

31. Statutes. The provision of the act of 1847 providing for arbitration in case of damages done by a railway company — construed. *Macon and Western R. R. Co. v. Davis*, 13 Ga., 68. 1853.

32. Umpire. Two arbitrators, after hearing the evidence and arguments, being unable to agree, chose an umpire to act as third arbitrator, and the three met without notifying the parties of the appointment of the third arbitrator, or of the time and place of their meeting, giving no opportunity to the parties to be heard; *held*, that their action, though believed by themselves to be lawful and proper, was misconduct in the sense of the law, and fatal to the validity of the award. *Thomas v. West Jersey R. R. Co.*, 9 C. E. Green's Ch., (N. J.), 567. 1874.

ARREST.

1. Bond. Under the provisions of § 14, page 615, of the *Revised Statutes*, "no sheriff, or other officer, shall take any obligation of or from any person in his custody, for or concerning any matter relating to his office, otherwise than such as is specially directed by law. Every obligation taken by such officer, by color of his office, in any other manner or form, shall be null and void." Under an order of arrest, the sheriff, instead of the bond designated by the *Civil Code* (§ 190) took bond, with security, that the defendant would perform the judgment that might be rendered in the action. *Held*, that such bond was null and void. *Lexington and Danville R. R. Co. v. Barbee*, 1 Metcalfe (Ky.), 384. 1858.

2. Female defendant. Where the complaint showed that a female defendant had aided her co-defendants in taking from the plaintiff certificates of stock and converting them to their own use, it was *held*, that this was a willful injury to property for which a female could be arrested under the code. *Northern R. R. Co. of France v. Carpentier*, 3 Abbott's Pr. (N. Y.), 259. 1856. 13 Howard's Pr. (N. Y.), 222. 1856.

ARREST OF JUDGMENT.

1. A motion in arrest of judgment must be made before judgment is rendered. *Hilli-*

goss v. Pittsburgh, etc., R. R. Co., 40 Ind., 112. 1872.

2. — A motion in arrest of judgment is an affirmation of the verdict, and precludes a motion for a new trial. After a default and an inquest of damages, the defendant moved for a new trial. *Held*, that the motion was not a proper one. *Held*, also, that the proper motion would have been to set aside the inquest. *Marion and Logansport R. R. Co. v. Lomax*, 7 Ind., 406. 1856.

3. Pleading. The objection that the petition against a railroad company contains no averment of the corporate existence of the defendant, comes too late after judgment, and constitutes no ground for motion in arrest. *Andre v. Chicago and N. W. R. R. Co.*, 30 Iowa, 107. 1870.

ASSAULT AND BATTERY.

See INJURIES TO PASSENGERS.

ASSESSMENTS.

See STOCK; SUBSCRIPTIONS BY INDIVIDUALS.

ASSIGNMENT.

See CARRIAGE OF MERCHANDISE.

1. Rights of assignee. An assignment made in New York to a citizen thereof by a citizen of Wisconsin, of personal property then present with the assignor, the same being made in payment of a debt, will be upheld in Wisconsin, there being nothing in it contrary to good morals or public policy. *Smith v. Chicago and N. W. R. R. Co.*, 23 Wis., 267. 1868.

2. — The thing assigned being a claim against the defendant, suit thereon must be brought in the name of the assignee. *Ib.*

3. — The damages for the breach of covenant in a deed may be assigned. *Vail v. Junction R. R. Co.*, 1 Cincinnati Superior Ct. Rep., 571. 1871.

4. — A railroad company, having a contract guaranteed by certain persons, took another contract in lieu thereof with guaran-

Dividends — Effect — Form.

ties also, but by neglect the first contract was not surrendered. *Held*, that the company could not convey the first contract to a third person as security for moneys advanced to the company. *McDonald v. Kneeland*, 5 Minn., 332. 1861.

5. — Under the code, an assignee under a claim of damages, resulting from injuries to personal or real estate, may bring an action in his own name. *Hall v. Cincinnati, Hamilton, etc., R. R. Co.*, 1 Disney (Ohio), 58. 1855.

6. — A cause of action founded on injuries to the person cannot be assigned. The code does not change this rule. *Purple v. Hudson River R. R. Co.*, 1 Abbott's Pr. (N. Y.), 33. 1854. *Same v. Same*, 4 Duer. (N. Y.), 74.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. **Dividends.** In a distribution by auditors of a fund assigned for the benefit of creditors, a judgment recovered against the assignor in a suit commenced after the assignment, upon a claim which the record shows existed before, is *prima facie* entitled to a dividend. *Pittsburg and Steubenville Railroad Company's Appeal*, 3 Grant's Cases (Penn.), 68. 1859. 2 *Ib.* 151. 1858.

2. **Effect of an Assignment.** An action on the case is properly brought in the name of the owner of property alleged to have been lost by the defendant's negligence, although after the cause of action accrued, but before it was commenced, he had assigned his whole estate for the benefit of his creditors. *O'Neill and Chambers v. South Carolina R. R. Co.*, 9 Richardson's Law (So. Car.), 465. 1856.

3. **Form of an assignment.** A transfer by the Minneapolis and Cedar Valley R. R. Co. of certain state railroad bonds to a trustee "for the protection of the creditors of the company so far as they can be applied to that object" and reserving certain bonds from the effect of the trust was held not to be an assignment for the benefit of creditors. *Banning v. Sibley*, 3 Minn., 389. 1859.

4. — A deed of assignment was made for the benefit of creditors to J. L. and A. I., "the survivor or his assigns." J. L. died and the assignor joined with A. I. in making a

new conveyance to said A. I. and G. R. *Held*, that the second deed was valid. *Peck v. Ingraham and Read*, 28 Miss., 246. 1854.

5. — An agreement of lease by which the Philadelphia and Sunbury R. R. Co. placed its entire road in the possession of the Sunbury and Erie R. R. Co. to be stocked, repaired and run, at certain rates of tolls, and after applying the proceeds to these objects, so far as necessary, then to pay the earnings remaining to certain preferred creditors of the former company, is an assignment for the benefit of creditors, within the meaning of the act of March 24, 1818, and, having been recorded within thirty days in the proper county, is good as an assignment for the benefit of creditors, although not so intended. *Bittenbender v. Sunbury and Erie R. R. Co.*, 40 Penn. St., 270. 1861.

6. — The preferences in the assignment are void being forbidden by law, but the assignment is good, although the assignee is ineligible as a trustee, for the court can supply a trustee who is competent. *Ib.*

7. — An assignment like a grant, may be made of any property of which the assignor has the actual or potential possession, and the road being in possession, and its future earnings potential and capable of being appraised, both interests passed under the assignment. *Ib.*

8. — The lease possessing all the elements of an assignment must be construed as such. *Ib.*

9. — Where one of the preferred creditors, whose bill was against the Philadelphia and Sunbury R. R. Co., after it had taken possession, upon the promise of the president of the latter company to pay him as prescribed in the lease, and upon failure of payment brought his action in assumpsit against the latter company, proving the agreement, and that the lessees had received net profits enough to meet his claim; *held*, that the promise was but a promise to pay in accordance with the terms of the assignment, and it was therefore an agreement to carry out the assignment and could not be enforced. *Ib.*

10. — A transfer of property in trust for the payment of debts will not fall within the statutes which regulate assignments for the benefit of creditors unless made in due form and purporting to be an assignment. *Lucas*

Fraud — Preferences — Stock.

v. R. R. Co., 3 Philadelphia Rep. (Penn.), 215. 1858.

11. Fraud. An assignment to secure future advances is not *per se* fraudulent. It depends on the good faith of the transaction. *Arthur v. Commercial and R. R. Bank of Vicksburg*, 9 Smedes and Marshall (Miss.), 394. 1848.

12. — And a condition in the assignment that the assignees should each receive an annual salary of \$8,000, though suspicious in appearance is not necessarily fraudulent. *Ib.*

13. — But where there is a conveyance made by a failing debtor to assignees, transferring his property for an indefinite time until the profits shall have paid all the debts of the grantor, the conveyance is fraudulent and void as to existing creditors. *Ib.*

14. Preferences. A creditor, in the absence of a statutory prohibition, may, at any time, before liens have attached on his property, make a general or partial assignment to a trustee for the benefit of his creditors, with preferences, or he may assign the whole for the benefit of a single creditor. *New Albany and Salem R. R. Co. v. Huff*, 19 Ind., 444. 1862.

15. — The mere reservation, in such an assignment, of the surplus, "if any there should be," to the debtor, will not vitiate the assignment. *Ib.*

16. — A prior assignment of stock, transferred to him for the benefit of creditors, will be preferred to a subsequent attaching creditor. *Haldeman v. Hillsborough and Cincinnati R. R. Co.*, 2 Handy (Ohio), 101. 1855.

17. — The Pennsylvania R. R. Co. being about to purchase the rolling stock and bonds of the Sunbury and Erie R. R. Co., and to lease its road for nine hundred and ninety-nine years, the lessee agreeing, by the contract, to keep the road in repair, maintain its equipment and pay thirty per cent. of the gross earnings for taxes, interest on bonds, and the balance of the rent, if any, to the lessors; a bill in equity was filed by a stockholder in both companies for a preliminary injunction against the proposed purchase and lease. *Held*, that the intended contracts were valid, because within the corporate powers of the two companies under the acts of April 13, 1860, and April 23, 1861, and that they

were not assignments in trust for the benefit of creditors with preferences. *Gratz v. Pennsylvania R. R. Co.*, 41 Penn. St., 447. 1862.

18. — By § 5 of act of 1843, prescribing the mode of proceeding against incorporated banks, for a violation of their franchises, etc., it was provided that the provisions of the act should not apply to the R. R. Bank of Vicksburg, so as to effect the railroad and its operation: *held*, that the operation of the law was only limited as to this bank, but that the bank was not exempt from its operation. *State v. Commercial and R. R. Bank of Vicksburg*, 12 Smedes & Marshall (Miss.), 276. 1849. *State v. Same*, 24 Miss., 144. 1852.

19. — An assignment for the benefit of creditors was made by the company prior to the passage of said act; in the year 1846 proceedings in the nature of a *quo warranto* were commenced against the bank; the assignees moved to quash the information and dissolve the injunction on the ground of the assignment to them: *Held*, that the motion could only be sustained so far as the interest of the assignees in the railroad was concerned. *Ib.*

20. What may be assigned. The real estate of a corporation, purchased for railway purposes, is subject to sale on execution, and hence may be assigned for the benefit of the creditors. *Arthur v. Commercial and R. R. Bank of Vicksburg*, 9 Smedes & Marshall (Miss.), 394. 1848.

21. — But the franchise of the road is not subject to sale or assignment without the consent of the power that granted it. *Ib.*

22. Stock subscriptions. Unpaid stock subscriptions pass to the assignees and may be recovered by them. *West Chester and Philadelphia R. R. Co. v. Thomas*, 2 Philadelphia Rep. (Penn.), 344. 1856. *German-town Passenger R. R. Co. v. Fidler*, 60 Penn. St., 124. 1869.

23. — A corporation is not necessarily dissolved by its insolvency or by a writ of sequestration. Its franchises not capable of assignment must be exercised by it, but in sub-serviency to its legal and equitable obligations. *Ib.*

24. — The right to make calls upon stockholders is vested in the managers, whose lawful exercise of the right can only be objected to by creditors or their representative. *Ib.*

Bonds — Contractors — Curator — Foreign Corporation.

25. — Where the debts of the corporation require it, is the duty of the managers to make calls. They have discretion only as to the time and manner of making payments. *Ib.*

ATTACHMENT.

See CONTRACT. GARNISHMENT. STOCKS.

1. **Attachment Bonds.** Where an attachment was sued out in the name of A. for the use of B., and B. made the affidavit and executed the bond, which was conditioned for B's effectual prosecution of the suit; it was *held*, that the affidavit and bond were within the statute, which required the officer granting the attachment to take bond and security from the party plaintiff. *Grand Gulf R. R. and Banking Co. for use of etc. v. Conger*, 9 Smedes & Marshall (Miss.), 505. 1848.

2. **Bonds.** Railway bonds and Minnesota State railroad bonds are personal property, capable of manual delivery; and as such, cannot be belived upon or attached, unless the attaching officer succeeds in getting them into actual possession and under his control. *Caldwell v. Sibley*, 3 Minn., 406. 1859; *Banning v. Same, ib.*, 389. 1859.

3. — Bonds executed by a railway company and in the hands of its agents are not subject to attachment against the company. *Coddington v. Gilbert*, 5 Duer. (N. Y.), 72. 1855. *Same v. Same*, 2 Abbott's, Pr., 242. *Same v. Same*, 17 N. Y., 489. 1858.

4. **Contractors.** The estimates of work done by a contractor for a railroad company, are made up to the 20th of each month, when they are considered due, though not paid for some days afterwards. As the price of the work done by the contractor after the 20th may be forfeited to the company for several causes, before the 20th of the next month, no debt is due from the company to the contractor, until the 20th arrives: and therefore an attachment being served on the company on the 14th of the month, there is nothing then in its hands due to the contractor which may be attached, though in fact no forfeiture occurs, and on the following 20th of the month the estimate may be due. *Baltimore and Ohio R. R. Co. v. Gallahue*, 14 Grattan (Va.), 563. 1858.

5. **Curator.** A curator *ad hoc*, appointed to represent an absent defendant, has no authority to waive the production of legal evidence. *Edmonson v. Mississippi and Ala. R. R. Co.*, 13 La. (O. S.), 282. 1838.

6. **Foreign corporation.** A suit against a *foreign* corporation cannot be commenced by original writ or summons. Attachment is the only mode provided by statute. *Lawrence v. N. J. R. R. Co.*, 1 Howard's Pr. (N. Y.), 250. 1845.

7. — A contract by a foreign corporation for the manufacture and purchase of property in New York, to be paid for on delivery at the office of such corporation out of that state, does not give the corporation a *title* to such property *until delivered and paid for* according to the agreement. *Bates v. New Orleans, Jackson and Great Northern R. R. Co.*, 13 Howard's Pr. (N. Y.), 516. 1856. *Same v. Same*, 4 Abbott's Pr. (N. Y.), 72. 1856.

8. — Therefore where such property is on its passage through the state of New York to its destination out of that state, it is not liable to be taken on attachment against the corporation. *Ib.*

9. — Where the demand for which the action was brought, arose upon written contracts for the payment of money, made, executed, delivered and made payable in Canada; and all the labor done and materials furnished, were under those contracts, and upon work located in Canada, for a corporation created by the laws of Canada and existing there, except a small part, which was performed in New York, it was *held* not a case where the *subject of the action* was situated in New York; and although the defendant had *property in that state* liable to attachment, the attachment could not be sustained by a *nonresident* plaintiff. *Campbell v. Champlain and St. Lawrence R. R. Co.*, 18 Howard's Pr. (N. Y.), 412. 1858.

10. — *It seems*, that the statute of New York (Session Laws of 1858, ch. 121), which authorizes a railway company, created by the laws of and located in Canada, to take and hold real estate, for the purpose of making a railway in New York, does not give authority to proceed against such company only as against a *foreign corporation*. *Whitehead v. Buffalo and Lake Huron R. R. Co.*, 18 Howard's Pr. (N. Y.), 218. 1859. *Campbell v. Champlain and St. Lawrence R. R. Co., ib.*, 412. 1858.

Powers and Duties.

11. — An attachment will not lie against a foreign corporation owning property in New Jersey, and transacting business there under legislative authority. *Phillipsburgh Bank v. Lackawanna R. R. Co.*, 3 Dutcher (N. J.), 206. 1858.

12. — The property of a foreign corporation within the limits of Georgia may be there attached. *S. C. R. R. Co. v. McDonald*, 5 Ga., 531. 1848.

13. — By the laws of Kentucky, Session Acts 1847-8, p. 344-5, all the privileges and immunities were conferred upon the Mobile and Ohio R. R. Co., in this state that it had granted to it in the state of Alabama; and it was not subject in Alabama to have its property and effects attached for mere failure to pay its liabilities; and unless it was so subject there it cannot be here, notwithstanding the provision of the civil code on that subject, adopted since the passage of the above act. *Martin and Merriwether v. Mobile and Ohio R. R. Co.*, 7 Bush. (Ky.), 116. 1870.

14. — A foreign corporation having its chief place of business in Missouri may, it seems, be sued as a resident there, by ordinary summons, and it cannot be sued there by attachment on the ground of nonresidence. *Farnsworth v. Terre Haute, Alton and St. Louis R. R. Co.*, 29 Mo., 75. 1859.

15. **Jurisdiction.** In an action for the recovery of money, jurisdiction of the defendant may be acquired by service by publication, when the action is against a nonresident of the state, having property in the state sought to be taken by attachment. Code, § 70. *National Bank of New London v. Lake Shore and Mich. South. R.R.Co.*, 21 Ohio St., 221. 1871.

16. — A private corporation holds its corporate property in trust for the benefit of its stockholders. Hence, a nonresident stockholder in a corporation in Ohio has property in that state. *Ib.*

17. — Such stock is taken in attachment when a notice of garnishment is duly served upon the corporation. *Ib.*

18. — When such property is attached the jurisdiction of the court is complete and cannot be ousted by any subsequent answer of the garnishee. *Ib.*

19. **Locomotives.** The locomotive engines and cars of a railroad company are liable to attachment, when not in actual use, like other

personal property. *Boston, Concord and Montreal R. R. Co. v. Gilmore*, 37 N. H., 410. 1858.

20. **Mortgaged property.** When the property attached had been previously mortgaged to pay certain debts outstanding, of which those of the plaintiffs were a part, the plaintiffs could not appropriate the mortgaged property to the payment of their debts without alleging that the residue of the debts secured had been paid, and bringing the trustees or legal titleholders before the court. *Martin and Merriwether v. Mobile and Ohio R. Co.*, 7 Bush. (Ky.), 116. 1870.

21. **Notice.** Where no property is attached and no garnishee found indebted, jurisdiction cannot be obtained against a foreign corporation by publication of notice. *Wheat v. Platte City, etc., R. R. Co.*, 4 Kan., 370. 1863.

22. **Practice.** It is erroneous, where two attachments have been sued out by the same plaintiff against the same defendant, to submit both causes to a jury, and to enter judgment upon their general verdict without any order consolidating the cases, and without publication having been made in one of them. *Buckhalter v. Mississippi and Tennessee R. R. Co.*, 32 Miss., 119. 1856.

23. — It is too late to rule the plaintiff in foreign attachment to show his cause of action, after judgment entered at or after the third term for default of appearance. *Manuel v. Miss. and Ala. R. R. Co.*, 2 Miles (Penn.), 398. 1840.

24. **Storage of cars.** In an action by a railroad company against an officer for storage of freight cars attached by him and left for some days on its premises, freight agents of other railroads are competent witnesses to the proper charge for such storage, although they have never known a case of storing cars except when the freight in a car has been attached. *Fitchburg R. R. Co. v. Freeman*, 12 Gray (Mass.), 401. 1859.

ATTORNEYS.

- I. POWERS AND DUTIES.
- II. COMPENSATION AND LIEN.

I. POWERS AND DUTIES.

1. **Authority.** Where several suits were brought by the same plaintiff against differ-

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ent defendants — the defenses being the same in each case — and the attorneys of the several parties agreed that all the cases should abide the final decision in one case; *held*, that the agreement was within the authority of the attorneys and was binding upon the parties. *North Missouri R. R. Co. v. Stephens*, 36 Mo., 150. 1865.

2. Appearance for commonwealth. A disinterested counsellor at law, appointed by the court of common pleas for the purpose, may conduct the trial of a suit in behalf of the commonwealth in that court, although the district attorney remains in court throughout the trial. *Commonwealth v. Conn. River R. R. Co.*, 15 Gray (Mass.), 447. 1860.

3. Change of sides. An attorney is never allowed to change sides in the same suit, or receive fees of two adversaries in one cause; but where an attorney, in the course of other business, obtained a knowledge of matters connected with the suit in question, courts will not, in general, on that account, restrain an attorney from acting against the party through whose business he obtained such knowledge. *Price v. Grand Rapids and Ind. R. R. Co.*, 18 Ind., 137. 1862.

4. Director. The constitution does not restrain the legislature from prohibiting a director of a bank from appearing as its attorney. *West Feliciana R. R. Co. v. Johnson*, 5 Howard (Miss.), 273. 1840.

5. Prochein ami. The payment to the attorney of record of a *prochein ami*, of the amount due upon a judgment, and the satisfaction of the judgment by him is binding on the infant plaintiff. *Baltimore and Ohio R. R. Co. v. Fitzpatrick*, 36 Md., 619. 1872.

6. Release. A party receiving an injury from the wrongful acts of others, is entitled to but one satisfaction, and an accord and satisfaction by, or a release or other discharge by the voluntary act of the party injured, of one, of two or more joint *tort feorsors*, is a discharge of all, but an attorney at law, as such merely, cannot settle a suit and give a release concluding his client in relation to the subject in litigation, although he may discontinue the action. *Barrett v. Third Avenue R. R. Co.*, 45 N. Y., 628. 1871.

7. Withdrawal of appearance. *It seems* that it is in the discretion of the court to permit, or to refuse to permit, an attorney to

withdraw his appearance in a cause. *New Albany and Salem R. R. Co. v. Combs*, 13 Ind., 490. 1859.

8. — A full appearance waives defects in process; but a limited one, for the purpose of making objections, does not. *Id.*

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9. Fees. An attorney cannot recover for services rendered as such, unless he can show an employment or retainer. *Chicago, St. Charles and Miss. R. R. Co. v. Larned*, 26 Ill., 218. 1861.

10. — In cases where exemplary damages are allowed it is proper to prove the reasonable and proper charges of plaintiff's counsel. *New Orleans, Jackson and Great Northern R. R. Co. v. Albritton*, 38 Miss., 242. 1859.

11. — Attorneys' fees are not recoverable in an action for breach of contract. *New Orleans, Jackson and Great Northern R. R. Co. v. Moore*, 40 Miss., 39. 1866.

12. — The act of May 3, 1866, requiring corporations to pay counsel fees in suits against them does not apply to a case of an action against a railway company for interest upon its coupons after maturity. *North Pennsylvania R. R. Co. v. Adams*, 54 Penn. St., 94. 1867.

13. — The provision in the statute of Dec. 23, 1840, ch. 584, § 2, authorizing land owners in certain cases to employ counsel at the expense of railroad corporations, applies only to proceedings under that statute. *Boston and Me. R. R. Co. v. Wentworth*, 20 N. H., 406. 1845.

14. — A counsel fee that the plaintiff may be required to pay to his counsel in the cause is not to be allowed by the jury in estimating the plaintiff's damages. *Welch v. North Eastern R. R. Co.*, 12 Richardson's Law (So. Car.), 290. 1859.

15. — **contract.** S. contracted with defendant to build its railway and to bear all expenses of litigation growing out of its construction, and it was agreed that he might use the defendant's name in all necessary litigation. H., one of the directors, of which there were five, was also the agent of S., in relation to the execution of the contract. The plaintiffs not being aware of such contract were employed by H., and rendered professional services in a suit against S. by a rival

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corporation, in which, however, the defendant was really interested, and charged the services to defendant. The remaining items of plaintiff's claim consisted of charges for services rendered in a suit in favor of H., against the same rival corporation, which suit was brought after consulting with H. and two other managing directors, and nothing was said as to whom the charges therefor were to be made. The object of the suit was to protect defendants' interests, but the two directors who consulted with H. in reference to the suit supposed that the services were to be rendered on the credit of S. These services were originally charged by the plaintiffs to H. No action was ever taken by the board of directors with reference to the employment of counsel for defendant in such suits. *Held*, that defendant was liable for all said services. *Foot & Hodges v. Rutland and Whitehall R. R. Co.*, 32 Vt., 633. 1860.

16. — *director's*. Plaintiff's testator, while a director of a railroad company, acted as legal counsel in a certain action, to which the company was a party. *Held*, that the testator was entitled to compensation when so employed by the company, and that it was not indispensable that his employment should be by a formal resolution of the board of directors, but it might be inferred from the nature of the employment, the importance of the subject matter, the partial payment of his claim, and other acts of the board recognizing an indebtedness. *Jackson v. N. Y. Central R. R. Co.*, 2 N. Y. Sup. Ct., 653. 1874.

17. *Immaterial as to third persons*. Evidence is inadmissible to show an agreement between the plaintiff and her attorney as to the measure of his compensation and the terms on which he was to commence and prosecute the action for her as such attorney, there being no issue in respect to the proper parties to the action, and no other issue to which such evidence was material. *Cook v. N. Y. Central R. R. Co.*, 5 Lansing (N. Y.), 401. 1871.

18. *Lien*. The parties may settle an action without consulting an attorney employed in the cause, and the attorney will have no lien for his costs, if there be no collusion between the parties to deprive the attorney of such costs. *McDowell v. Second Avenue R. R. Co.*, 4 Bosworth (N. Y.), 670. 1860.

19. — Points of practice decided in relation to the lien of an attorney. *Richardson v. Brooklyn City and Newtown R. R. Co.*, 24 Howard's Pr. (N. Y.), 321. 1862. *Same v. Same*, 15 Abbott's Pr. (N. Y.), 342. 1863.

20. — The Code has not abolished the lien of an attorney for his costs upon a judgment recovered by him. *Rooney v. Second Avenue R. R. Co.*, 18 N. Y., 368. 1858.

21. — Where a sum is confessed in damages by the defendant, and the plaintiff proceeds for more, but recovers nothing beyond the amount confessed, the attorney for the plaintiff is entitled to his lien upon the judgment for the amount confessed, and the attorney of the defendant to his lien upon the judgment rendered in his favor for costs; and the court will not set off the amount to be rendered in one judgment against the other to the prejudice of the lien of the attorney, of either party. *Currier v. Boston and Maine R. R. Co.*, 37 N. H., 223. 1858.

AUDITA QUERELA.

1. When the basis of an *audita querela* is altogether personal it will die with the person. *Connecticut and Passumpsic Rivers R. R. Co. v. Bliss*, 24 Vt., 411. 1852.

2. — In such case the bail upon the recognition cannot be held. *Id.*

3. — Writs of error and *audita querelas*, when they go to the foundation of the judgment, may be prosecuted by executors or administrators. *Id.*

BAGGAGE.

See JURY.

I. WHAT CONSTITUTES BAGGAGE.

II. LIABILITIES AND DUTIES OF CARRIERS.

I. WHAT CONSTITUTES BAGGAGE.

1. *Articles included*. Common carriers are only responsible for the loss of a reasonable amount of baggage. *New Orleans, Jackson and Great Northern R. R. Co. v. Moore*, 40 Miss., 39. 1866.

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2. — Articles for use as baggage at the end of a journey, or during a temporary stay at a particular place, are as properly baggage as those actually used in transit. *Toledo, Wabash and Western R. R. Co v. Hammond*, 33 Ind., 379. 1870.

3. **Clothing, etc.** In an action brought to charge a railroad company as a common carrier for the loss of an overcoat belonging to a passenger, it appeared that the coat was not delivered to the defendant, but that the passenger, having placed it on the seat of the car in which he sat, forgot to take it with him when he left, and that it was afterwards stolen. *Held*, that the defendant was not liable. *T'ower v. Utica and Schenectady R. R. Co.*, 7 Hill (N. Y.), 47. 1844.

4. **Bedding, etc.** Whether bedding, belonging to a poor man who is moving with his family, carried along packed in a box or trunk, is *baggage* or not, is a question for the jury, taking into consideration the particular circumstances of the case and the use, quality, value and kind of the articles in question. *Quimit v. Henshaw*, 35 Vt., 605. 1863.

5. **Jewelry and watches.** A passenger may place his gold watch or jewelry in his trunk and in case of the loss of the baggage the carrier will be liable. *McCormick v. Hudson R. R. Co.*, 4 E. D. Smith (N. Y.), 181. 1855.

6. — A gold watch deposited in his trunk by a traveler on a railroad is baggage, for which the carrier is responsible. *American Contract Co. v. Cross*, 8 Bush (Ky.), 472. 1871.

7. — A railroad company is held responsible as a common carrier for the value of a gold watch which was lost from the trunk of a passenger by the negligence of the company. *Ib.*

8. — Whatever forms the necessary appendages of the traveler may be regarded as baggage, when placed in a trunk for conveyance. *Ib.*

9. **Married Women.** In the absence of statutes varying the rule, jewelry and ornaments presented to a wife are her paraphernalia, and as such are subject to the control of her husband, and he alone can sue for an injury to or conversion of them. *McCormick v. Penn. Cent. R. R. Co.*, 49 N. Y., 303. 1872.

10. — Under the statutes relating to married women, the common law rule that a wife can-

not take by gift from her husband is abrogated. *Rawson v. Penn. R. R. Co.*, 2 Abbott's Pr., N. S. (N. Y.), 220. 1867.

11. — Hence a married woman may maintain an action for the loss, by the negligence of the defendants, of apparel and jewelry which were a gift to her, whether from her husband or any other person. *Ib.*

12. **Laces.** Old laces, purchased prior to the memory of persons living, were lost with baggage. *Held*, that their value should be proved. *Fraloff v. N. Y. Cent. and Hudson River R. R. Co.*, 10 Blatchford (U. S. C. C.), 16. 1872.

13. **Merchandise.** Where a carrier of passengers, in addition to passage money, demands and receives from a passenger compensation as freight for the transportation of packages containing merchandise and baggage, in the absence of evidence of fraud or concealment on the part of the passenger as to the contents of the packages, such carrier, in case of loss, is liable for the merchandise, as well as baggage. *Stoneman v. Erie R. R. Co.*, 52 N. Y., 429. 1873.

14. — A person, who, under pretence of having baggage transported, places in the hands of the carrier's agent merchandise, jewelry and other valuables, is guilty of fraud, which releases the carrier from its common law liability. *Cincinnati and Chicago R. R. Co. v. Marcus*, 38 Ill., 219. 1865.

15. — In such a case the carrier becomes possessed of the property as a common bailee for hire. *Ib.*

16. — Common carriers of passengers are bound to transport the ordinary baggage of their passengers, but this liability is limited to ordinary baggage, consisting of such articles of necessity and convenience as are usually carried by passengers, and does not include merchandise and other valuables not designed for any such purpose. *Mississippi Central R. R. Co. v. Kennedy*, 41 Miss., 671. 1868.

17. — In an action for damages to recover for lost baggage a passenger cannot recover his expenses in searching for the same. *Ib.*

18. — The ticket of a passenger includes also the ordinary baggage required for his personal accommodation upon his journey, but does not include merchandise. *Smith v. Boston and Me. R. R. Co.*, 44 N. H., 325. 1862;

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Collins v. Boston and Me. R. R. Co., 10 Cushing (Mass.), 506. 1852.

19. — Therefore a common carrier of passengers is not an insurer of such merchandise, when taken along by the passenger, unless a reward be given for its transportation, or it be of a character which, by usage or contract, is to be regarded as a part of the baggage. *Ib.*

20. — The fact that other passengers on other occasions had taken along with them in the passenger cars similar bundles of merchandise, without objection has no legal tendency to prove that the bundle in question was transported at the risk of the carrier, unless it were shown that such bundles were knowingly carried as part of the baggage and paid for by the passenger ticket. *Ib.*

21. — Although the carrier in such case is not liable as an insurer, he is liable as a bailee without reward, for loss or injury caused by his gross negligence; but such negligence must be proved, and is not to be presumed from the mere fact of the loss. *Ib.*

22. — Merchandise cannot, without notice to the carrier, be shipped as baggage. *Cincinnati and Chicago R. R. Co. v. Marcus*, 38 Ill., 219. 1865; *Mich. Southern and Northern Ind. R. R. Co. v. Oehm*, 56 ib., 293. 1870.

23. — The carrier's liability does not extend to articles which the passenger has purchased for a person not a member of his family and has packed with his own baggage. *Dexter v. Syracuse, Binghamton and N. Y. R. R. Co.*, 42 N. Y., 326. 1870.

24. — A package delivered by a traveler to be carried on a railroad, to his place of destination, is not necessarily to be considered baggage, if not so represented by him and if not so put up as to deceive. *Butler v. Hudson River R. R. Co.*, 3 E. D. Smith (N. Y.), 571. 1854.

25. — Although under such circumstances the package is carried by the same train that conveys the passenger, the railroad company may charge freight thereon, and the company will be liable, as a common carrier, for the loss thereof, where no fraud is practiced by the owner, by representing or treating it as baggage. *Ib.*

26. — Where a passenger delivered his trunk and a piece of carpeting to the baggage master of a passenger railroad train, and received a check for his trunk, but was told

that no check was necessary for the carpet as it would go safely — *held*, that the railroad company was liable for the loss of the carpet, although by the printed rules of the company the baggage master was forbidden to receive as passengers' baggage articles of merchandise. *Minter v. Pacific R. R. Co.*, 41 Mo., 503. 1867.

27. **Liability.** Where a railroad company knowingly receives and transports, in cars accompanying its passenger trains, the property of a passenger other than his baggage it assumes, in reference thereto, the liability of a common carrier of merchandise. *Hannibal R. R. Co. v. Swift*, 12 Wallace, 262. 1870.

28. — Surgical instruments of an army surgeon, traveling with troops, constitute a part of his baggage. *Ib.*

29. **Money.** Common carriers of passengers are responsible for money *bona fide* included in the baggage of a passenger for traveling expenses and personal use, to an amount not exceeding what a prudent person would deem proper and necessary for the purpose; but not for money beyond that amount, or intended for other purposes, unless the loss is occasioned by the gross negligence of the carriers or their servants. *Jordan v. Fall River R. R. Co.*, 5 Cushing (Mass.), 69. 1849.

30. — But the passenger cannot recover for money carried in his baggage for the purpose of purchasing clothing at the place to which he is going. *Hickox v. Naugatuck R. R. Co.*, 31 Conn., 281. 1863.

31. — Where a trunk contains specie it is not incumbent upon the owner to notify the company of its contents, unless inquired of, notwithstanding the advertisement of the company, that passengers are "prohibited from taking with them anything as baggage but their wearing apparel, which will be at the risk of the owner;" and where the extra weight of the passenger's baggage was paid for; — *held*, that it was immaterial whether the trunk was viewed as baggage or freight, and that the company was liable for its loss through the negligence or fraud of its agents. *Camden and Amboy R. R. Co. v. Baldauf*, 16 Penn. St., 67. 1851.

32. — A reasonable amount of bank bills may be carried in a trunk, and their value recovered as lost baggage. *Ill. Cent. R. R. Co. v. Copeland*, 24 Ill., 332. 1860.

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33. Principal and Agent. A merchant's clerk went out on business for his employer and paid his fare on a railway. His trunk containing a sufficient amount of his employer's money to pay his reasonable expenses was lost by the railway company. *Held*, that the carrier was not liable for such loss in an action in the name of the principal. *Weed v. Saratoga and Schenectady R. R. Co.*, 19 Wendell (N. Y.), 534. 1838.

34. Revolver. A revolver is included in personal baggage. *Davis v. Mich. Southern and Northern Ind. R. R. Co.*, 22 Ill., 278. 1859.

35. — Two revolvers are not reasonably necessary as a part of a passenger's baggage in Illinois, and a recovery can only be had for one in case of loss of baggage. *Chicago, Rock Island and Pacific R. R. Co. v. Collins*, 56 Ill., 212. 1870.

36. Sample valise. A railroad company is not liable, to either owner or agent, on its ordinary contract of transportation of a passenger, for losing a valise delivered into its charge as his personal luggage, but which contained only samples of merchandise, and, with its contents, was owned by a trader-whose traveling agent he was to sell such goods by sample; nor in tort, for the loss, without proof of gross negligence. *Stimson v. Conn. River R. R. Co.*, 98 Mass., 83. 1867.

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37. Agent. It is enough to establish a delivery of baggage to a common carrier, in the first instance, to prove that a person acting as the agent of the company, received and accepted the property for transportation, even if there be in fact another person who is proved to be the actual agent having charge of the receipt of freight. *Rogers v. Long Island R. R. Co.*, 38 Howard's Pr. (N. Y.), 289. 1869. *Same v. Same*, 2 Lansing (N. Y.), 269. 1869.

38. — Where a ticket agent is apparently in charge of the depot, the company which sanctions his employment, is not at liberty to repudiate his acts; especially in accepting the delivery of baggage. *Id.*

39. Burden of proof. Where baggage is

lost it is presumed to have been lost by the negligence or fraud of the carrier or his agent. *Camden and Amboy R. R. Co., v. Baldauf*, 16 Penn. St., 87. 1851. *Garvey v. Camden and Amboy R. R. Co.*, 4 Abbott's Pr. (N. Y.), 171. 1857.

40. Checks. A check in the possession of a passenger is evidence that his baggage was delivered to the company. And as a trunk is the usual baggage it is evidence that a trunk with its contents was delivered. *Dill v. South Carolina R. R. Co.*, 7 Richardson's Law (So. Car.), 158. 1854.

41. Where a passenger on a railroad, having lost the check of his baggage, applied for the latter to one of the company's employes at the station, who replied that the check, or proof of the property by affidavit, must be produced; and the passenger afterward assigned the baggage to the plaintiff, who, in company with the passenger, demanded it anew of the baggage master at the station, who represented that it was not in the defendant's possession; *held*, that the plaintiff's right of action against the company, for the value of the baggage, was complete. *Cass v. New York and New Haven R. R. Co.*, 1 E. D. Smith (N. Y.), 522. 1852.

42. — The plaintiff's possession of a check, and the testimony of the baggage master that when required by passengers, he put checks on their baggage and gave duplicates to the passengers, is sufficient evidence that plaintiff was a passenger on the cars, and that he had baggage checked. *Davis v. Cayuga and Susquehanna R. R. Co.*, 10 Howard's Pr. (N. Y.), 330. 1854.

43. — Proof that a passenger, riding on a through ticket from New York to Junction City, Kan., by way of the Hannibal and St. Joseph Railroad, delivered at Kansas City to the baggage master of the Kansas Pacific Railway certain checks of the H. and St. J. R. R. Co. for baggage, with the understanding and agreement that the Kansas Pacific Co. should forward said baggage to Junction City, is competent evidence to go to the jury as tending to show that the Kansas Pacific Co. received the baggage. *Kansas Pacific R. Co. v. Montelle*, 10 Kan., 119. 1872.

44. — The plaintiff took his trunk to a railroad station at 11 o'clock A. M., and requested that it might be checked for the next train

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to B., which was to leave at 3 P. M., but being informed by the agent of the company that they did not check baggage until fifteen minutes before the train left, he left the trunk with the agent, and at the proper time called for and obtained a check, and went himself by the same train. When he received the trunk again some money and clothing had been taken from it, but it did not appear whether it was done while the trunk was lying at the station or after it left. *Held*,

I. That the railroad company was to be regarded as receiving the trunk when first delivered for transportation and not for storage, and that its liability commenced as soon as it was delivered to and received by its agent.

II. That the delivery of a check was of no importance, as constituting the contract of the company, it being merely in the nature of a receipt, and intended as evidence of the ownership and identity of the baggage. *Hickox v. Naugatuck R. R. Co.*, 31 Conn., 281. 1863.

45. — The delivery of a baggage check by a railroad company, is *prima facie* evidence that the company has the baggage. *Davis v. Michigan Southern and Northern Indiana R. R. Co.*, 22 Ill., 278. 1859.

46. — If on a change of passage from one railroad to another, the agent of the road does not find the baggage which is checked, he should give immediate notice to the owner, or the company owning the road on which the passenger embarks, will be held liable. *Ib.*

47. — An action of tort before a police court or justice of the peace, is the proper form of suing for the penalty of \$10, provided by St. 1854, ch. 23, for the refusal of a railroad corporation to check the baggage of a passenger delivered to it for transportation. *Commonwealth v. Connecticut River R. R. Co.*, 15 Gray (Mass.), 447. 1860.

48. — A railway company which in fact receives the baggage of a passenger upon a train on which it is not bound to take it, to be transported over a portion of the road for which he has purchased a ticket, is subject, upon refusing to check the baggage, to the penalty provided in St. 1854, ch. 23. *Ib.*

49. Commencement of liability. Where a passenger bought a through ticket, entitling him to a passage over several lines, and carried his baggage (a valise) with him in the

cars over one of the lines, and delivered it to the next line to be carried in the baggage car, and it was lost; *held*, that the first railway company was not responsible for the loss, the baggage never having come into its possession. *Straiton v. New York and New Haven R. R. Co.*, 2 E. D. Smith (N. Y.), 184. 1853.

50. Compensation for carriage. The fare paid by a passenger over a railroad is the compensation for the carriage of so much of his baggage as is necessary for use on the journey. But baggage subsequently forwarded by his direction, in the absence of any special agreement with or negligence on the part of the carrier, is liable like any other article of merchandise to the payment of the usual freight. *Wilson v. Grand Trunk R. R. Co.*, 56 Me., 60. 1868.

51. — The delivery of a trunk into the possession of a railroad station baggage master, at his station, for transportation, and his reception of the same for that purpose, impose upon the corporation the obligations of a common carrier. *Wilson v. Grand Trunk R. R. Co.*, 57 Me., 138. 1869.

52. Connecting lines. Where a passenger ticket entitles the holder to travel over different lines of road to his place of destination, and to which his baggage is checked, all of them recognizing the validity of the ticket when presented by the passenger, each company to whose possession the baggage may come will be liable to the owner for its loss while in the possession of such company. *Chicago and Rock Island R. R. Co. v. Fahey*, 52 Ill., 81. 1869.

53. — Where a railroad company in Wisconsin sells a through passenger ticket by a specified route to some point beyond its line, it seems that the first company undertakes to transport the passenger and his baggage safely to the place of destination. It is liable for any loss or injury to his baggage occurring on any of the connecting lines over which his contract entitles him to be transported. *Candee v. Pennsylvania R. R. Co.*, 21 Wis., 582. 1867.

54. — The rechecking of the baggage at a point on the route does not affect the contract so as to create a new liability, but is simply an act done in pursuance of the original undertaking. *Ib.*

55. — In the absence of any averment of

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negligence upon the part of a connecting road it will not be held liable. *Ib.*

56. — Where three separate railroad companies owning distinct portions of a continuous railroad between two *termini*, run their cars over the whole road, employing the same agents to sell passage tickets, and receive luggage to be carried over the entire road, an action may be maintained against one of them for the loss of luggage received at one terminus to be carried over the whole road. *Hart v. Rensselaer and Saratoga R. R. Co.*, 8 N. Y., 37. 1853. *Cary v. Cleveland and Toledo R. R. Co.*, 29 Barbour (N. Y.), 35. 1859.

57. — A railway company by delivery of baggage at its terminus, to the baggage master of an independent steamboat company, who, by agreement between the railroad and steamboat company, always entered the defendant's cars before their arrival at the depot and exchanged the checks of the passengers for the checks of the steamboat company, cannot exonerate itself from liability for a loss caused by larceny of the servants of defendant after the baggage was delivered to the baggage master of the boat, unless the evidence shows that such baggage master was the authorized agent of the plaintiff to receive the baggage. *Mobile and O. R. R. Co. v. Hopkins*, 41 Ala., N. S., 486. 1868.

58. — By the appointment of a common agent to receive the entire consideration and issue through tickets and checks, which they recognize and assume, the several companies are made aware that the contract is treated by the passengers as entire, and not several. *Check v. Little Miami R. R. Co.*, 2 Disney (Ohio), 237. 1858.

59. — A railroad company selling through tickets over its own and other roads, is liable for the safety of baggage to the point of destination. *Ill. Cent. R. R. Co. v. Copeland*, 24 Ill., 332. 1860.

60. — If the agent at the starting point fails to disclose his principals, and the contracts on their behalf, whether jointly or severally, he, or the company represented by him, may be treated as sole principal; but if the contract be, in fact, entire, and he is, in fact, dealing for others, who receive the benefit of the contract, the other contracting party may look to the real principals, and subject all who are interested in the joint contract.

Check v. Little Miami R. R. Co., 2 Disney (Ohio), 237. 1858.

61. — Where a passenger purchased, in Chicago, a "through ticket" for New York, consisting of four coupons, to be separated and delivered upon demand, three thereof at points between Chicago and Albany, and the fourth after leaving the latter place; *held*, that the railroad company owning the last route of the journey, from Albany to New York, was liable for the loss of a trunk, the passenger having received its check upon surrendering such trunk and a carpet bag at Buffalo, and said company having delivered a part of said baggage at New York. *McCormick v. Hudson River R. R. Co.*, 4 E. D. Smith (N. Y.), 181. 1855.

62. — Where railway passenger trains arrive late at night and stop for a few hours, and it is the usual course of the company upon whose train the baggage arrives, upon being informed that it is going on in the morning by the next train over a connecting road, to put it in the baggage room of the company, and keep it for delivery in the morning to the servants of another road, when called for by the owner and requested to do so, its liability during the night is that of a carrier and not a warehouseman. *Oumit v. Henshaw*, 35 Vt., 604. 1863.

63. — The usual course of business of a railway company in this respect is of great importance in determining the nature of its liability. *Ib.*

64. — A railroad company is not liable for a passenger's baggage lost by a connecting steamboat line, unless the company has some interest in or control over the carriage of passengers by such boat line. *Green v. N. Y. Cent. R. R. Co.*, 12 Abbott's Pr., N. S. (N. Y.), 473. 1872.

65. — Proof that the railroad company checked the baggage to the terminus of the boat line, although there be evidence that it did so for its own convenience, without proof that the passenger paid it his fare for passage by the boat, is not sufficient. *Ib.*

66. — A railroad company is not liable for a passenger's baggage lost by a connecting steamboat line, even though the company has given a check for the baggage to the terminus of the steamboat line, unless the company has some interest in or control over the carriage

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of passengers by such boat line. *Green v. New York Central R. R. Co.*, 4 Daly (N. Y.), 553. 1872.

67. — Defendant, a railroad company, organized under the laws of Connecticut for the purpose of constructing a railroad from New Haven, by the way of Bridgeport, westerly to the line dividing the state of New York from Connecticut, was afterwards by a law of this state, authorized to extend its railroad into this state. *Held*, that it came within the provisions of the law of New York in respect to domestic corporations, and that it could not, in this state, make a contract for the carriage of passengers or their baggage beyond the limits of its own road. *Milnor v. New York and New Haven R. R. Co.*, 4 Daly (N. Y.), 355. 1873.

68. — The Chesapeake and Ohio R. R. Co. is the Virginia Central R. R. Co. under another name; and is liable upon any contract, or for the negligence of the Virginia Central R. R. Co. *Wilson v. Chesapeake and Ohio R. R. Co.*, 21 Grattan (Va.), 654. 1872.

69. — Where a contract was made in the city of New York between R. and H., and a person professing to act as the agent of three lines of public conveyances, (including the N. Y. Cent. R. R. Co.), running in connection with each other, to transport R. and her baggage from N. Y. to C., in Canada, and she received of him three tickets, one of which was for a passage on defendant's road, which ticket was accepted upon that road by the conductors; *held*, that this was sufficient proof of an undertaking of defendant to transport R. and her goods on its road, until the contrary appeared. *Glasco v. N. Y. Central R. R. Co.*, 36 Barbour (N. Y.), 557. 1862.

70. — Under the contract between the Va. Central R. R. Co. and Trotter & Bro., stage proprietors, for the carriage, by the latter, of passengers, from the terminus of the railroad to the White Sulphur Springs, Trotter & Bro. are the agents of the railroad company, and the company is liable for the loss of baggage of a passenger by Trotter & Bro. *Wilson v. Chesapeake and Ohio R. R. Co.*, 21 Grattan (Va.), 654. 1872.

71. — Though the through ticket given to a passenger at Richmond, specifies on its face that each party to the contract is only liable for losses on their part of the line, the rail-

road company is liable for the loss on the stage line. *Ib.*

72. — Where one of several connecting lines is shown to have had possession of the lost baggage, it is incumbent on the company operating that line to show that the property was delivered to the next carrier. *Philadelphia, Wilmington, etc., R. R. Co. v. Harper*, 29 Md., 330. 1868.

73. — A railway company which receives passengers and commences their carriage at the station of another road, is bound to have a servant there to take charge of baggage until it is placed in its cars; and if it is the custom of the baggage-master of the station, in the absence of such servant, to receive and take charge of baggage, in his stead, the proprietors will be responsible for baggage so delivered to him. *Jordan v. Fall River R. R. Co.*, 5 Cushing (Mass.), 69. 1849.

74. — If various railway companies whose lines connect together from Massachusetts into the British Provinces have arranged together for an excursion train over their several roads, and the company at this end of the route issues tickets with coupons attached for the whole distance, and its agent refuses to give a check for the luggage of a purchaser of such ticket, saying that the same "would be perfectly safe, as he was to go through with them," and the luggage is accordingly put into one of the company's baggage cars, which is sent through the whole distance in charge of its agent, the company is liable if the luggage is lost anywhere upon the route. *Najac v. Boston and Lowell R. R. Co.*, 7 Allen (Mass.), 329. 1863.

75. — The mere failure of a railroad company to deliver at B., on its road, luggage of a passenger who delivered it to a connecting railroad at N., is not evidence of negligence on the part of the latter, which sold to the passenger at N. the tickets to transport him over both roads to B., and checked his luggage accordingly. *Stimson v. Conn. River R. R. Co.*, 98 Mass., 83. 1867.

76. — The plaintiff purchased a ticket of the defendant to New York, and had his baggage checked for that city. He arrived there by the Hudson River railroad, a connecting line of road, at nine o'clock in the morning, and about noon of that day gave his check to an expressman in the city of Brooklyn, with

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instructions to get the trunk from the depot of the Hudson River railroad for him. The expressman neglecting to do so, when, two days afterward, the plaintiff demanded the trunk at the depot, it could not be found. The defendant had, in pursuance of an arrangement with the Hudson River R. R. Co., transferred the baggage of the latter at Albany, and it had been conveyed by it to New York. In an action brought by the plaintiff to recover the value of his trunk, and contents, it was *held*, that he was entitled to recover, in the absence of any proof on the part of defendant accounting for the failure to deliver it. *Burnell v. N. Y. Central R. R. Co.*, 45 N. Y., 184. 1871.

77. — A railroad company which sells passenger tickets for its own road, with the ordinary coupons attached for connecting roads, to a point beyond its own terminus, in the absence of proof of agency, as partner or otherwise, for such roads, contracts for through transportation to that point. But the intermediate carriers are only responsible for the transportation over their respective lines. *Kessler v. N. Y. Central R. R. Co.*, 7 Lansing (N. Y.), 62. 1872.

78. — Where a party contracts for transportation over a route composed of several railroads, for which he pays an entire sum, and receives a through ticket or receipt, the contract is entire, and not of several distinct liabilities. If no partnership in fact exists between the roads, he may treat the contract as entire, or several, so far as the other parties are concerned. *Check v. Little Miami R. R. Co.*, 2 Disney, (Ohio), 237. 1858.

79. **Contracts limiting the liability of the carrier.** A carrier cannot limit his liability from the consequences of the negligence, willful default, or tort of himself and agents. *Mobile and Ohio R. R. Co. v. Hopkins*, 41 Ala., N. S., 486. 1868.

80. — The liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice, printed upon the face of the ticket issued by it, stating the terms upon which baggage will be carried. *Ransom v. Pennsylvania R. R. Co.*, 48 N. Y., 212. 1872.

81. — If, however, the passenger's attention is called to it when purchasing his ticket, or if he knew of it when he purchased, the

law will presume, in the absence of any objection on his part, that he assented to the terms. A discovery by the passenger of the notice after he has entered upon his journey does not affect his rights. *Ib.*

82. — There is no presumption of law that a railway passenger has read a notice limiting the liability of the company for baggage, printed upon the back of a check delivered to him, having on its face the words "look on the back," and also printed on a placard posted in the cars and containing other notices which he has read. *Malone v. Boston and Worcester R. R. Co.*, 12 Gray (Mass.), 388. 1859.

83. — A notice of "all baggage at the risk of the owners" is no protection to common carriers. *Camden and Amboy R. R. Co. v. Belknap*, 21 Wendell (N. Y.), 354. 1839.

84. — A notice that a railroad company would not be liable for the baggage of passengers beyond a certain amount, printed on the back of the passage ticket, and detached from what ordinarily contains all that is material for the passenger to know, does not raise a legal presumption that the party at the time of receiving the ticket and before the train had left the station, had knowledge of such limitations. *Brown v. Eastern R. R. Co.*, 11 Cushing (Mass.), 97. 1853.

85. — Public notice of a railway company that all baggage is at the risk of the owner, not brought home to the owner, will not exonerate the company from liability as a carrier. *Logan v. Pontchartrain R. R. Co.*, 11 Robinson (La.), 24. 1845.

86. — A. purchased a ticket issued by the Indianapolis and Cincinnati R. R. Co., securing a right of passage from I. to S. His baggage was taken charge of by the company for delivery at S., and a check given him for it, on one side of which was stamped these words: "In consideration of free carriage, its value is agreed to be limited to one hundred dollars," and on the other, "I. & C. R. R., 583, Indianapolis and Shelbyville." A. could have read the words and figures on the check. The value of the baggage exceeded one hundred dollars. It was lost by the company. *Held*, that the limitation expressed in the words stamped on the check could not, in any case, apply to a loss resulting from the company's want of care. *Held*, also, that if such

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a limitation of the liability imposed by law could be secured by the carrier, it could only be by an express contract. *Indianapolis and Cincinnati R. R. Co. v. Cox*, 29 Ind., 360. 1868.

87. — A company using steamboats and railroads for the transportation of passengers and their baggage, is liable as a common carrier for damages happening to the baggage of passengers from a defect in the vehicles or machinery used, although the company is not chargeable with actual negligence or want of skill or want of care in securing the safety of the baggage: nothing will excuse the company but inevitable accident arising from superhuman causes, or the acts of the enemies of the country. *Camden and Amboy R. R. Co. v. Burke*, 13 Wendell, (N. Y.), 611. 1835.

88. — Notice in the usual form, "All baggage at the risk of the owners," though brought home to the knowledge of the passengers, will not in such case excuse the company. Common carriers cannot, by such notice excuse themselves from the implied agreement that the vessel, coach, or other vehicle used for the transportation of goods or baggage, is sufficient for the business in which it is employed. *Ib.*

89. Damages. In an action for damages resulting from the loss of baggage, the value of the trunk and contents is the true measure of damages. It is improper to consider expenses incurred in the purchase of other articles to supply the immediate wants of the party. *New Orleans, Jackson and Great Northern R. R. Co. v. Moore*, 40 Miss., 39. 1866.

90. Delivery. The liability of a railway company as a carrier ceases upon the expiration of such reasonable time after the arrival of the baggage at its place of destination as will enable the traveler to receive and take charge of the same. *Mote v. Chicago and N. W. R. R. Co.*, 27 Ia., 22. 1869.

91. — In determining what would be a reasonable time the customs of the company, the manner of transporting baggage from the station and all the circumstances surrounding the case should be considered. *Ib.*

92. Detention. Chapter 165, of the acts of 1870, does not authorize a recovery against a railroad company by a traveler for delay caused by the mere detention of baggage, but only such delay as results from damage to the

baggage and institution of suit to recover the same. *Anderson v. Toledo, Wabash and Western R. R. Co.*, 32 Ia., 86. 1871.

93. Evidence. The rule of evidence which allows the plaintiff in an action against a common carrier to recover for a lost trunk, etc., to prove the value of the contents by his own oath, is confined to cases of fraud or wrong; and has no application to cases of loss through negligence merely. *Garvey v. Camden and Amboy R. R. Co.*, 4 Abbott's Pr. (N. Y.), 171. 1857. *Same v. Same*, 1 Hilton (N. Y.), 280. 1857.

94. — The provisions of the general railroad act of 1850 — allowing plaintiff in an action to recover baggage lost to testify in his own favor — only applies in actions against companies formed under that act. *Ib.*

95. — The provision of St. 1851, ch. 147, § 5, that in any action "brought by a passenger against any railroad corporation, steamboat proprietor or other common carrier," the plaintiff, after proof of the bailment of his trunk to the defendant, and of its loss "by the fault of such carrier, or of the agents of such carrier," shall be allowed to put in evidence a descriptive list of its contents, sworn to by himself, applies to the case of the loss of a trunk left by the passenger with the baggage master of a railroad company, after arriving at his place of destination. *Harlow v. Fitchburg R. R. Co.*, 8 Gray (Mass.), 237. 1857.

96. — In an action against a railroad company to recover the value of a lost trunk, the *ex parte* affidavit of the plaintiff is not competent evidence to prove the contents of the trunk, but the plaintiff himself is a competent witness for that purpose. *Indiana Central R. R. Co. v. Gulick*, 19 Ind., 83. 1862. *Douglass v. Montgomery and West Point R. R. Co.*, 37 Ala., N. S., 638. 1861. *Nolan v. Ohio and Miss. R. R. Co.*, 39 Mo., 114. 1866.

97. — The owner of a trunk is a competent witness in a suit brought by him against a common carrier, for its loss, to prove the contents of the trunk, and their value, and for the same reason the evidence of the wife of the owner is admissible to prove the same facts. *Mad River and Lake Erie R. R. Co. v. Fulton*, 20 O., 318. 1851. *Davis v. Michigan Southern and Northern Indiana R. R. Co.*, 22 Ill., 278. 1859.

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98. — A wife can be a witness in all cases, where her husband may. *Illinois Central R. R. Co. v. Taylor*, 24 Ill., 323. 1860.

99. — A party may prove by himself or wife the contents of lost baggage, but not its value. *Id.*

100. — In an action against a railroad company to recover damages for the loss of a trunk by its negligence, the plaintiff is not a competent witness, although he has no other evidence. *Snow v. Eastern R. R. Co.*, 12 Metcalf (Mass.), 44. 1846. *Pudor v. Boston and Maine R. R. Co.*, 26 Maine, 458. 1847. *Smith v. North Carolina R. R. Co.*, Winston's Law (N. C.), 203. 1864. *Dill v. South Carolina R. R. Co.*, 7 Richardson's Law (So. Car.), 158. 1854.

101. — The declarations of a clerk of a railway company about the loss of a trunk, made some time after the loss had occurred, were held inadmissible as evidence, although the clerk had since died. *Baltimore and Ohio R. R. Co. v. Christie*, 5 W. Va., 325. 1872.

102. — An agent having charge of a depot, and the freight therein, is the proper person to inquire of, respecting lost baggage; and his answer is part of the evidence of the loss, and admissible, as *res gestæ*. *Curtis v. Avon, Genesee and Mt. Morris R. R. Co.*, 49 Barbour (N. Y.), 148. 1867.

103. — So, in regard to an arrangement between a passenger and the baggage master, at a station, that the baggage of the former may remain at the depot, and that the latter will see to it until it can be sent for. *Id.*

104. — An admission by the superintendent of a railroad company, on the presentation of a claim for lost baggage, that the claim is a good one, is not competent evidence against the company in an action to recover for the loss. *Green v. N. Y. Central R. R. Co.*, 4 Daly (N. Y.), 553. 1872.

105. — In an action against a railroad company by a passenger for the loss of his trunk, the admissions of the conductor, baggage master or station master, as to the manner of the loss, made in answer to inquiries in behalf of the passenger the next morning after the loss, are admissible in evidence against the corporation. *Morse v. Connecticut River R. R. Co.*, 6 Gray (Mass.), 450. 1856.

106. — In an action to recover the value of a trunk and contents alleged to have belonged to the plaintiff, the evidence tended to show

that the trunk belonged to a third person, who took it away from the depot without the knowledge of the agent of the company, and then procured the plaintiff to bring suit for its recovery. *Held*, that a letter written by such third person to a stranger to the transaction, going to show the conspiracy, was admissible in evidence against the plaintiff. *Chicago, Rock Island and Pacific R. R. Co. v. Collins*, 56 Ill., 212. 1870.

107. **Extra baggage.** The obligation of the carrier is the same, whether the baggage is within the quantity allowed to a passenger, to be carried without any charge, other than the ordinary fare of the passenger; or whether it is an extra quantity, for which an additional charge is made. *Glasco v. N. Y. Central R. R. Co.*, 36 Barbour (N. Y.), 557. 1862.

108. **Fire.** Where a passenger arrived at his destination at half past eight P. M., and left his baggage in the custody of the agent of the company, and during the same night the depot and contents, including the baggage, were destroyed by fire, it was *held* that the company was only liable as a warehouseman. *Louisville, Cincinnati and Lexington R. R. Co. v. Mahan*, 8 Bush. (Ky.), 184. 1871.

109. — Railroad companies are liable as common carriers for the baggage of passengers until the baggage is ready to be delivered to the owner at his place of destination, and until he has had a reasonable opportunity of receiving and removing it. *Id.*

110. — Plaintiff went with his baggage to defendant's depot in Philadelphia to take passage to Chicago; upon presenting his baggage, the baggage-master, in accordance with a rule of the defendant, declined to check until plaintiff had procured his passage tickets; he left his baggage to procure tickets; in his absence the baggage master caused it to be placed in the baggage car, and on plaintiff's return with tickets, the baggage master refused to give him the checks without his paying extra compensation on account of extra weight. Plaintiff refused to pay the extra charge, and demanded his baggage; this the baggage master refused to deliver, for the reason that it was covered by other baggage, and to obtain it would delay the train beyond the time fixed for starting. Plaintiff declined to take passage without his checks; his baggage was taken through to Chicago, and on

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the night after its arrival was destroyed by fire. The action was for the conversion of the baggage. *Held*, that defendant did not occupy the position of common carrier of the plaintiff. Also, that the defendant was liable for the acts of the baggage master, though that act should be held wrongful. *McCormick v. Pennsylvania Central R. R. Co.*, 49 N. Y., 303. 1872.

111. Free pass. A passenger, who, having a free pass over a railroad for himself, buys a ticket for his wife, and delivers her trunk to the company without giving information that it is not his, may maintain an action for a loss of the trunk during the carriage. *Malone v. Boston and Worcester R. R. Co.*, 12 Gray (Mass.), 388. 1859.

112. Liability of carriers generally. In respect to baggage of passengers, railway companies are common carriers. *Dill v. South Carolina R. R. Co.*, 7 Richardson's Law (So. Car.), 158. 1854.

113.—An express man, employed by plaintiff, left a trunk, containing clothing, etc., part belonging to plaintiff and part to his wife, at the depot of defendant, at the time calling the attention of defendant's agent to the trunk. The agent said "all right;" gave some men directions to take care of the trunk, and the expressman left the depot. *Held*, that the defendant was liable for the loss of the trunk. *Rogers v. Long Island R. R. Co.*, 1 N. Y. Sup. Ct., 396. 1873.

114.—Voluntary assistance by railway employes in looking for the baggage, or an offer by way of gratuity, to pay on account of it, will not render the company liable. *Michigan Southern, etc., R. R. Co. v. Meyres*, 21 Ill., 627. 1859.

115.—Evidence to show that the passenger was lame, and unable to take charge of his baggage, personally, is admissible, as tending to prove that he was not guilty of negligence in not taking charge of his baggage, on the arrival at his place of destination; and as furnishing a good reason for making an arrangement with the agents of the railroad company that it should remain in the custody of the company until called for. *Curtis v. Avon, Genesee and Mt. Morris R. R. Co.*, 49 Barbour (N. Y.), 148. 1867.

116.—Where a passenger, on arriving at his destination neglects to look after his bag-

gage, and leaves it, without any arrangement that the carrier shall retain it for him, and it is lost, without fault on the part of the carrier, the latter is not liable. *Id.*

117.—But where there is no delivery of baggage carried upon a railroad, to the passenger, and no neglect to claim it, or inquire for it, but on the contrary the company's agents agree to retain it until it can be sent for, the company's liability as a common carrier continues after the baggage is taken from the cars, and until it is delivered or tendered to the owner. *Id.*

118. Married women. Under the provisions of the act, statutes concerning the rights and liabilities of husband and wife, the paraphernalia of a wife, given her by her husband, which prior to those statutes was her separate estate in equity, became clothed with all the incidents of a legal estate; and, for an injury to or conversion thereof, she is the proper person to bring suit. *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y., 212. 1872.

119. Pleadings. The declaration need not aver that the plaintiff was a passenger, this fact can be proved without such averment, and by the baggage check alone, if it appears that such checks are not given until the passenger tickets are shown. *Illinois Central R. R. Co. v. Copeland*, 24 Ill., 332. 1860.

120.—In an action in a justice's court for the loss of a trunk, the plaintiff may prove how the trunk came into the hands of the defendant, and the manner of the loss under a general claim. *Byers v. Lessees of Des Moines Valley R. R. Co.*, 21 Ia, 54. 1866.

121. Public enemy. A railway company is not responsible for a loss of baggage caused by the act of the public enemy. *Philadelphia, Wilmington, etc., R. R. Co. v. Harper*, 29 Md., 330. 1868.

122. Termination of liability. Where the usage of the company was to run a car to the end of a pier forming one of the *termini* of the road, and to take from steamers all the baggage and effects of the passengers, and to return to the ticket office, a short distance from the pier, where passengers were at liberty to take off their baggage without charge, the car proceeding with the remaining baggage, and there was no person employed by the company to look after the baggage, but each passenger was expected to look after

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his own, and the plaintiff's baggage was put upon the car at the end of the pier and he did not accompany it, but took his passage on the succeeding train, and the baggage was lost: *held*, that the company was liable. *Logan v. Pontchartrain R. R. Co.*, 11 Robinson (La.), 24. 1845.

123. — Where a railroad company is employed by a person to transport his baggage for hire from A. to B., stations on said company's road, and does not deliver the goods to him at B., but carries them to C., another station on said road, and there stores them in the company's depot baggage-room, the liability of the company as a common carrier is not thereby ended; and if the goods are stolen from the company at C. and thereby lost to said owner, the company will be liable to him for the damage sustained by him by reason of the failure to deliver the goods at B. *Toledo, Wabash and Western R. R. Co., v. Hammond*, 33 Ind., 379. 1870.

124. — Common carriers of passengers and their baggage are liable for the latter until its safe delivery to the owner. They are bound not only to safely carry the same to its place of destination, but there to deliver it, in a reasonable time and in a reasonable manner. *Cary v. Cleveland and Toledo R. R. Co.*, 29 Barbour (N. Y.), 35. 1859.

125. — A carrier will not be relieved from its liability as such until he has either delivered the baggage or stored it in a secure warehouse. *Bartholomew v. St. Louis, Jackson-ville and Chicago R. R. Co.*, 53 Ill., 227. 1870.

126. — The wife of plaintiff was a passenger upon defendant's road from N. to M.; immediately upon the arrival of the train the baggagemaster placed her trunk in the depot and went away. She waited fifteen minutes to get the trunk, but could find no one to deliver it. About three hours after, plaintiff's son went to the depot for it, but the baggagemaster was still absent. The son went in pursuit of him, and returned with him, delivered his check and the trunk was drawn out to the door, but meanwhile the conveyance employed to remove the trunk had gone, and no other could be obtained, and it was thereupon left in charge of the baggagemaster for the night. During the night it was broken open and the contents stolen: *held*, that defendant's liability as a common carrier

had not terminated. *Dinenny v. New York and New Haven R. R. Co.*, 49 N. Y., 546. 1872.

127. — Common carriers, who carry passengers and their baggage as well as merchandise, are answerable under their common law liability for the baggage of passengers left at their offices in charge of their agents, with the intention of proceeding with the same in the next train of cars, steamboats or other conveyances departing from the place where the baggage is deposited. *Camden and Amboy R. R. Co. v. Belknap*, 21 Wendell (N. Y.), 354. 1839.

128. — Where a railway passenger on arriving at his place of destination, takes his baggage into his own exclusive control, but afterwards, for his own convenience, hands it to the baggage master at the depot to be kept until sent for, the company is not liable for the baggage as a common carrier, but is liable only for gross negligence as a gratuitous bailee. *Minor v. Chicago and Northwestern R. R. Co.*, 19 Wis., 40. 1865.

129. *Theft.* Where a passenger upon the defendant's railroad, having his valise checked from B. to U., on the arrival of the cars at the latter place left the valise in the open depot, after seeing it placed where baggage was usually kept during the day, in the charge of an employe of the company, without giving any directions respecting it, and did not present his check, or call for his valise, until nearly twenty-four hours afterwards: *held*, that he was guilty of negligence; and that the defendant was not liable for the loss of the valise, during the interval, by theft. *Holdridge v. Utica and Black River R. R. Co.*, 56 Barbour (N. Y.), 191. 1868.

130. — Where a passenger's baggage is not, from any cause, delivered to the passenger, at its destination, it is the duty of the company to deposit such baggage in its baggage room, in which event its responsibility becomes that of a warehouseman, and it must respond in damages for any neglect in that capacity. *Chicago, Rock Island and Pacific R. R. Co. v. Fairclough*, 52 Ill., 106. 1869.

131. — The plaintiff purchased a ticket of defendant's agent to go from O. to F. His trunk was locked up in the baggage room of another company, whose check he held; he gave his check to the defendant's station agent, who told plaintiff he would forward his

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trunk by next train. The trunk was subsequently forwarded to F., and there placed in the common passenger room, where it was broken open by burglars and rifled of its contents. *Held*, that defendant was liable as a warehouseman. That it was immaterial whether the agent had authority to make such agreement or not. That the defendant having undertaken to carry out the agreement of the agent, was liable the same as if the trunk had been forwarded in the same train with the passenger. *Warner v. Burlington and Missouri River R. R. Co.*, 22 Ia., 166. 1867.

132. Ticket. Where the ticket sold by a railway company to a point upon a connecting line contained a printed stipulation, that in selling, the company acted as the agent only for roads beyond the terminus of its own road, and assumed no responsibility therefor, the company is not liable to a passenger for the loss of baggage not occurring upon the line of its own road. *Pennsylvania Central R. R. Co. v. Schwarzenberger*, 45 Penn. St., 208. 1863.

133. — The purchase of a ticket includes the payment for the transportation of the person's baggage, not exceeding a specified weight. *Cincinnati and Chicago R. R. Co. v. Marcus*, 38 Ill., 219. 1865.

134. Tools. A set of *harness maker's tools*, valued at \$10, in the plaintiff's trunk with his clothing, *held* to be included, and recoverable under the term *baggage*; it appearing in proof that the plaintiff was a harness maker by trade; and that it was customary, when such persons leave one place to go to another, to pack their tools in their trunk, and take them with them. *Davis v. Cayuga and Susquehanna R. R. Co.*, 10 Howard's Pr. (N. Y.), 330. 1854.

135. — Where baggage is unclaimed within a reasonable time after its arrival it is the duty of the company to store it in a suitable place until called for; and when thus stored the liability of a warehouseman attaches and that of a carrier ceases. *Mote v. Chicago and Northwestern R. R. Co.*, 27 Ia., 22. 1869.

136. — Where such baggage was stored in a building insecurely fastened and without a watchman, and the baggage was stolen, the company was held liable for negligence as a warehouseman. *Id.*

BAILEMENT.

1. Apportionment; hire. If a slave, hired for a term, die during the term, the hire must be apportioned, even though his death is caused by the negligence of the hirer. *Muldrow v. Wilmington and Manchester R. R. Co.*, 13 Richardson's Law (So. Car.), 69. 1860.

2. Loss of goods. A bailee of goods, upon which labor is to be performed for a sum of money, and they are not converted into something essentially different in their character, has only a special property in them, which is terminated by the performance of the labor and delivery to the owner. And when the goods have been delivered to a common carrier for the general owner, the bailee has no right of action against the carrier for their loss. *Morse v. Androscoggin R. R. Co.*, 39 Me., 285. 1855.

3. Negligence. A bailee without reward is only answerable for gross negligence. *Knowles v. Atlantic and St. Lawrence R. R. Co.*, 38 Me., 55. 1854.

4. — Thus where hay was left on defendants cars after shipment, without compensation, and with notice to the shipper that it was at his risk, it was held, that in the absence of gross negligence the company was not liable. *Id.*

5. Trover. Where property is held for the time being, under a contract which gives the possessor a right to hold it against the owner, as in case of a hiring for a term unexpired, the right to maintain *trespass* for an injury to it, or *trover* for a conversion of it, is in the bailee; and neither of those actions can be maintained by the general owner. His remedy is a special action on the case, for the consequential injury to his reversionary interest. *Lexington and Ohio R. R. Co. v. Kidd*, 7 Dana (Ky.), 245. 1838.

BALTIMORE AND OHIO R. R. CO.

1. Terminus. The act of March 6, 1847, sess. acts, ch. 99, p. 86, in securing to the city of Wheeling the benefits of the western terminus of the Baltimore and Ohio railroad, does not forbid said company to connect with

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the Ohio river or a railroad in the state of Ohio, at any point between the mouth of Grave Creek and Wheeling. *Baltimore and Ohio R. R. Co. v. Wheeling*, 13 Grattan (Va.), 40. 1855.

BANKING.

See QUO WARRANTO.

1. **Illegal banking.** Under the act to prevent illegal banking a violation thereof may be pleaded in bar of any suit brought by a corporation, and it is not necessary that the franchise should have been forfeited upon direct proceedings for that purpose. *North Missouri R. R. Co. v. Winkler*, 33 Mo., 354. 1863.

2. — Under the illegal banking act of 1855, a stockholder sued for his subscription is not estopped to plead the violation of the act by the corporation in bar of the suit. (R. C. 1855, ch. 16, §§ 4 and 9). *Id.*

BANKRUPTCY.

1. **Act of bankruptcy.** It is *not an act of bankruptcy*, under § 39 of the bankrupt act, as amended July 14, 1870, for a railway company to suspend and not resume payment of its commercial paper for a period of fourteen days. *Winter v. Iowa, Minnesota and Northern Pacific R. R. Co.*, 2 Dillon (U. S. C. C.), 487. 1873.

2. **Assignees in bankruptcy** stand no better than the bankrupts in respect to assets, except in cases of attachments or fraud of less than four months standing. *Rockford, Rock Island and St. Louis R. R. Co., ex parte*, 1 Lowell (U. S. C. C.), 345. 1869.

3. **Jurisdiction.** A railroad company, incorporated by the laws of a state, cannot be proceeded against, in bankruptcy, in a district court without the state or states where its railroad is, or is to be, built, maintained and operated, on the petition of a creditor, charging an act of bankruptcy. *Alabama and*

Chattanooga R. R. Co., In re, 9 Blatchford (U. S. C. C.), 390. 1872.

4. **Petition.** The sufficiency of a petition in bankruptcy against a railway company—determined. *Boston, Hartford and Erie R. R. Co., In re*, 9 Blatchford (U. S. C. C.), 101. 1871. See *Same*, *ib.*, 409.

BERGEN TUNNEL.

1. **Erie railway.** Under the act of March 4 and 11, 1858 (Pamph. Laws 204 and 321), the Delaware, Lackawanna and Western R. R. Co. has a right of way through the Bergen tunnel, and the consequent right to connect its tracks with those running through the tunnel. *Delaware, etc., R. R. v. Erie R. R. Co.*, 6 C. E. Green's Ch. (N. J.), 298. 1871.

2. — Under the acts of 1858, the Erie R. Co.'s trains of every description have the right of precedence over those of the Delaware, Lackawanna and Western R. R. Co. through the Bergen tunnel. But the unlawful use of this privilege, with a view to embarrass or impede the Delaware, Lackawanna and Western R. R. Co. in the use of the tunnel, or the road connected with it, will upon a proper case being made, be a ground of interference by this court. Such case, however, is not made by the present pleadings. *Id.*

3. — That part of the regulations of the Erie company, giving preference to extra or irregular trains, enjoined. *Id.*

BILLS AND NOTES.

1. **Alteration.** A promissory note in the following words was signed by the defendant: "For value received I promise to pay to Quincy R. R. Co.," (who was the plaintiff), "or order, \$1,030 in six months." The note was then indorsed by E. P., and delivered to the treasurer of the plaintiff, who without the knowledge or consent of the defendant, inserted the words, "the order of E. P.," above the words, "Quincy R. R. Co., or order," but

Bill of Exchange—Corporation.

without erasing the latter words. It was *held*, that, in the absence of fraud, this was not an alteration affecting the validity of the note. *Granite R. R. Co. v. Bacon*, 15 Pickering (Mass.), 239. 1834.

2. Bill of exchange. A bill of exchange signed J. K., President of the E. and S. R. R. Co., is ambiguous and parol evidence may be introduced to show whether the individual or the corporation is the drawer. *Kean v. Davis*, 1 Zabriskie (N. J.), 683. 1847.

3. — A bill drawn by the president of a railroad company on the treasurer of the company, payable on demand, is, when dishonored, properly sued on as a bill of exchange, and presentment for payment, and notice of the dishonor must be proved, or an excuse for failing to do so, shown. *Wetumpka and Coosa R. R. Co. v. Bingham*, 5 Ala. N. S., 657. 1843.

4. — A bill of exchange drawn by one upon himself, as by a corporation upon its secretary, is in legal effect a promissory note, and may be the foundation of an action. *Marion and Mississinewa R. R. Co. v. Hodge*, 9 Ind., 163. 1857.

5. — Such draft must, however, be presented for payment. *Ib.*

6. — A resolution adopted by the corporation that it would pay interest on the scrip issued by it, entitles the holder to interest on drafts drawn by the company after the adoption of the resolution, without a demand of payment. *Ib.*

7. — If a bill of exchange is drawn, indorsed and accepted by some of the trustees of a masonic corporation, for the purpose of raising money to pay a debt incurred by them for its benefit, and is negotiated by a railroad company, without authority under its charter, and the money is expended in paying the debt incurred by the parties,—the railroad company may maintain an action for money had and received against the drawer, although no recovery could be had on the bill of exchange. *Waddill v. Alabama and Tennessee Rivers R. R. Co.*, 35 Ala., N. S., 323. 1859.

8. Collaterals. Where the defendant, for the purpose of raising money for the use of a railroad company, signed a note payable to a bank, and delivered it to agents to procure it to be discounted, but the bank refusing to ad-

vance the money, the agents obtained a larger sum of other persons upon the notes of the corporation and directors, and pledged the note of the defendant, together with the bonds of the company, as collateral security, and appropriated the money to the use of the road; *held*, that the notes of the corporation not being paid, a suit could be maintained upon the note of defendant, in the name of the bank, for the benefit of those who advanced the money. *Bank of Newbury v. Rand*, 38 N. H., 166. 1859.

9. — Where a note was delivered to A., and he gave his receipt therefor, agreeing to account for the same or deliver it to an attorney for collection, and it was received by A. only twelve days before the next approaching term of court, it was *held*, that A. was not liable for negligence in not suing in such court. *Hall v. Junction R. R. Co.*, 15 Ind., 362. 1860.

10. Consideration. A certificate of deposit is a good consideration for a note discounted in bank. *Mississippi R. R. Co., v. Scott*, 7 Howard (Minn.), 79. 1843.

11. — Where a note is given by one at the request of another, to a third person, in a suit between the payee and signer, it is not essential that there should be shown a consideration between the payee and him at whose request it was made. *Peterborough and Shirley R. R. Co. v. Chamberlin*, 44 N. H., 494. 1863.

12. Corporation. The authority of a president of a railroad company to make contracts for necessary labor for the company, is incident to his office. And he may furnish evidence of the amount payable under the contract, either before or after the service, and put that evidence, in his discretion, into the form of a due bill or promissory note, unless such power is restricted by special legislation, or by regulations of the company known to the other contracting party. *Richmond, Fredericksburg, etc., R. R. Co. v. Snead*, 19 Grattan (Va.), 354. 1869.

13. — A bill or note executed within the power of a corporation, but by an abuse of that power in the particular instance, would, if governed by the law merchant, be valid in the hands of a *bona fide* holder; but if executed entirely without the corporate power, it would not, if, indeed, there could be a *bona fide* holder of such paper. *Smead v. Indian-*

Evidence — Indorsers.

apolis, Pittsburgh and Cleveland R. R. Co., 11 Ind., 104. 1858.

14. — Under the original charter of the Indianapolis and Bellefontaine Railroad Company, that corporation had no general power to execute promissory notes and bills of exchange. *Ib.*

15. — Under its charter, as amended, it may execute notes or bills to pay the expense of altering the gauge of another railroad, to enable it to transport freight and passengers over such road in its own cars, and its bills accepted on such a consideration would be valid. *Ib.*

16. — *Prima facie* a railway company has power to execute a promissory note, and a complaint upon such note need not show that the agent who made it was appointed by a written or sealed commission. *Hamilton v. Newcastle and Danville R. R. Co.*, 9 Ind., 359. 1857.

17. — A note signed, "A. B., Prest. of the Dorchester Avenue R. R. Co.," binds A. B. personally, although given by the authority of the railroad company, and in consideration of a policy of insurance issued to that company by the payee. *Haverhill Mutual Insurance Company v. Newhall*, 1 Allen (Mass.), 180. 1861.

18. — An instrument by which a railroad company promises to pay in Boston to W. S., or order, "\$1,000, with interest semi-annually, as per interest warrants hereto attached, as the same shall become due; or upon the surrender of this note, together with the interest warrants not due, to the treasurer at a time until six months after its maturity," to issue stock in exchange therefor, is a negotiable promissory note. *Hodges v. Shuler*, 22 N. Y., 114. 1860. *Same v. Same*, 24 Barbour (N. Y.), 68. 1857.

19. — An order drawn by the president of a railroad company upon its treasurer, directing the latter to pay to A. B., or order, a specified sum, stated as being the amount due A. B. for work done by him as contractor, in building a section of the corporation's railroad, is in effect a promissory note, and may be declared on as such. *Fairchild v. Ogdensburg, Clayton and Rome R. R. Co.*, 15 N. Y., 337. 1857.

20. — Where a corporation is authorized to take a note for any purpose, the presumption

with regard to any note executed to it is, that it was executed for a legitimate purpose. *Howard v. Boorman*, 17 Wis., 459. 1863.

21. — The complaint in an action upon such note, therefore, need not state facts showing that it was given for a purpose authorized by the charter. *Ib.*

22. — Where a note was made payable to a railway company, and it appeared that such company was formed by the union of two other companies, and that such union was subsequently declared illegal and void, it was held, that if the payee was to be regarded as never having been a *de facto* company, that even then the note was good in the hands of a *bona fide* holder the same as a note made to a fictitious payee. *Farnsworth v. Drake*, 11 Ind., 101. 1858.

23. Evidence. R., the president of a railroad company, signed his name without any addition, to a due bill, acknowledging that there is due to S. & S. \$484, in full of labor performed, on cottage lot of the railroad company. It being uncertain on the face of the note whether the labor was performed for R. or the company, parol evidence is admissible to prove that fact. *Richmond, Fredericksburg, etc., R. R. Co. v. Snead*, 19 Grattan (Va.), 354. 1869.

24. Indorsers. Where one who has contracted with A. to indemnify him and keep him harmless from liabilities incurred as an indorser for B., permits judgment to be taken against him in such indorsement, it is not necessary that the judgment should have been collected to enable A. to maintain an action for the breach of the contract. *Smith v. Chicago and Northwestern R. R. Co.*, 18 Wis., 17. 1864.

25. — A coal company indebted to a railroad corporation for freights gave its notes for a less amount, which the latter indorsed and procured to be discounted. There being no evidence that the coal company received the avails of the notes, it was held immaterial, in respect to the objection that the notes were indorsed for its accommodation, that it did not appear whether these notes were given to apply on the coal company's indebtedness. If so, the railroad corporation was the owner; if not, the notes were lent for its accommodation. *Olcott v. Tioga R. R. Co.*, 27 N. Y., 546. 1863. *Same v. Same*, 40 Barbour (N. Y.), 179. 1862.

Pleading — Protest — Signature.

26. Payable in property. The plaintiff paid off a note to defendant with certain negotiable railroad bonds, but, by inadvertence, the note was not given up to plaintiff. Afterward defendant sold the note, before maturity, to a *bona fide* holder, who commenced suit thereon. *Held*, that plaintiff could recover of the defendant for said bonds before judgment had been obtained on the note. *Connecticut and Passumpsic Rivers R. R. Co. v. Newell*, 31 Vt., 364. 1858.

27. — In a suit upon a promissory note payable in certain railroad scrip, where the maker had failed to pay in such scrip, the market value of the scrip is the measure of damages. *Parks v. Marshall*, 10 Ind., 20. 1857.

28. — If an obligation is executed for a sum of money, to be paid in the bonds of a railroad company, and said obligation is not complied with, the measure of damages in an action thereon, or when offered as a set-off is the nominal value of the bonds, and not the value at which they might be rated in the market. *Memphis and Little Rock R. R. Co. v. Walker*, 2 Head (Tenn.), 467. 1859.

29. Pleading. A declaration upon a note endorsed in blank, payable on a future day, should aver demand and notice. *Tumley v. Clarksville and Memphis R. R. Co.*, 2 Coldwell (Tenn.), 327. 1865.

30. Protest. The notice of protest being addressed to the indorser *via* a postoffice in an adjoining parish, that being the nearest postoffice to his residence, is sufficient. The word *via* does not necessarily raise a presumption that the notice was forwarded to another office. *New Orleans and Carrollton R. R. Co. v. Ratliff*, 10 Robinson (La.), 37. 1845.

31. — Notice of protest may properly be sent to the office where the indorser keeps a postoffice box and usually gets his mail, although there may be a postoffice nearer to his place of residence, it being proven that he does not receive mail at the latter office. *New Orleans and Carrollton R. R. Co. v. Kerr*, 9 Robinson (La.), 122. 1844. *Same v. Robert*. *Ib.* 130, 157.

32. — To hold an indorser upon a new promise, made after he had been discharged by a failure to protest, the plaintiff must show that the promise was made by the indorser

with full knowledge of his discharge. *New Orleans and Carrollton R. R. Co. v. Mills*, 2 La. An., 824. 1847.

33. — Where a person residing in New York, and acting as the authorized agent of another, requested a friend at Cincinnati to collect from a corporation there the amount of a dividend due to his principal, upon stock, and to transmit to him a draft for the amount; it was *held*, that if the agent left New York while expecting the draft, it was his duty to leave authority, with some one, to present the draft when received. *Brady v. Little Miami R. R. Co.*, 34 Barbour (N. Y.), 249. 1861.

34. — For the negligence of the agent in not presenting such draft for payment within the proper time, the principal was responsible. *Ib.*

35. — Under the civil code art. 2259, before a recovery can be had upon any written instrument that has been lost, its loss shall have been advertised a reasonable time. This applies to a written new promise to pay a note executed by an indorser who had been discharged, as well as to the note itself. Both having been lost both should have been advertised. *New Orleans and Carrollton R. R. Co. v. Armstrong*, 2 La. An., 829. 1847.

36. — The executor of a deceased indorser is the proper person on whom to serve notice of protest, although the heirs may have taken possession of the property of the decedent. Creditors have the right to regard the executor as the representative of the estate until his discharge. *New Orleans and Carrollton R. R. Co. v. Kerr*, 9 Robinson (La.), 122. 1844.

37. Seal. A sealed note is not negotiable, and an action will not lie upon it in the name of the assignee. *Conine v. Junction and Breakwater R. R. Co.*, 3 Houston (Del.), 288. 1866. *Hopkins v. Railroad Co.*, 3 Watts & Sergeant (Penn.), 410. 1842.

38. Set-off. Where a note is made payable to a bank, the holder may sue in the name of the bank for his own use, and proof is admissible on a tender in the bills of the bank, to show that the note was never the property of the bank. *Graves v. Mississippi and Alabama R. R. Co.*, 6 Howard (Miss.), 548. 1842.

39. Signature. Proof of signature to notes, bills, etc., given by a corporation, is not necessary to authorize a judgment, and if the signature is denied, it must be under oath.

Equity—Amendment—Facts.

Peoria and Oquawoka R. R. Co. v. Neill, 16 Ill., 269. 1855.

40. Suit. An instrument of writing in terms as follows, viz: "Treasurer of St. Louis" etc., "Railroad Company will pay to A., or order, \$1,700. Done by order of the Board of Directors; B., President, C., Secretary;" was a bill or note for the direct payment of money, within the meaning of the statute, and the party suing upon it was entitled to default in case of failure to answer on or before the second day of the return term. *Gilstrap v. St. Louis, Macon and Omaha Air Line R. R. Co.*, 50 Mo., 490. 1872.

2. — *Held*, in this particular case that no discovery was necessary, as the parties were competent witnesses, under acts of congress of July 6, 1862, and July 2, 1864. *Heath v. Erie R. R. Co.*, 9 Blatchford (U. S. C. C.), 316. 1872.

3. Petition. A petition for a discovery should be denied where it appears that the petitioner might have access to the books and papers without an order. *Charlick v. Flushing R. R. Co.*, 10 Abbott's Pr. (N. Y.), 130. 1860.

BILLS OF EXCEPTIONS.

See EVIDENCE.

BILL OF DISCOVERY.

1. Equity. Where a railroad company brought a bill in chancery against B. and others, stating, that the plaintiff had made several contracts with B. for the construction of certain portions of its road and the structure connected with it under which B. had performed a large amount of labor, and received from the plaintiff large sums of money, but finally failed to fulfill the stipulations on his part; that B. threatened to commence suits against the plaintiff for the recovery of the balance which he claimed to be due to him; that sundry other persons, made defendants, claiming to be creditors of B., had already instituted suits against him, by process of foreign attachment, serving copies upon the plaintiff as his debtors; that C., one of such attaching creditors, having obtained judgment against B., had brought his writ of *scire facias* against the plaintiff, which suit was still pending; and that the accounts between the plaintiff and B., and between him and the attaching creditors were numerous and complicated; praying for a discovery from the defendants respectively, that the accounts be taken, between the plaintiff and B., and between him and the other defendants, and that the defendants be restrained from proceedings at law; it was *held*, that no sufficient ground was shown for the interposition of a court of chancery. *Norwich and Worcester R. R. Co. v. Story*, 17 Conn., 364. 1845.

1. Amendment. A court cannot legally alter the record of its proceedings after the close of the term; and a bill of exceptions cannot be altered. But before a cause is tried, it is proper that material issues, calculated to settle the merits of the pending controversy, should be formed, and courts possess the power up to that point of correcting errors which have occurred in their proceedings. *Heaston v. Cincinnati and Ft. Wayne R. R. Co.*, 16 Ind., 275. 1861.

2. Authentication. A bill of exceptions not signed by the judge as being untrue, nor bystanders as required by the statute, but only accompanied by affidavits filed in vacation, and that without any consent that the same should be filed out of time, will not be considered in the supreme court. *Blankenship v. North Missouri R. R. Co.*, 48 Mo., 376. 1871. *Price v. Same*, ib., 389.

3. — Where exceptions are taken at the time of the ruling, the bill of exceptions may be signed afterwards. *Illinois Central R. R. Co. v. Palmer*, 24 Ill., 43. 1860.

4. — Where the points presented by the bill of exceptions are reserved at the trial, but the bill itself is not drawn up and sealed until six months thereafter, the appellate court will consider it as a part of the record. *Pool v. Cahawba and Marion R. R. Co.*, 5 Ala. N. S., 237. 1843.

5. Facts. The finding of a court, upon a question of fact, is conclusive, and cannot be

Filing—Evidence—Firm.

reviewed by motion in error, founded on a bill of exceptions, when no question of law arises thereon. *Norwich and Worcester R. R. Co. v. Kay*, 22 Conn., 603. 1853.

6. — A bill of exceptions showed that plaintiff excepted to the finding and judgment; but no instructions were asked or given. *Held*, that no point of law being saved, the supreme court will not review the finding of facts. *Wilson v. North Missouri R. R. Co.*, 46 Mo., 36. 1870.

7. — The equity of the statute of Westminster 2, allowing bills of exceptions, embraces all such judgments or opinions of the court, as arise in the progress of a cause which are the subjects of revision by an appellate court, and which do not otherwise appear on the record. *York and Cumberland R. R. Co. v. Myers*, 18 Howard, 246. 1855.

8. — But to present the question to the supreme court, the subordinate tribunal must ascertain the facts upon which the judgment or opinion excepted to, is founded. *Ib.*

9. — Therefore, where there was a reference in the circuit court, and the bill of exceptions set out the objections to the award and the testimony of the arbitrator who was examined in open court, and that testimony showed the facts on which the objections were founded, it was held a sufficient exception. *Ib.*

10. Filing. Where time is given, beyond the term, to file a bill of exceptions, and the bill is not filed within the time limited, the court cannot at a succeeding term, allow the bill to be filed *nunc pro tunc*, without notice to the adverse party. *New Albany and Salem R. R. Co. v. Wilson*, 16 Ind., 402. 1861.

11. — When time is given within which to file a bill of exceptions, and one is copied in the record without any evidence of being filed, it will not be regarded on appeal, and a question on the sufficiency of the evidence cannot be considered. *Louisville, New Albany and Chicago R. R. Co. v. Laflund*, 38 Ind., 55. 1871; see also *Ohio and Mississippi R. R. Co. v. Cobb*, 42 Ind., 390. 1873.

12. Evidence. A bill of exceptions is defective in not stating that it contains all the evidence which was given in the cause. *Routson v. Pacific R. R. Co.*, 45 Mo., 236. 1870. *Blankenship v. North Missouri R. R. Co.*, 48 Mo., 376. 1871. *Price v. Some*, *ib.*, 389.

13. — When the bill of exceptions fails to state that it contains all of the evidence, the appellate court will presume that there was other and sufficient evidence to warrant the verdict. *Illinois Central R. R. Co. v. Garish* 39 Ill., 370. 1866.

14. — A bill of exceptions may contain all the evidence, although it appear that the jury were allowed to inspect the place where the matters referred to in the pleadings occurred. *Evansville, etc. R. R. Co. v. Cochran*, 10 Ind., 560, overruled. *Jeffersonville, etc., R. R. Co. v. Bowen*, 40 Ind., 545. 1872.

15. Form. A bill of exceptions should only certify such matters as are not necessarily a part of the record, and it is improper to certify matters that are essential to the record through the medium of a bill of exceptions. *New Orleans, Jackson and Great Northern R. R. Co. v. Allbritton*, 38 Miss., 242. 1859.

16. — A motion for a new trial cannot be certified in a bill of exceptions. *Ib.*

17. — The supreme court will not review instructions on a general exception to all the instructions, when it is not claimed that they are all erroneous. *Jack v. Naber*, 15 Ia., 450. 1863. *Cedar Rapids and Missouri River R. R. Co. v. Willetts*. *Ib.*

18. — A failure to except to the giving or refusing to give instructions before the jury retires is considered an approval of the charge given by court. *Evans v. Burlington and Missouri River R. R. Co.*, 21 Ia., 374. 1866.

19. — Where the error complained of in an appeal from the circuit court is apparent on the face of the record, it may be revised without the saving of exceptions or the filing of a motion for new trial. *Hannibal and St. Joseph R. R. Co. v. Mahoney*, 42 Mo., 467. 1868.

20. — No exceptions are necessary to be made in order to bring a case from the district court to the supreme court on appeal; the statute in relation to such exceptions only applies to the circuit court. *Quincy and Pulmyra R. R. Co. v. Taylor*, 43 Mo., 3. 1868.

21. — Bills of exceptions should be sent to the supreme court by copy and not in the original form; but an omission in this respect would only at most work a continuance to obtain a corrected transcript. *Fernow v. Dubuque and Southwestern R. R. Co.*, 22 Ia., 528. 1867.

Alteration — Effect of a Bill of Lading.

BILL OF LADING.

1. **Alteration.** Where a railway company made an alteration in the name of the place of delivery in a bill of lading, and sent the bill to the shippers who did not observe the alteration until after the loss of the property, it was *held*, that this alteration was a rejection of the proposition contained in the bill of lading, and that the shipper was presumed to have consented to the alteration by not dissenting within a reasonable time. *Muller v. Cincinnati, etc., R. R. Co.*, 2 Cincinnati Superior Ct. Rep., 280. 1872.

2. **Effect of a bill of lading.** A carrier having given a bill of lading should be required to introduce clear proof to show that he never received the goods. *Little Miami, etc., R. R. Co. v. Dodds*, 1 Cincinnati Superior Ct. Rep., 47. 1870.

3. — Whoever receives a cargo from a vessel under a bill of lading, in the absence of circumstances showing a different understanding, is liable for the freight. *Philadelphia and Reading R. R. Co. v. Barnard*, 3 Benedict (U. S. D. C.), 39. 1868.

4. — When property is delivered to a forwarder or carrier, upon consignment to a factor for sale, but the receipt or bill of lading is not delivered or sent by the owner to the factor, and the property has not reached him, the factor acquires by the transaction no general or special property in the goods. *Bank of Rochester v. Jones* 4 N. Y., 497. 1851.

5. — The delivery of a bill of lading without indorsement, if intended to pass the title to the goods, is sufficient for that purpose, although the bill is drawn to order and is not indorsed. *City Bank v. Rome, Watertown and Ogdensburg R. R. Co.*, 44 N. Y., 136. 1870. *Michigan Central R. R. Co. v. Phillips*, 60 Ill., 190. 1871

6. — A shipment of goods by the owner, under an agreement by which the consignee has advanced money thereon, and agreed to make a further advance on receiving the bill of lading, gives the consignee a title to the goods to secure both advances, as against one who afterwards, though before this bill of lading is delivered, receives a second bill of lading of the goods, with notice that the first has been issued. *Stevens v. Boston and Worcester R. R. Co.*, 8 Gray (Mass.), 262. 1857.

7. — If A. has property upon which he has received advances from B., under an agreement, that he will ship it to B. to be sold to pay the advances, or to pay any indebtedness; he may or may not comply with this contract. He may ship to C. or B. upon conditions, but if he ships to B. in pursuance of his contract the title vests in B. upon the shipment. The highest evidence that he has so shipped is the consignment and unconditional delivery to B. of the bill of lading; but if A. retains the bill of lading, and notifies B. by letter that he has shipped the property for him in pursuance of the agreement, the title passes as effectually, as between them, as if the bill of lading had been delivered. *Bailey v. Hudson River R. R. Co.*, 49 N. Y., 70. 1872.

8. — A. purchased a quantity of flour to be manufactured by a certain mill in St. Louis, Mo., and a parol agreement was made by A. and B for the sale of the flour by the former to the latter for cash on delivery. Afterwards a freight company, which owned no means of transportation, gave B. an instrument styled a bill of lading, dated before the flour had been manufactured, by which said company acknowledged the receipt by it of the flour from B. and agreed to transport it to C. at Boston, Mass. A few days afterwards the servants of a transfer company, an organization engaged in carrying freights across the river at St. Louis, took the flour from said mill, conveyed it across the river, and put it in the custody of a railroad company for which said freight company acted as agent, receiving a certain percentage for all freights obtained for said railroad, said transfer company giving the superintendent of said mill dray tickets for the flour, and receiving from said railroad company a bill of lading for the flour to be delivered to C. at Boston. The barrels had been marked at the mill with B.'s brand without the knowledge of A. Before the flour was taken from the mill B. drew on C. for a certain amount payable to the order of the former, chargeable to account of the flour, and for value sold the bill of exchange to a bank and transferred to said bank the instrument so given by said freight company to B., the bank having no notice of any claim on the flour in favor of A. Hearing of the embarrassment of B., who a few days afterwards became insolvent, A. inquired of the

Evidence.

superintendent of the mill about the flour, received from him said dray tickets, and the day after the delivery of the flour to the railroad company went with said tickets and bill for the flour to B. and requested payment, which not being made, A. told B. that he would keep the tickets and make other disposition of the flour, and went to the railroad company with said tickets and demanded a bill of lading, which was refused. No order, oral or written, was given by A. for the delivery of the flour from the mill, but the agents of the transfer company received their orders from the agent of said freight company, who received his authority from B. *Held*, that A. was still the owner of the flour and entitled to its possession. *Held*, also, that said instrument given by said freight company to B. could not be regarded as a bill of lading. *Union R. R. and T. Co. v. Yeager*, 34 Ind., 1. 1870.

9. — A. delivered to a railway company a quantity of flour to be shipped to B. at another station on its road, in pursuance of a contract between A. and B. for the sale of the flour from the former to the latter, to be so delivered on cars and to be paid for on receipt of the bills of lading. At the time of the delivery B. was insolvent, and A. received from the station agent a bill of lading containing the usual clauses and in addition a provision, inserted at the request of A., that the flour should be delivered to B. upon the presentation of a duplicate of such bill of lading, and received also a second bill of lading, marked "duplicate," in which the clause in relation to the presentation of the duplicate was omitted by mistake of the agent. A. drew a draft on B. for the purchase money and attached the duplicate thereto, and negotiated the draft to C., who in good faith paid for the same, knowing the form of the original bill of lading, which was then endorsed and delivered to C. as collateral security for the payment of the draft, with the duplicate attached, at the bank where the draft was made payable, and the cashier of the bank presented it to B. before the delivery of the flour, and B. refused payment but accepted it, and after three days' grace being granted, the draft was protested for nonpayment, and next day C. presented the original bill of lading and demanded the flour, but

the company had already delivered it to B., who was still insolvent, and B. had shipped the flour out of the state. *Held*, that the company was liable to C. for his loss occasioned by the delivery of the flour to B. *McEwen v. Jeffersonville, Madison and Indianapolis R. R. Co.*, 33 Ind., 368. 1870.

10. — A carrier is not bound to forward goods to a person who claims to be the consignee if they are not accompanied with any instructions or bill of lading, and the claimant produces no authority from the consignor for their delivery; although they are marked with the initials of the claimant's name. *Finn v. Western R. R. Co.*, 102 Mass., 283. 1869.

11. Evidence. A bill of lading is *prima facie* evidence of the matters contained in it; but is subject to explanation, and the carrier may show any injury, loss, fraud or deceit occasioned or practiced by any previous carrier, or by the shipper of the goods. *Great Western R. R. Co. v. McDonald*, 18 Ill., 172. 1856.

12. — Where, by a bill of lading, goods were to be transported from Cincinnati to New York, over certain specified railroads, to Belle Air, "and there delivered to the agents of the next connecting *steamboat*, railroad company or forwarding line, etc.; *held*, that the bill of lading was conclusive evidence as to the contract which the carrier made; and that under it the carrier was not bound to carry entirely by railroad. *Bostwick v. Baltimore and Ohio R. R. Co.*, 55 Barbour (N. Y.), 137. 1869.

13. — Where a bill of lading is made out by the carrier and accepted by the shipper, all previous parol agreements are merged in it. *Bostwick v. Baltimore and Ohio R. R. Co.*, 55 Barbour (N. Y.), 137. 1869. *Long v. New York Central R. R. Co.*, 50 N. Y., 76. 1872.

14. — Evidence that a consignor of goods shipped them on a vessel, took a bill of lading from one whom he believed to be master of the vessel, and who was personally acting as such, indorsed and sent it to the consignee, and procured a policy of insurance on the goods payable to the consignee, is sufficient to warrant a finding of a delivery to the consignee, who had made advances on the goods; although the bill of lading was signed by one who was not in fact the master, and who had no authority to sign it. *Prince v. Boston and Lowell R. R. Co.*, 101 Mass., 542. 1869.

Bonds.

15. Limitation of carrier's liability. —

When goods are shipped under a verbal agreement for the transportation thereof, such agreement is not merged in a bill of lading, partly written and partly printed, delivered to the shipper after he has parted with control of his goods, although such bill of lading, by its terms, limited the liability of the carrier and expressed on its face that by accepting it, the shipper agreed to its conditions. The mere receipt of the bill, after the verbal agreement has been acted on, and the shippers omitting, through inadvertence, to examine the printed conditions, are not sufficient to conclude him from showing what the actual agreement was, under which the goods had been shipped. *Bostwick v. Baltimore and Ohio R. R. Co.*, 45 N. Y., 712. 1871.

See CARRIAGE OF MERCHANDISE.

16. — A bill of lading exempting the carrier from loss or damage by fire beyond its own route — construed. *Lamb v. Camden and Amboy R. R. Co.*, 46 N. Y., 271. 1871.

17. — A steamboat bill of lading for the shipment of goods at Memphis, to be delivered at Cairo, specifying the rate of freight through to Baltimore, and signed by the agents of the connecting railroad company, is a contract for through shipment, and the railroad company is entitled to the benefit of the exceptions contained in the bill of lading. *Woodward v. Illinois Central R. R. Co.*, 1 Bissell (U. S. C. C.), 447. 1864.

BILL OF SALE.

1. Bonds. A bill of sale of railroad bonds, coupled with a guaranty that certain railroads should be consolidated — construed. *Litchfield v. Irvin*, 51 N. Y., 51. 1872.

BOATS.

1. Damages. When a person undertakes to load a boat with goods, and by his negligence the goods are suffered to fall, so as to injure the boat, he is liable for the damages to the owner of the boat. *Pate v. Greenville and Roanoke R. R. Co.*, 13 Irédell's Law (N. C.), 325. 1952.

BONDS OF RAILWAY COMPANIES.

See BILL OF SALE; GARNISHMENT; INCOME BONDS; MORTGAGE.

I. BONDS.**II. COUPONS.****III. MISCELLANEOUS.****I. BONDS.**

1. Negotiability. Bonds issued by a railway company of Massachusetts, payable in blank, and issued to a citizen of that state, which had passed through several intervening holders, could be filled up by a citizen of New Hampshire, payable to himself or order, and then suit could be maintained upon them in the circuit court of the United States for Massachusetts. *White v. Vermont and Massachusetts R. R. Co.*, 21 Howard, 575. 1858.

2. — The eleventh section of the judiciary act does not apply to such a case. *Id.*

3. — Such instruments are negotiable. *Id.*

4. — The later English authorities on this point are overruled. *Id.*

5. — The bond of a railroad corporation, payable to A. B., or his assigns, is in the nature of commercial paper, negotiable by delivery under an assignment in blank, and not a specialty, subject to equities between the corporation and the person named in the bond as the primary payee. *Brainerd v. New York and Harlem R. R. Co.*, 25 N. Y., 496. 1862. See *Same v. Same*, 23 Howard's Pr. (N. Y.), 491. 1862. *Same v. Same*, 10 Bosworth (N. Y.), 332. 1863.

6. — Bonds issued by a railroad company, whether under seal or not, payable to A. B., or the holder thereof, are negotiable, and will pass by delivery. *Connecticut Mutual Life Insurance Co v. Cleveland, Columbus and Cincinnati R. R. Co.*, 41 Barbour (N. Y.), 9. 1863. See *Same v. Same*, 23 Howard's Pr. (N. Y.), 180. 1862. *Same v. Same*, 26 ib., 225. 1863.

7. — A railroad corporation, having charter power to build a road, and issue bonds to raise money therefor, has power to issue to contractors in payment for work done, negotiable certificates of indebtedness, payable in money or bonds. *Pusey v. New Jersey R. R. Co.*, 14 Abbott's Pr., N. S. (N. Y.), 434. 1873.

8. — Such an instrument, issued under the signature of the proper officers and the seal

Coupons — Miscellaneous.

of the corporation, is presumed to have been properly issued. *Id.*

9. — Where a railway bond is issued payable to — or assigns, any lawful holder may fill up the blank with his own name, and may bring suit thereon as payee when it falls due. *Hubbard v. New York and Harlem R. R. Co.*, 36 Barbour (N. Y.), 286, 1862; *Same v. Same*, 14 Abbott's Pr. (N. Y.), 275, 1862.

10. Set-off. A railway company entered into a contract for finishing its road in a specified time, and in payment delivered its coupon bonds to the contractor, from time to time as the road progressed; the road having been finished, but not in the time specified, it was held, that the company could not set up a claim for damages for the delay as against *bona fide* holders of the bonds. *McElrath v. Pittsburgh and Steubenville R. R. Co.*, 55 Penn. St., 189. 1867.

11. A *bona fide* holder, for value, of a lost bond, is entitled to recover the full amount of principal and interest due thereon, notwithstanding he may have had a suspicion, and good grounds for suspicion of defect in the title, and been guilty of gross negligence in respect to it at the time of the transfer. His title will not be defeated unless he was also guilty of bad faith. *New Orleans, etc., R. R. Co. v. Mississippi College*, 47 Miss., 560. 1873.

12. — A bond to pay money, and to do something else, as to feed and clothe a slave, is not negotiable. *Knight v. Wilmington and Manchester R. R. Co.*, 1 Jones' Law (N. C.), 357. 1854.

II. COUPONS.

13. Attachments. Coupons are *choses in action* and cannot be attached by trustee process, even though they have been pledged as collateral security. *Smith v. Kennebec and Portland R. R. Co.*, 45 Me., 547. 1858.

14. Demand. Suit may be brought upon a coupon bond, made payable at a certain time and place, without first making demand of payment. *Langston v. South Carolina R. R. Co.*, 2 So. Car. (N. S.), 248. 1870.

15. Guaranty. Where a corporation indorses upon an interest-warrant, or coupon, issued by another company, a guaranty of payment, "for value received," it is not to be deemed an accommodation indorser or guar-

antor. The words "value received" import a sufficient consideration. *Connecticut Mutual Life Ins. Co. v. Cleveland, Columbus and Cincinnati R. R. Co.*, 41 Barbour (N. Y.), 9, 1863; see *Same v. Same*, 23 Howard's Pr. (N. Y.), 180, 1862. *Same v. Same*, 26 ib., 225, 1863.

16. Interest. If interest coupons, annexed to a negotiable bond, are not paid, when due, interest should be allowed, by way of damages for nonpayment. *Connecticut Mutual Life Ins. Co. v. Cleveland, Columbus and Cincinnati R. R. Co.*, 41 Barbour (N. Y.), 9, 1863; see *Same v. Same*, 23 Howard's Pr. (N. Y.) 180, 1862; *Same v. Same*, 26 ib., 225, 1863; *Whitaker v. Hartford, Providence and Fishkill R. R. Co.*, 8 R. I., 47, 1864.

17. Negotiability. Coupon bonds, payable to bearer, are negotiable. *Langston v. South Carolina R. R. Co.*, 2 So. Car. (N. S.), 248. 1870.

18. — A coupon-bond is negotiable, and its coupons may be detached and negotiated separately by simple delivery, and sued on separately from the bond, even after the bond itself has been paid and satisfied. *National Exchange Bank v. Hartford, Providence and Fishkill R. R. Co.*, 8 R. I., 375. 1866.

19. — A coupon, once detached and negotiated, ceases to be a mere incident of the bond, and becomes an independent claim. *Id.*

20. — In the absence of proof of custom as to negotiability of coupons disconnected from the bonds, and in the absence of any statute, they will not be held to have an independent negotiable character, unless the intention of the party issuing them appears upon the coupon itself. *Myers v. York and Cumberland R. R. Co.*, 43 Me., 232. 1857.

21. — At common law the assignee of a *chose in action* cannot maintain a suit in his own name unless there has been an assent to the assignment and a promise by the debtor to pay the assignee. *Id.*

22. — The owner of coupons which have been lost may recover by making indemnity. *Fitchett v. North Pennsylvania R. R. Co.*, 5 Philadelphia Rep. (Penn.), 182. 1863.

III. MISCELLANEOUS.

23. Contract. Where a person acknowledged the receipt of "the sum of \$119,000 in bonds" of a railway company, and of "50,405

Miscellaneous.

dollars of coupons" amounting in the aggregate to the "sum of \$169,405," "which said sum he promised to expend in the purchase of lands" of the same company "at or near the average price of \$5 per acre," *held*, that this was a trust to buy the lands with the bonds at or near the price of \$5 an acre; and not to buy them with the proceeds of the bonds after they had been sold at a nominal price. *Kitchen v. Bedford*, 13 Wallace, 413. 1871.

24. Convertibility. Where by the terms of a railroad bond, a period was fixed within which it might be converted into stock at the option of the holders, *held*, that an agreement for the extension of the time of payment before maturity of the bond, did not extend the right of conversion after the time limited. *Muhlenberg v. Philadelphia and Reading R. R. Co.*, 47 Penn. St., 16. 1864.

25. — The directors of the Erie R. R. Co., acting in good faith, have power to issue convertible bonds in the name of the corporation for the amounts they may borrow to complete and finish, or to operate the road, with the right to authorize their conversion into stock; although it increases the amount of capital stock beyond that fixed by the charter. *Ramsey v. Erie R. R. Co.*, 38 Howard's Pr. (N. Y.), 193. 1869.

26. Demand. Where a bond is payable at a particular place, it is not necessary to aver and prove a demand of payment at that place to show a default. *Truman v. McCollum*, 20 Wis., 360. 1866.

27. — Where a railroad company issued bonds, payable at its office, in a particular way, and at the maturity of the bonds there was no office of the company at that place; *held*, that a demand for payment elsewhere was sufficient. *Alexander v. Atlantic, Tennessee and Ohio R. R. Co.*, 67 N. C., 198. 1872.

28. Exchange. Where an exchange of bonds of three classes was made for new bonds, and W. consented to the exchange and took the new bonds, and the road was subsequently sold under a foreclosure of the mortgage to secure the same, and the proceeds were first applied to the payment of such of the old bonds as had not been surrendered under the arrangement, and the remainder was insufficient to pay the new bonds, and W. intervened by petition and set up a separate agreement by which it was specified that

he should not be held to surrender his rights under the old bonds unless all the stockholders consented, it was *held*, that he was not entitled to any relief, as the holders of the new bonds took the same without notice of his equity. *Ex parte White, v. Wilmington and Manchester R. R. Co.* 2 So. Car. (N. S.) 469. 1871.

29. Guaranty. A railway company, under the laws of Iowa, having power to issue bonds may guaranty the bonds of a municipal corporation issued for railway purposes. *Railroad Company v. Howard*, 7 Wallace, 392. 1868.

30. — In 1851, the legislature of Ohio authorized railway companies to subscribe aid to other companies, but required the assent thereto of two-thirds, in value, of the stockholders.

In 1852 this act was reenacted with the further proviso that any company might accept the provisions of the act, and when so accepted and a certified copy of their acceptance filed with the secretary of state, that portion of their charters inconsistent with this act, should be repealed. The defendant had guarantied bonds for another company without formally complying with these requirements. A stockholder of the defendant's company brought suit to enjoin the payment of the interest on the guarantied bonds. *Held*, that as between the parties to this suit the acceptance of the acts of 1851 and 1852 may be inferred from the acts of the corporators. *Zabriskie v. Cleveland, Columbus and Cincinnati R. R. Co.*, 23 Howard, 381. 1859.

31. — The act of the corporators, in approving, adopting and sanctioning the endorsement of these bonds, at a meeting in which the complainant was present, and declined to vote, taken in connection with the fact that the bonds were placed on sale accompanied by the resolutions and votes of such meeting, and no effort was made by any of the corporators to disabuse the public mind, will estop the corporators or corporation from afterward defeating the claims and calculations their own conduct has superinduced. *Id.*

32. — The general railroad laws of Ohio provided that any railroad company might, by means of subscription to the capital stock of any other company, or otherwise aid such company in the construction of its railroad, for the purpose of forming a connection be-

Consideration.

tween said last mentioned road and the road owned by the company furnishing such aid; and authorized any two or more railroad companies, whose lines were connected, to enter into an arrangement for their common benefit. *Held*, that these provisions gave the power to companies whose lines of road were connected, to enter into an arrangement with each other for the purpose of securing a uniform gauge of the connecting roads, and to make it part of such arrangement that one or more of the companies should guaranty the payment of the interest coupons issued by another. *Connecticut Mutual Life Insurance Company v. Cleveland, Columbus and Cincinnati R. R. Co.*, 41 Barbour (N. Y.), 9, 1863; see *Same v. Same*, 23 Howard's Pr. (N. Y.), 180, 1862; *Same v. Same*, 26 ib., 225, 1863.

33. — An arrangement between several connecting railroad companies, entered into for the purpose of securing a uniform gauge of the several roads, and thus increasing the business and profits of each, forms a sufficient consideration for a guaranty by one of the corporations, of the payment of the coupons issued by another. *Id.*

34. — Holders of the coupons guarantied have a right to presume that the guarantors have proceeded regularly in the execution of the power. *Id.*

35. Interest. Where the interest on bonds is fixed at six per cent., but the bonds are silent as to the rate of interest after maturity, they will draw seven per cent. from maturity. *Langston v. South Carolina R. R. Co.*, 2 So. Car. (N. S.), 248. 1870.

36. North Carolina. The state, under the act of 1840-41, entitled "An act to secure the state against any and every liability incurred for the Gaston and Raleigh Railroad Company, and for the relief of the same," cannot recover upon any bond given under the said act, unless it is proved that the whole amount of \$500,000 had been secured by bonds. *Bennehau v. Webb*, 6 Iredell's Law (N. C.), 57. 1845.

37. Special fund. Where bonds are issued by the defendant corporation under the act of 1841, and a special fund was designated for the payment of the interest, etc., and in 1843 an act was passed disregarding the act of 1841; *held*, that the creditors to whom bonds were

issued under the act of 1841 were entitled to the funds specified in that act, and such funds could not, without their consent, be taken from them. *McCullough v. Annapolis and Elk Ridge R. R. Co.*, 4 Gill (Md.), 58. 1846.

38. Warranty. If a railroad company issues and sells bonds bearing upon their face a certificate, signed by persons describing themselves as trustees, that the same are secured by a first mortgage to them in trust for the bondholders, there is no absolute presumption that a purchaser thereof relies upon such certificate; and, in an action upon a note given by him as a part of the consideration of the purchase, the question should be submitted to the jury to determine whether he accepted the bonds, relying upon such certificate. *Edwards v. Marcy*, 2 Allen (Mass.), 486. 1861.

BONUS.

See SUBSCRIPTIONS BY INDIVIDUALS.

1. Consideration. An engagement to pay an incorporated railroad company a certain sum to induce the location of their route at a particular place, is valid and binding, and may be enforced by action. *Cumberland Valley R. R. Co. v. Baab*, 9 Watts (Penn.), 458. 1840.

2 — *Held*, that the Indianapolis and Vincennes R. R. Co. had built its road in accordance with the terms of the contract in this particular case, and that defendant was therefore liable for the amount of his subscription. *Branham v. Record*, 42 Ind., 181. 1873.

BRAKEMEN.

See INJURIES TO EMPLOYÉS.

BRANCH RAILWAYS.

See LATERAL RAILWAYS.

BRIDGES.

See CONSTITUTIONAL LAW; INJURIES TO EMPLOYEES;
MECHANIC'S LIENS; NUISANCE.

1. **Approaches.** A person having paid toll attempted to cross a bridge and fell over an embankment in a dark night and was injured. *Held*, under the facts of this particular case, the company was liable for the damages. It was the duty of the company in erecting such bridge to so construct the approaches as not to render them dangerous for passengers by day or night. *Baltimore and Ohio R. R. Co. v. Boteler*, 38 Md., 568. 1873.

2. **Charter.** The right to cross a navigable water by a railroad bridge, must be given by the sovereign power, by a special or general grant. *Works v. Junction R. R. Co.*, 5 McLean, 425. 1853.

3. — Where a railway company is authorized to construct its road between two points "over" a navigable river, a right to bridge the stream is implied. *Id.*

4. **Commissioners.** The validity of the appointment of one who holds a commission as commissioner, to supervise certain work, under St. 1856, ch. 296, upon a bridge at the intersection of the Boston and Lowell, and the Fitchburgh and Grand Junction railroads, in Somerville, and to apportion the cost thereof between the Fitchburgh R. R. Co. and the Grand Junction R. R. Co., in such proportion as should by him be deemed equitable, cannot be inquired into in an action brought under that statute by the Fitchburgh R. R. Co. against the Grand Junction R. R. Co., to recover a fair and just proportion of the cost incurred in doing the work. *Fitchburgh R. R. Co. v. Grand Junction R. R. Co.*, 1 Allen (Mass.), 552. 1861.

5. **Conflicting charters.** A franchise, granted in 1766, to erect and keep a toll bridge over a stream, and forbidding the erection of any other bridge or ferry within six miles, and imposing a penalty of *twenty shillings* for every passenger "set over" in violation of such act, is not violated by a railroad company, (incorporated by a modern act), which carried passengers along its road, and as a part of its road over its bridge, though the latter was within less than six miles of the other. *McRee v. Wilmington and Raleigh*

R. R. Co., 2 Jones' Law, (N. C.), 186, 1855; see *Taylor v. Wilmington and Manchester R. R. Co.*, 4 ib., 277, 1857.

6. — A railway viaduct, constructed so as to make it as nearly impossible as may be for a man or beast to cross, except in cars, is not a "bridge" within the meaning of the act of New Jersey, passed in 1790, hence the act of the assembly of that state passed in 1860, authorizing the building of a railway and the necessary viaduct does not impair the obligation of a contract made by the act of 1790. *Bridge Proprietors v. Hoboken Co.*, 1 Wallace, 116. 1863.

7. — The franchise to erect a railroad bridge is no interference with a previous exclusive franchise for the erection of a toll bridge. *McLeod v. Savannah, etc., R. R. Co.*, 25 Ga., 445, 1858; *Lake v. Virginia and Truckee R. R. Co.*, 7 Nev., 294, 1872; *Tucker v. Cheshire R. R. Co.*, 1 Foster, (N. H.), 29, 1850; *Thompson v. New York and Harlem R. R. Co.*, 3 Sandford's Ch. (N. Y.), 625, 1846.

8. — The words "commencing at or near the city of Schenectady, and running thence on the north side of the Mohawk river," etc., in the charter of the Utica and Schenectady R. R. Co., authorized the company to commence its road at some point on the north side of the river, near the city, or at some point on the south side at or within the city and then to cross the river to the north side thereof; the middle of the river forming the north bounds of the city. The right to build a bridge, for the purpose of crossing the river was therefore granted to the company by the act for its incorporation. *Mohawk Bridge Co. v. Utica and Schenectady R. R. Co.*, 6 Paige Ch. (N. Y.), 554. 1837.

9. — The building of a bridge across the Mohawk river at the city of Schenectady, by the railroad company, and the transportation of passengers across the river on such bridge in the railroad cars, in the ordinary course of business of conveying travelers upon the railroad, is not an infringement of the chartered rights of the Mohawk Bridge Company. *Id.*

10. **Contract.** The contract between the Niagara Falls Bridge Co., and Great Western R. R. Co. — construed. *Niagara Falls Bridge Co. v. Great Western R. R. Co.*, 39 Barbour (N. Y.), 212. 1863.

11. **Damages.** If there is no difficulty in

Federal Courts — Location — Mills.

constructing a culvert under a railroad, to carry off the water from a meadow over which the road passes, the company will be liable for flowing the meadow, if it does not make a culvert, with ditches to and from it, sufficiently low to drain the water. *Johnson v. Atlantic and St. Lawrence R. R. Co.*, 35 N. H., 568. 1857.

12. Federal courts; jurisdiction. This court has jurisdiction of a suit in equity brought to restrain the building of a bridge across the Connecticut river between Saybrook and Lyme, to be used for a railroad, although the construction of such bridge is claimed to be authorized by the legislature of the state of Connecticut. *Baird v. Shore Line R. R. Co.*, 6 Blatchford, (U. S. C. C.), 276. 1868.

13. Indictment. Where a corporation is authorized to construct a bridge over a navigable stream, "provided said bridge is so constructed as not to prevent the navigation" of the stream, an indictment that charges the company with erecting a bridge, so as to obstruct and impede navigation, is insufficient. *State v. Portland and Kennebec R. R. Co.*, 57 Me., 402. 1869.

14. Injunction. Where an injunction is prayed to restrain the erection of a bridge, on the ground that it will obstruct navigation, and the evidence is very nearly balanced, the injunction ought not to be granted. *Works v. Junction R. R. Co.*, 5 McLean, 425. 1853.

15. — A bill prayed for an injunction against a railroad corporation, upon the ground that a certain railroad bridge which the respondents intended to build across the Connecticut river, would injure the orator's bridge, which had been erected under a charter from the legislature. The answer stated that the orator and his wife owned certain land adjacent to the bridge, and held it and the franchise of the bridge by the same title. It was then stated that the assessment of damages to them was for injuries sustained by them as owners of the bridge and franchise, and also as owners of the land. *Held*, that the statement of the ownership of the land was not important, because it explained the reason of the assessment. *Tucker v. Cheshire R. R. Co.*, 1 Foster (N. H.), 29. 1850.

16. — The bridges proposed to be constructed over the Mississippi river at Rock

Island, will not, as projected, cause any appreciable obstruction to commerce, and there is no cause for the interference of the court to prevent their erection. *United States v. Rock Island R. R. Bridge Co.*, 6 McLean, 517. 1855.

17. — Where there is an obstruction to commerce, which operates to the irreparable injury of an individual, the court may act to prevent the injury. And in a similar case relief can be granted to the United States. *Ib.*

18. — The injury done to land on Rock Island does not justify such interference. *Ib.*

19. Justice of the peace. The charter of the St. Louis and Iron Mountain Railroad Company did not confer upon a justice of the peace jurisdiction of an action against the company to recover damages for injuries sustained by reason of the construction of a culvert. *Fatchell v. St. Louis and Iron Mountain R. R. Co.*, 28 Mo., 178. 1859.

20. Location. The charter of the Central R. R. Co. required it to construct a suitable bridge over any navigable water that it might cross, and required that such bridge should be "located at a point convenient for navigation." *Held*, that in the absence of any allegation of the want of care or good faith in the selection of the location of such bridge, the company was not liable at the suit of a party who complained of damage from an alleged mislocation of such bridge. *Stephens & Condit Transportation Co. v. Central R. R. Co.*, 5 Vroom (N. J.), 280. 1870.

21. Mandamus. *Mandamus* is a proper remedy to compel a railway company, in making its track across a navigable stream, to pursue the mode prescribed by its charter, and not to obstruct navigation. *State v. North-eastern R. R. Co.*, 9 Richardson's Law (So. Car.), 247. 1856.

22. Maritime lien. Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense subjects of maritime liens. (U. S. Sup. Ct.) *Galena Packet Co. v. Rock Island Bridge Co.*, 35 Howard's Pr. (N. Y.), 190. 1868.

23. Mills. The state has the right to authorize the erection of a railway bridge over a navigable stream entirely within its borders; and a mill owner on the stream above has no right of action for the resulting obstruction to navigation and loss of flowage of the water.

Municipal Corporations — Nuisances — Overflow.

Bailey v. Philadelphia, Wilmington and Baltimore R. R. Co., 4 Harrington (Del.), 389. 1846.

24. Municipal corporations. The charter of New Haven authorizes the city to require the railway bridges in its limits to be kept in repair, etc., and in case of the failure of a railway company to comply with the orders of the city authorities in that respect, that such repairs might be made by the city and the expense thereof collected from the railway company. *Held*, that the term "bridge" in the city charter did not include the embankments, fills or approaches. *New Haven v. New York and New Haven R. R. Co.*, 39 Conn., 128. 1872.

25. — Where a municipal corporation has granted a right of way through a street to a railroad company, and the company solely for its own use, erects a culvert on the street, the municipal corporation is not liable for an injury resulting to an individual from an overflow of water caused by the defective construction of the culvert. *Stackhouse v. City of Lafayette*, 26 Ind., 17. 1866.

26. — If the expense of keeping a bridge in repair is imposed by statute upon several towns and a railroad company jointly, with a provision that the municipal authorities of one of the towns shall have the care and superintendence of it, and shall employ all services necessary in the care of it, no action lies against said town, in favor of the railroad company, to recover for damages sustained by the latter in consequence of a defect in the bridge. *Malden and Melrose R. R. Co. v. Charlestown*, 8 Allen (Mass.), 245. 1864.

27. Negligence. It is negligence to leave a bridge uncovered at night over a public street in a city in the vicinity of a railway. *Chicago and Northwestern R. R. Co. v. Fillmore*, 57 Ill., 265.

28. Nuisance. Where a party suffers any special damage by reason of a nuisance, an action lies in his favor for the injury. *South Carolina R. R. Co. v. Moore*, 28 Ga., 398. 1859.

29. — The erection of bridges over rivers, suitable draws being constructed, is not a nuisance. But a bridge should be so erected as to do the least possible injury to navigation. *Attorney General v. Patterson and Hudson River R. R. Co.*, 1 Stockton's Ch. (N. J.), 526, 1853; see *Attorney General v. New York and Long*

Branch R. R. Co., 9 C. E. Green's Ch. (N. J.), 59. 1873.

30. — The provision in the charter of a railway company authorizing it to bridge a navigable stream, provided that the navigation of the stream shall not be obstructed, is not violated by a temporary obstruction of the stream by scaffolding, etc., in the construction of the bridge. *Memphis and Ohio R. R. Co. v. Hicks*, 5 Sneed (Tenn.), 427. 1858.

31. — Congress has power to prevent the obstruction of a navigable river, which is a means of commerce between any two or more states. *Works v. Junction R. R. Co.*, 5 McLean, 425. 1853.

32. — A public nuisance cannot be tolerated on the ground that it is of advantage to a local community. *Ib.*

33. — A draw bridge, although it unavoidably occasions delay, is not necessarily a nuisance. *Ib.*

34. — Where damages result from the unlawful building of railway bridges and causeways, so as to interfere with navigation, the remedy is not by an application to the county commissioners, but by an action at law for the damages occasioned by such structures. *Rogers v. Kennebec and Portland R. R. Co.*, 35 Me., 319. 1853.

35. Overflow. A railroad company, building and maintaining, as part of its road, a bridge across a river, in such a manner as to obstruct the passage of the water, is liable to an action of tort by the owner of land thereby flowed, unless it shows that it has taken reasonable precautions to prevent unnecessary damage to his land. *Mellen v. Western R. R. Co.*, 4 Gray (Mass.), 301. 1855.

36. Post route. An act of congress declaring "that a bridge shall be a lawful structure, and shall be known and recognized as a post route," sanctions the bridge, and makes it lawful as it then is. *The Clinton Bridge*, 10 Wallace, 454. 1870.

37. — Such act abates a suit in equity brought praying for an injunction against the building of the bridge as a nuisance. *Ib.*

38. — A law declaring lawful a bridge over the Mississippi, which obstructs the navigation of the river, is not unconstitutional because of the treaty with France, by which its free navigation is secured. *The Clinton Bridge*, 1 Woolworth (U. S. C. C.), 150. 1867.

Repairs — States — Tolls.

39. Purchase. A corporation authorized by law to build a bridge at a given point, may buy one already built, at the same point, if suitable for its purpose. *Thompson v. New York and Harlem R. R. Co.*, 3 Sandford's Ch. (N. Y.), 625. 1846.

40. Repairs. A corporation, purchaser of the "canals and public works of the state," subject to all contracts and arrangements heretofore made by act of Assembly, or otherwise, for or in respect to the use of such works;" and required to "carry out the same with all persons interested therein, in the same manner as the commonwealth or its agents were required to do by law;" is bound to rebuild a bridge, necessary to the public, which had been erected by the state over a canal when made, but which had fallen down since the purchase. *Pennsylvania R. R. Co. v. Duquesne Borough*, 46 Penn. St., 223. 1863.

41. — While the state owned the canal, the question of the necessity of the bridge was for the canal commissioners alone, because of the immunity of the state from suit; but when it passed to a private corporation, the question of necessity became one of private rights and in the jurisdiction of the courts. *Ib.*

42. — And upon a failure of the corporation to make the repairs, after notice from the proper public officers, they may make the necessary repairs and recover the expense thereof from the corporation in an action of assumpsit. *Ib.*

43. — The facts in a particular case with regard to the negligent construction of a bridge and damage by floods — considered. *Brown v. Mohawk and Hudson R. R. Co.*, 1 Howard's Cases (N. Y.), 52. 1847.

44. Right of way. In 1798 a charter for 100 years was granted to the E. T. Co. to erect a bridge and maintain the same across the Connecticut river, and the charter provided that no person should erect another bridge across said river within certain limits. *Held*, that the erection of a bridge for railway purposes exclusively within such limits was a violation of the charter of the E. T. Co., the railway bridge having been erected without compensation to the E. T. Co. That the franchise of the bridge company might be thus injured upon the payment of compensation. *Enfield Toll Bridge Co. v. Hartford and New*

Haven R. R. Co., 17 Conn., 40, 1845; *Same v. Same*, *ib.*, 454. 1846.

45. — Where the charter of the railroad company provided that the company should be holden to pay all damages that might arise to any person or persons; and that freeholders should assess the damages to those whose real estate might be taken or injured; it was *held*, that a franchise issuing out of land was an incorporeal hereditament, which might be treated as real estate within the charter, and an injury done to it be the subject of assessment. *Same v. Same*, *ib.*, 454. 1846.

46. States. It is competent for a state government to authorize the erection of a bridge across a navigable river, at a point below where the coasting trade is carried on by licensed vessels, provided that the bridge be built with a draw for the passing and repassing of vessels free of expense. *People v. Rensselaer and Saratoga R. R. Co.*, 15 Wendell (N. Y.), 113. 1836.

47. Stockholders. Any act of incorporation, impairing the vested rights of a stockholder in a bridge company, would not be binding upon him without his consent. His rights can only be taken for public use upon the payment of compensation. But long acquiescence will be considered as equivalent to consent. *Gifford v. New Jersey R. R. Co.*, 2 Stockton's Ch. (N. J.), 171. 1854.

48. Street railways. The right of the commonwealth to widen the draw in a bridge belonging to it over a navigable stream, is not impaired by the fact that the widening will temporarily interrupt the use of the street railway of a corporation to which it has granted a right of way to run cars over the bridge. *Middlesex R. R. Co. v. Wakefield*, 103 Mass., 261. 1869.

49. Tolls. A charter authorizing the grantees to collect toll at the Augusta bridge, across the Savannah river, from persons going from the South Carolina side, provided that "the collecting of said toll shall not subject the railroad company or the community to the payment of double toll": *Held*, not to authorize the grantees to collect toll from persons going from the South Carolina side, as long as such persons are required to pay again at a gate on the Georgia side owned by the city council of Augusta. *South Carolina R. R. Co. v. Jones*, 4 Richardson's Eq. (So. Car.) 459. 1852.

Commission — Evidence — Canal Lands — Injuries to Carriages.

BROKER.

1. Commission. The plaintiff contracted with the defendant to negotiate a loan of \$100,000 to it, and did negotiate such a loan with one H., upon the condition that what the plaintiff's brother was owing H. should constitute a part of it, and this amount the plaintiff expected to cash to defendant at the time the loan was made. *Held*, that this constituted a sufficient compliance with the contract on the part of the plaintiff. *Durkee v. Vermont Central R. R. Co.*, 29 Vt., 128. 1856.

BY-LAWS.

1. Evidence. The by-laws of a corporation are not evidence for it against strangers who deal with it, unless such by-laws are brought home to their knowledge and assented to by them. *Smith v. North Carolina R. R. Co.*, 68 N. C., 107. 1873.

CANALS.

See BRIDGES; EMINENT DOMAIN.

1. Canal lands. The state obtained from R. a grant of certain lands in perpetuity, and constructed a canal upon the same. Subsequently the state sold the canal, and the vendee abandoned it. *Held*, that the lands did not revert to R. *Robinson v. West Pennsylvania R. R. Co.*, 72 Penn. St., 316. 1872.

2. Railroads. Where a railroad company is authorized by statute to construct its road upon a particular route, a mere temporary injury to a canal which has been previously constructed, and which can be compensated in damages, is not sufficient to justify the granting of an injunction to stop the progress of the work. *Hudson and Delaware Canal Co. v. New York and Erie R. R. Co.*, 9 Paige Ch. (N. Y.), 323. 1841.

3. — But if the railway is being constructed upon such route without authority, and such construction will probably injure the works of the canal company, an injunction will be granted to restrain the construction of the railway upon the route of the canal. *Ib.*

4. — It is no objection to the construction of a railroad on the route of a canal that

the road cannot be traversed by steam engines, after it is completed, without frightening the horses upon the towing path of the canal, so as to destroy the navigation of such canal. Such question cannot be raised until the railway company attempts to use steam instead of horses upon its road. *Ib.*

5. State canals. The purchasers of the state canals, under act of April 21, 1858, took the same subject to all the provisions of the resolution of April 14, 1843, respecting the payment of the tolls collected at Williamsport, to the Williamsport and Elmira Railroad Company. *Williamsport and Elmira R. R. Co. v. The Commonwealth*, 33 Penn. St., 238. 1859.

CARRIAGES.

1. Injuries to carriages. A party will be responsible for damages occasioned by negligence or want of skill in a driver, or by the vicious temper of his horses where the latter belonged to him, or where the former was in his employment. *Hart v. New Orleans and Carrollton R. R. Co.*, 1 Robinson (La.), 178. 1841.

2. — In an action for damages done to the plaintiff's carriage by an omnibus belonging to the defendant, it is not necessary that the plaintiff should prove the legal title of the omnibus in the defendant; public reputation and *prima facie* evidence of title is sufficient. *Ib.*

CARRIERS — COMMON.

See BAGGAGE; CARRIAGE OF MERCHANDISE; CARRIAGE OF LIVE STOCK; INJURY TO PASSENGERS; PASSENGERS.

[The various matters pertaining to common carriers are distributed under different heads throughout this digest.]

CARRIAGE OF LIVE STOCK.

See CARRIAGE OF MERCHANDISE.

I. CONTRACTS LIMITING THE CARRIER'S LIABILITY.

II. EXTENT OF CARRIER'S LIABILITY.

III. GENERAL MATTERS.

Contracts Limiting the Carrier's Liability.

I. CONTRACTS LIMITING THE CARRIER'S LIABILITY.

1. **Agency.** Where A. contracted to pay a certain price for cars to carry 400 cattle, and delivered a part, signing a contract restricting the liability of the company, it will be presumed that other persons, who delivered the remainder of the cattle, acted as his agents, and had authority to sign similar contracts. *Illinois Central R. R. Co. v. Morrison*, 19 Ill., 136. 1857.

2. **Power to limit liability.** A railroad company acting as a common carrier of live stock, cannot, by special contract, procure exemption from responsibility for losses arising from its own neglect of the duties incident to such employment. *Welsh v. Pittsburgh, Fort Wayne and Chicago R. R. Co.*, 10 Ohio St., 65. 1859.

3. — Such common carrier is liable for damages resulting from defective and unsafe cars, or vehicles of transportation, notwithstanding an express contract to the contrary. *Ib.*

4. — A contract exempting a railway company from the consequences of its negligence does not exempt it from the necessity of furnishing suitable cars. *Hawkins v. Great Western R. R. Co.*, 17 Mich. 57. 1868.

5. — A railroad company engaged in the business of transporting cattle, assumes all the responsibility of a common carrier; and it can limit such responsibility only to the same extent and by the same means as in the transportation of other property. *Kansas Pacific R. R. Co. v. Reynolds*, 8 Kan., 623. 1871.

6. — A common carrier may contract that the owner of live stock shall assume all risk of damage from whatever cause in the course of transportation. *Betts v. Farmers' Loan and Trust Co.*, 21 Wis., 80. 1866.

7. **Effect of contract.** Where a contract for the shipment of live stock limits the liability of a carrier to losses occurring from gross negligence, only the burden of proving gross negligence is upon the shipper. *Bankard v. Baltimore and Ohio R. R. Co.*, 34 Md., 197. 1870.

8. — Defendant contracted to transport a lot of hogs for plaintiffs from B. to A. By the contract, in consideration of a reduced

rate of freight, plaintiffs assumed the risks of injuries from heat, etc. Forty-three of the hogs died from the effects of the heat, the result of the negligence of defendant's employees in not watering and cooling the hogs by wetting. *Held*, that as the common law liability of carriers did not apply to live stock, but in the transportation thereof they were only liable for negligence, to give effect to the stipulation in the contract, it must be construed as exempting defendant from injuries by heat, the result of negligence, and that therefore defendant was not liable. *Cragin v. New York Central R. R. Co.*, 51 N. Y., 61. 1872.

9. — Where the plaintiff signed a special contract for shipment of horses made by the defendant as a common carrier, in which was a clause that "the owner undertakes all risk of loss, injury, damage and other contingencies, in loading, unloading, conveyance and otherwise," and, as the plaintiff alleged, the defendant carelessly and willfully run the car containing the horses upon a side track, and kept them locked up for four days and nights without food or drink, and refused to permit them to be unloaded so that they could be fed — it being impossible to feed them in the car; by reason whereof the horses were nearly starved to death and thereby rendered comparatively valueless; it was *held*, that an action by the plaintiff against the defendant for damages by reason of such acts, could not be sustained. *Heineman v. Grand Trunk R. R. Co.*, 31 Howard's Pr. (N. Y.), 430. 1866.

10. — Although the shipper has contracted to assume all risks occasioned by delay or other cause, this will not excuse the carrier from liability for deliberately causing cars loaded with cattle to be placed upon a side track, where the cattle can neither be unloaded nor fed and watered, and left there for three or four days. *Keeney v. Grand Trunk R. R. Co.*, 59 Barbour, (N. Y.), 104. 1870.

11. — A contract for shipping hogs provided that the company should not be liable for loss "by delay of trains, or any damage the property might sustain, except such as might result from a collision of a train, or when cars were thrown from the track in course of transportation." During the trip one car was thrown from the track by reason of a broken rail, while all the cars containing

Extent of Carrier's Liability.

the hogs remained on the track. *Held*, that the company was liable for whatever hogs were lost, or whatever shrinkage occurred by reason of the delay caused by the accident. *Illinois Central R. R. Co. v. Owens*, 53 Ill., 391. 1870.

12. — Where hogs were shipped by railway under a written contract providing that the shipper should take the risk of injuries which the animals might receive from heat, suffocation or being crowded, it was *held* that the company was not liable for any loss arising from suffocation, although the contract was signed without a full knowledge of its contents, and although the company did not furnish suitable cars. *Squire v. New York Central R. R. Co.*, 98 Mass., 239. 1867.

13. Rates. Where the contract exonerated the defendant from all liability for loss or damage that might happen from any other cause than willful negligence or fraud; and stated that the rate of freight to be paid by the plaintiffs had been reduced in consequence of their assuming these risks; *held*, that the defendant was not liable for damages to the plaintiffs' cattle arising from the cars being thrown off the track, without any willful negligence on the part of the defendant or any of his agents. *Lee v. Marsh*, 43 Barbour (N. Y.), 102. 1864.

14. — The company offered to carry the dead stock through, if the owner, who accompanied the train and was present at the accident, would take charge of them, but he refused to do so: *held*, that the owners could not recover on the ground of the failure to deliver the carcasses of the dead animals. *Ib.*

15. — Certain cattle were delivered at Brady's Mills, to the Baltimore and Ohio R. R. Co., to be transported thence to Baltimore. The charge for transportation was paid in accordance with a tariff of special rates under which, by the printed table, the company assumed no responsibility for loss, damage or delay to stock. A portion of the cattle were killed on the route, and others were injured. An action was brought against the railroad company by the owner of the cattle, to recover damages for their loss and injury. The company claimed exemption from responsibility for the loss upon the ground that the transportation charges were paid under the tariff of special rates. *Held*, that this alone was

not sufficient — it was necessary to show that the owner of the cattle had notice or actual knowledge of these terms at the time, or before the delivery of the stock by him to the railroad company for transportation, and that they were assented to by him. *Baltimore and Ohio R. R. Co. v. Brady*, 32 Md., 333. 1869.

16. Snow storm. Cattle were shipped under an agreement that the shipper should assume certain risks, including those caused by delay. The agreement provided that the shipper should load and unload, the company furnishing assistance as required. At D., on the route, the train was delayed three days by a snow storm. The cattle could have been unloaded by the construction of a platform, but the company declined to do this, and the cattle, in consequence, remained twenty-four hours in the cars, and some of them died in consequence. *Held*, that the provision for loading and unloading related to the terminus only, and that the company was not bound to furnish facilities at D. for unloading, and that the injury was attributable to the fault of plaintiff. *Penn. v. Buffalo and Erie R. R. Co.*, 49 N. Y., 204. 1872.

17. — Where, under a similar contract, a train loaded with cattle was left at an intermediate station two or three days, where they could not be fed, watered or unloaded, this was held to be an intentional abandonment of the contract of shipment by the company, constituting a breach of contract, for which it was liable. *Keeney v. Grand Trunk R. R. Co.*, 47 ib., 525. 1872.

II. EXTENT OF CARRIERS LIABILITY.

18. The liability of a common carrier of cattle is governed by the general legal principles applicable to the common carriage of other property. *Rixford v. Smith*, 52 N. H., 355, 1872; *Ritz v. Pennsylvania R. R. Co.*, 3 Philadelphia Rep. (Penn.), 83, 1858.

19. — The liability of a common carrier of live stock is not, in all respects, the same as that of a common carrier of goods. *Clarke v. Rochester and Syracuse R. R. Co.*, 14 N. Y., 570. 1856.

20. — The liability of a railroad company, engaged as a common carrier of animals is not limited to the careful and safe conveyance of the car containing them. *Ib.*

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21. — In the absence of a special agreement the company is responsible for any injury which can be prevented by foresight, vigilance and care, although arising from the conduct of the animals. *Ib.*

22. — The carrier is not an insurer against injuries arising from the nature and propensities of the animals, and which diligent care cannot prevent. As to damages arising from other causes, the liability is the same as that of a carrier of other property. *Ib.*

23. — The act of 1867, (Sess. L., p. 165), which forbids railway companies from changing or limiting their common law liability, only applies to those kinds of property which the company was bound by its charter to carry in that capacity, and those that it assumed thus to carry. *Michigan Southern and Northern Indiana R. R. Co. v. McDonough*, 21 Mich., 165. 1870.

24. — The company is therefore not bound as a common carrier in the transportation of live stock, unless by a special contract, or by professing to transport such property in the character and with the risks incident to common carriers. *Ib.*

25. — The holding itself out as a carrier of such property to all alike on the same special terms (different from those of common carriers), would not make it liable to the care and risk of a common carrier. Though in other respects its liability would be the same as in the case of other property. *Ib.*

26. — Evidence that a railroad company had carried, and still offered to carry, live stock for hire, for all who desired, on terms, as to duties, liabilities and relations, not recognized by the law of common carriers, but in some respects variant, and in others repugnant thereto, does not tend to prove that such company is a common carrier of live stock. *Lake Shore and Michigan Southern R. R. Co. v. Perkins*, 25 Mich., 329. 1872.

27. — Whenever a railroad company receives cattle or live stock for transportation, such company assumes all the responsibilities of a common carrier, unless modified by special contract. *Kansas Pacific R. R. Co. v. Nichols*, 9 Kan., 235. 1872.

28. — Railroad companies are not, by the common law, common carriers of live stock. *Lake Shore and Michigan Southern R. R. Co. v. Perkins*, 25 Mich., 329. 1872.

29. — A railway company, transporting cattle or other live stock for hire, is none the less a common carrier, from the fact that the transportation of cattle is not its principal business. *Kimball v. Rutland and Burlington R. R. Co.*, 26 Vt., 247. 1854.

III. GENERAL MATTERS.

30. Admissions. Where the owner of cattle shipped by a railroad (or his agent), who undertook to put them in the car, knew that the door of the car was in an unsafe condition, and neglected to inform the station agent, who was ignorant of the fact, he could not recover for injuries received by the cattle in escaping from the car in consequence of such defect. *Betts v. Farmers' Loan and Trust Co.*, 21 Wis., 80. 1866.

31. — A letter from the assistant superintendent of the road to the station agent relieving him from his position on account of negligence in permitting such car to leave his station with the door in such unsafe condition, was not evidence of an admission of negligence by defendant. *Ib.*

32. Chartered cars. If a railroad company hires or charters cars to any one absolutely, the hirer cannot look to the company for damages in case of injury to his property as a common carrier. His remedy for injury must be on contract of hire, and the implied undertaking of the company, that the hired cars are substantial and will be duly carried to their point of destination. *East Tennessee and Georgia R. R. Co. v. Whittle*, 27 Ga., 535. 1859.

33. Damages. In an action, to recover damages for injuries sustained by a lot of cattle, through the negligence of the carrier, the rule of damages is, the difference in value between the cattle when placed in the carrier's charge, and their condition when delivered, so far as caused by injuries on the way. *Black v. Camden and Amboy R. R. Co.*, 45 Barbour, (N. Y.), 40. 1865.

34. — It is competent for witnesses to testify as to their knowledge of the market price of cattle derived from the newspapers. *Cleveland and Toledo R. R. Co. v. Perkins*, 17 Mich., 296. 1868.

35. — The verdict if clearly excessive in amount will be set aside. *Harris v. Panama R. R. Co.*, 5 Bosworth (N. Y.), 312. 1859.

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36. — It seems, that where a horse dies through the neglect of a common carrier, to whom he has been delivered for transportation, the damages for such neglect consist of the value of the horse at the place of delivery, at the time he should have been delivered. *Davis v. New York and Erie R. R. Co.*, 1 Hilton (N. Y.), 543. 1858.

37. Defective cars. Where hogs were shipped in cars belonging to another company, and selected by the plaintiff, he refusing to use the cars of the defendant, *held*, that if the hogs escaped from these cars by reason of any defect in them, or of the door fastenings, the defendant would not be responsible if its agents did not know the fact when the plaintiff selected them. *Illinois Central R. Co. v. Hall*, 58 Ill., 409. 1871.

38. — It is the duty of a railroad company which undertakes to carry live animals for hire to provide cars of sufficient strength to prevent the animals from breaking through the same; and they will be responsible for a loss occurring through their failure to do so, although the animals were unruly and vicious; but they will not be responsible for an injury to the animals occurring simply from their own viciousness or unruliness, while being carried in a proper car. *Smith v. New Haven and Northampton R. R. Co.*, 12 Allen (Mass.), 531. 1866.

39. — Where a contract was silent as to the fitness of cars for the transportation of horses, it was held that the company was liable for any injury resulting from such defect. The liability of the company to furnish cars fit for a particular purpose is absolute, without reference to the fidelity of its agents, unless the plaintiff, with knowledge of the defect, assented to their use. *Great Western R. R. Co. v. Hawkins*, 18 Mich., 427. 1869.

40. — The plaintiff, having cattle to be transported by railroad, was shown two kinds of cars and he made his choice. The cars selected had two defects: one palpable to the plaintiff; the other — spikes on the inside — would have been visible to the plaintiff if he had entered the cars. *Held*, when the owner of property to be transported makes his own selection of the vehicles, under circumstances which charge him with full knowledge of their capabilities and defects, the carrier is not responsible for any injury which may re-

sult exclusively from such defects. *Harris v. Northern Indiana R. R. Co.*, 20 N. Y., 232. 1859.

41. — In an action against a railway company for injuries received by cattle in transportation, where it appeared that they were to be, and were, loaded by the owner, and it did not appear that he objected to the car furnished for that purpose, it was error to permit him to testify in his own behalf, that some other kind of car was better for the purpose. *Chicago and Northwestern R. R. Co. v. Van Dresser*, 22 Wis., 511. 1868.

42. — Where a railway company undertook to transport a lot of cattle for their owner, who was to take care of them, in a car which proved to be defective, by reason of which the cattle had to be changed to another car, which the owner of the cattle had no opportunity to properly provide with bedding, whereby some of the cattle got down and were injured, it was *held*, that the company was liable for the loss sustained. *McDaniel v. Chicago and Northwestern R. R. Co.*, 24 Ia., 412. 1868.

43. Delay. Where cattle were delivered to a railroad company for immediate shipment, but a written contract was executed by it two days afterwards, in an action for damages for unreasonable delay; *held*, that the written contract would be the measure of the obligation of the parties from the time it was given, but that it would not merge any liability the company might have incurred by unreasonable delay previously; there being nothing in its terms to indicate such an intention. *Cleveland and Toledo R. R. Co., v. Perkins*, 17 Mich., 296. 1868.

44. — The question of the measure of damages in cases of delay in the shipment of live stock — discussed. *Ballentine v. North Missouri R. R. Co.*, 40 Mo., 491. 1867.

45. — The rule of damages in an action against a common carrier for a failure to transport live animals to market and deliver them there in good condition on a certain day, in accordance with his undertaking, is the difference between their market value there in good condition on the day when they ought to have been delivered, and their market value there in their actual condition on the day when they were delivered. *Smith v. New Haven and Northampton R. R. Co.*, 12 Allen (Mass.), 531. 1866.

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46. — In an action against a common carrier, to recover damages resulting from a delay in transporting sheep to market, within the time agreed, any loss sustained by the plaintiff by a fall in the market between the times when the sheep should have arrived, and when they did arrive, is a proper element of damages. *Kent v. Hudson River R. R. Co.*, 22 Barbour (N. Y.), 278. 1856.

47. — Where a lot of cattle is placed in the cars for transportation, in time for the next regular cattle train, the station agent of the company at the place of shipment knowing the fact, it is the duty of the company to carry the cattle by the next train, and by its neglect so to do, it will be liable for whatever damage may result to the cattle by reason of the delay. *Illinois Central R. R. Co. v. Waters*, 41 Ill., 73. 1866.

48. — In an action against a railroad company for damages, resulting from its delay in forwarding stock, it is no defense that the delay was caused by the lack on the part of the company of proper appliances for transportation. *Tucker v. Pacific R. R. Co.*, 50 Mo., 385. 1872.

49. — The Laws of 1855, p. 303, requiring that freight shall be imported in the order in which it is received, when desired by the owner, are not violated by delaying the shipment of cattle at a way station waiting transportation, and ready for shipment when the train passed, and which could not be taken without the employment of an extra train. *Michigan Southern and Northern Indiana R. Co. v. McDonough*, 21 Mich., 165. 1870.

50. — The company is only bound to provide means for the ordinary exigencies of its business. *Ib.*

51. — The agreement with a carrier contained the following clause on the part of the shipper: "does hereby agree to take and hereby does assume all and every risk of injuries which the animals, or either of them, may receive in consequence of any of them wild, unruly, vicious, weak, escaping, maiming or killing themselves or each other, or from delays," etc., "and risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in, or incident to, or from or in loading or unloading the stock." *Held*, that this agreement refers to injuries to the animals caused

by delay, etc., and to loss or damage by reason of delay in loading or unloading; and has no reference to other losses which the delays of the carrier may cause to the shipper. *Sisson v. Cleveland and Toledo R. R. Co.*, 14 Mich., 489. 1866.

52. — Common carriers are not liable for the loss of weight in cattle transported by rail; but every reasonable effort must be used to deliver property at its destination in proper time. *Ohio and Mississippi R. R. Co. v. Dunbar*, 20 Ill., 623. 1858.

53. **Delivery; mistake.** Where two lots of live stock shipped by different owners, upon a railroad, to the same consignee, were, by a mistake of the clerk in the office of the station agent at the place of destination, all included in a single bill of charges to one of the shippers, to whom both lots of stock were delivered, it was *held*, that the owner who thereby lost his property, could recover from the company its value. *Chicago and Northwestern R. R. Co. v. Ames*, 40 Ill., 249. 1866.

54. **Fires.** If a railroad company, employed in the transportation of live stock, permit straw or other combustible materials to be used on the cars, and a fire originate therefrom, by which the animals are injured, it is such negligence as will render it liable for the loss sustained. *Powell v. Pennsylvania R. R. Co.*, 32 Penn. St., 414. 1859.

55. — A contract exonerating the company from all claims which may arise for injury to the stock while in the cars of the company, will not exonerate it from the consequences of negligence in the performance of its duties as a carrier. *Ib.*

56. **Lien.** The plaintiff claimed as a common carrier to recover of the defendant a certain sum for the transportation of cattle over its road, relying upon a lien upon the cattle for their freight, not knowing certainly who the owner was. The defendant agreed to become responsible for the freight on the delivery of the cattle to a third person; thereupon the plaintiffs delivered them; and the defendant (being a butcher, but not the owner), sold some of the cattle and received the proceeds, out of which he retained and was to pay by express agreement with the individual in whose name the cattle were shipped, the amount of the freight claimed. And the

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defendant, subsequent to the delivery of the cattle by the plaintiffs, promised to pay them. *Held*, that the promise of the defendant did not come within the statute of frauds. *New York and Erie R. R. Co. v. Gilchrist*, 16 Howard's Pr. (N. Y.), 564. 1858.

57. Negligence. Where live hogs are shipped in cars, and become heated, which can only be allayed by throwing water upon them while in the cars, and this fact is made known to the conductor of the train, and it being customary for the employes to apply water in such cases, and they, having the necessary conveniences for applying the water, neglect so to do, in consequence of which some of the hogs die, such conduct would be gross negligence on the part of the conductor, for which the company would be liable. *Illinois Central R. R. Co. v. Adams*, 42 Ill., 474. 1867.

58. — Carriers cannot by contract relieve themselves from responsibility for damages resulting from their gross negligence. *Id.*

59. — A train conveying cattle was detained sixteen hours at an intermediate station, in constant readiness to start when another train, which was belated, should arrive. The owner of the cattle proposed to take them out of the cars and to water them, but refrained on being informed by the carrier that the cars might start within a period too brief for that purpose. *Held*, that it was a question for the jury whether this amounted to a refusal by the carrier to permit them to be taken out. *Harris v. Northern Indiana R. R. Co.*, 20 N. Y., 232. 1859.

60. — The carrier having control of the train, is responsible for any injury to the cattle from their not being watered at the place of detention. The owner was not required to demand that the train should proceed, nor to persist in attempting to water the cattle until forcibly resisted. *Id.*

61. Poultry. Where, in a suit of a railroad company for the loss of poultry shipped, the defense was a usage of railroads to carry such freight only when accompanied by the owner, and at his risk, and that the loss had occurred through the fault of the owner, in not keeping the coops properly righted on the cars, it was *held*, that evidence from the plaintiff,

and others who had been accustomed to ship on railroads, that they had never heard of such usage, was admissible. *Evansville and Crawfordsville R. R. Co. v. Young*, 28 Ind., 516. 1867.

62. — On the trial, the company introduced a witness to prove that the plaintiff had used the stock passes of the company, and then offered in evidence one of those blank passes, on the back of which was a statement that the owner of stock should feed and take care of it at his own expense and risk, and that he assumed all risk of injury that the animals might do themselves, or that might arise from the delay of trains or otherwise. *Held*, that the evidence did not tend to prove the existence of the usage pleaded, and was properly rejected. *Id.*

63. Presence of owner. A railway company is bound to furnish suitable and safe cars for the transportation of live stock. The presence of the owner on the train, if he had no control over it, would not alter the rule. The company was therefore held liable for the death of cattle smothered by being shipped in box cars. *Peters v. New Orleans, Jackson and Great Northern R. R. Co.*, 16 La. An., 222. 1861.

64. — Where a contract on which cattle were carried provided that the owner should take care of them at his own expense and risk, and assume all risk of injury that they might do to themselves or each other, mere proof that the company had been in the habit of conveying cattle for the plaintiffs without their presence on the train, did not tend to show a waiver of this part of the contract. *Chicago and Northwestern R. R. Co. v. Van Dresar*, 22 Wis., 511. 1868.

65. — When a special contract for the transportation of cattle at reduced rates, provided that the plaintiff (the owner), should load and unload at his own risk, the carrier furnishing necessary laborers to assist, under direction and control of the plaintiff, who was to examine for himself, all the means used, as to the sufficiency, quality and condition thereof. *Held*, that the agreement intended that the carrier should furnish the facilities for, and perform the labor of unloading, and the plaintiff direct and control the laborers. *Penn v. Buffalo and Erie R. R. Co.*, 3 Lansing (N. Y.), 443. 1870.

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CARRIAGE OF MERCHANDISE.

See BAGGAGE; EVIDENCE; RATES; RECEIVER; WAREHOUSEMAN.

I. CONNECTING LINES.

II. CONTRACTS LIMITING LIABILITY.

III. DAMAGES.

1. *Delay.*2. *Damages generally.*

IV. LOSSES BY FIRE.

1. *Liability as carriers.*2. *Liability as warehousemen.*

V. LIABILITY OF CARRIERS GENERALLY.

VI. GENERAL MATTERS.

I. CONNECTING LINES.

1. *Charter.* The Rome R. R. Co. has a right under its charter, to deliver produce at a point that can only be reached over connecting roads. *Rome R. R. Co. v Sullivan*, 25 Ga., 228. 1858.

2. *Contract.* Where a railroad company in Georgia, whose road terminated at Atlanta, where it connected with the Western and Atlantic Railroad, received cotton at one of the stations consigned to parties in New York, and gave the consignors a receipt specifying that the cotton "was to be transported in turn to K. & Co., New York;" it was *held*, that this was a special contract on the part of such company to carry the property to New York; and made it liable not only for its own default, but for that of the other carriers on the line. The statutes of Georgia do not change this rule. *King v. Macon and Western R. R. Co.*, 62 Barbour (N. Y.), 160. 1872.

3. — A railway company may contract for the carriage of goods beyond the terminus of its line. *Schrøder v. Hudson River R. R. Co.*, 5 Duer (N. Y.), 55. 1855.

4. — Railroad companies may make valid contracts to carry passengers beyond their terminus either by land or water. If they contract to carry passengers beyond their limits, they are liable for the acts and negligence of other carriers beyond their control. *Wheeler v. San Francisco and Alameda R. R. Co.*, 31 Cal., 46. 1866.

5. — Where a company thus professes to be a common carrier to a point beyond the ter-

mination of its road, it must treat all alike and contract with all who apply. *Id.*

6. — A carrier may bind himself to transport goods beyond his own route, and thus become responsible for the default of those he employs to carry the remainder of the distance; but the proof of the contract should be clear, especially when it would contradict the papers accompanying the transaction. *Pennsylvania R. R. Co. v. Berry*, 68 Penn. St., 272. 1871.

7. — The terms of a particular contract for the shipment of goods — construed, and the carrier held liable only to the end of its own route. *Ricketts v. Baltimore and Ohio R. R. Co.*, 4 Lansing (N. Y.), 446. 1871.

8. — A railway company whose southern terminus was Chicago, received flour at Neenah, Wis., directed to the care of J. H. & Co., New York, and of C. S. T., general agent, Chicago, and gave the following bill of lading: "Received (as agents and forwarders) from E. W. P., the following packages: * * * *Contract from Neenah to New York at \$2.25 per barrel. J. H. S., agent.*" The words in parenthesis were printed, and those in italics written. *Held*, that the contract was to deliver the flour at New York, for a fixed compensation, and the company was liable as a common carrier for the whole route. *Peet v. Chicago and Northwestern R. R. Co.*, 19 Wis., 118, 1865; 20 ib., 594, 1866.

9. — The station agent at L., on defendant's road, billed the plaintiff's goods through to C., a point on a connecting road, and receipted for the pay for transporting the goods from L. to C., and this was shown to be in accordance with the usual course of business on defendant's road. *Held*, that these facts, without further proof, constituted sufficient evidence to warrant the court in submitting to the jury the question whether or not the defendant undertook to transport the goods over the connecting roads to their ultimate destination. *Mann v. Birchard*, 40 Vt., 326. 1867.

10. — Goods were received at S. by the defendant, to be transported to C., on their way to B. It appeared that C. was the terminus of defendant's road, and that at that point the road connected with other lines to B. In an action for the loss of the goods, it was *held*, that defendant, having receipted for the goods, to be transported to C., was not liable

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for any loss occurring beyond that point; but that it was sufficient to make a *prima facie* case to show that the goods were delivered to defendant and that they had not arrived at B. and had been lost. *Brintnall v. Saratoga and Whitehall R. R. Co.*, 32 Vt., 665. 1860.

11. — A contract for shipment of freight provided that the liability of the carrier should terminate on delivery to another carrier at the terminus of the first, and that the first carrier's liability should end where the goods were "unloaded from the cars at the place of delivery." The goods were not unloaded, but the cars were transferred to the next railway company as loaded. *Held*, that the contract was a "through freight contract," and the first company was liable beyond its terminus. *Toledo, Peoria and Warsaw R. R. Co. v. Merriman*, 52 Ill., 123. 1869.

12. — A company whose road extended from Cincinnati to Dayton, having an arrangement with other companies whose roads extended from Dayton to New York, for rates of "through fare," to be divided *pro rata* among them, received at Cincinnati goods consigned to a party in New York, and signed a bill of lading stating therein that the goods were "to be transported to the terminus of its road, and there delivered to agents" of connecting roads; and that in case of loss or damage the company alone should be held answerable therefor in whose custody the goods might be at the time of the happening thereof. *Held*, that this was not a contract to carry the goods to New York, but to carry them to Dayton only; and that the company so receiving the goods is not liable for loss or damage thereto while in the hands of the other companies between Dayton and New York. *Cincinnati, Hamilton and Dayton R. R. Co. v. Pontius*, 19 Ohio St., 221. 1869.

13. — In an action against a railroad corporation, to recover for the loss of goods, directed to a place situated beyond the line of its road, neither the receiving such goods for transportation, nor a receipt, given by the corporation, stating that the goods were so received, nor an advertisement by such corporation, of the general facilities for transportation, is evidence of a special contract to carry such goods to the place to which they were directed; but only to deliver them at the end of said road, thence to be forward-

ed in the usual course of business. *Elmore v. Naugatuck R. R. Co.*, 23 Conn., 457. 1855.

14. — The late English cases, which appear to conflict with the above principle, have not been adopted as the law of Connecticut. *Ib.*

15. — *through contract.* A railroad company received goods at Pittsburg, Pa., destined for Hudson, Wis., stipulating against responsibility as a carrier beyond its own line, but guarantying that the cost of transportation to Hudson should not exceed a certain sum—less than the aggregate of the charges on the several lines between Pittsburg and Hudson at the usual rates; the other connecting lines on the route having no knowledge or notice of the guaranty, *held*, that this was not a "through contract." *Schneider v. Evans*, 25 Wis., 241. 1870.

16. *Custom.* Where goods are received by a carrier for transportation, marked for a destination beyond the terminus of such carrier's route, the notice to the next carrier of their arrival and readiness for delivery need not be actually brought home to the knowledge of such next carrier; but where the uniform custom of doing business between them was for the first carrier to deposit such notice in a special box in its own depot, to which the next carrier had constant access and was accustomed to look for notices, such deposit was sufficient. *Mills v. Michigan Central R. R. Co.*, 45 N. Y., 622. 1871.

17. — But in addition to the giving of notice of arrival to the carrier next in the line, a reasonable time must elapse for him to take away, and on his neglect to do so, a storage must be made, or some act indicating a renunciation of the relation of carrier, be done by the first carrier, to relieve him from a common carrier's liability. And where the first carrier was a railroad company, and the next a propeller line on the great lakes, and it was the custom to ship the goods by the first vessel of the line that could take them, after their arrival at the railroad terminus, it was *held*, that the reasonable time which must elapse after notice, did not expire until a vessel which, in the ordinary course of business, could receive the goods, had failed to do so. *Ib.*

18. — Proof of the course of business adopted by connecting lines of railway should be received as competent evidence on the ques-

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tion of the receipt or delivery of property from one to the other. *Root v. Great Western R. R. Co.*, 65 Barbour (N. Y.), 619. 1873.

19. Delay. A railway company receiving goods from a connecting line to be forwarded, is liable for damages occasioned by delay, when such delay is for the purpose of awaiting the arrival of a bill of back charges from the connecting line. *Michaels v. New York Central R. R. Co.*, 30 N. Y., 564. 1864.

20. Delivery to next carrier. Where property is delivered to a railroad company, to be transported by that and another company, over their respective roads, it is enough for the owner, in an action against the company delivering the property, to recover damages for negligence, to show that he delivered the property to the first company in good order, and the burden of proof is then cast upon defendant. *Smith v. New York Central R. R. Co.*, 43 Barbour (N. Y.), 225, 1864; *Same v. Same*, 41 N. Y., 620, 1869.

21. — When goods are delivered to a carrier for transportation beyond the terminus of his line, and they are there delivered to another carrier to be forwarded, the latter is not liable for any damage to the goods, except upon proof that the injury occurred while they were in his custody. And it makes no difference that he received freight as agent for the other lines in addition to his own charges for transportation. *Hunt v. New York and Erie R. R. Co.*, 1 Hilton (N. Y.), 228. 1856.

22. — A contract to ship goods from one point to another with stipulation that the carrier shall not be responsible if the goods are "receipted for in good order" by an intermediate carrier on the route, does not relieve the first carrier from his common law liability. *Fatman v. Cincinnati, etc., R. R. Co.*, 2 Disney (Ohio), 248. 1858.

23. — When goods are delivered to a common carrier to be transported over his railroad to his depot in a place named, and there to be delivered to a second line of conveyance for transportation further on, the common law liability of common carriers remains on the first carrier until he has delivered the goods for transportation to the next one. His obligation, while the goods are in his depot, does not become that of a warehouseman. *Railroad Co. v. Manufacturing Co.*, 16 Wallace, 318. 1872.

24. — An agreement to carry goods from A. to B., and to deliver them at B. to another carrier, is complied with when the goods are delivered to such carrier at B. And this is true although the goods are directed to a point beyond B. *Marshall v. New York Central R. R. Co.*, 45 Barbour (N. Y.), 502. 1866.

25. — A railroad company, receiving goods for transportation to a place, situated beyond the line of its road, on another railroad with which it connects but with the proprietors of which it has no connection in business, and taking pay for the transportation over its own road only, is not liable, in the absence of any special contract, for the loss of the goods, after their delivery to the proprietors of the other railroad. *Nutting v. Connecticut River R. R. Co.*, 1 Gray (Mass.), 502. 1854.

26. — If an arrangement or course of business exists between two railroad companies whose roads are upon the same general route, but do not actually connect with each other, by which goods, which have been carried to the termination of one road, and are destined to some point upon or beyond the line of the other, are delivered to the second company with a bill of the expenses already incurred, from which, if found to be correct, a way bill is made out, the second company is only responsible as a warehouseman, and not as a common carrier, for goods so received and stored by it, until the delivery of the bill of expenses. *Judson v. Western R. R. Co.*, 4 Allen (Mass.), 520. 1862.

27. Duty of connecting carriers. Where goods are shipped and must pass through the hands of several intermediate carriers before arriving at the place of their destination, the duty of each intermediate carrier is to transport the goods safely to the end of his route, and deliver them to the next carrier on the route beyond. *McDonald v. Western R. R. Co.*, 34 N. Y., 497. 1866.

28. — An intermediate carrier, in such case, does not relieve himself from liability by simply unloading the goods at the end of his route, and storing them in his warehouse, without delivery or notice to, or any attempt to deliver to, the next carrier. *Id.*

29. — In the absence of any contract, a railway company is not bound to carry goods beyond its terminus, but if the goods are directed to a point beyond its terminus, it is

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bound to deliver them to the proper custody to ensure their transportation. *Rome R. R. Co. v. Sullivan*, 25 Ga., 228. 1858.

30. Evidence; goods lost beyond route of carrier. Instructions given by the purchaser of goods to the vendor, as to the manner of marking and shipping them, are not admissible in evidence for the plaintiff, in an action by the purchaser against the common carrier, who undertook to transport them. *Angle & Co. v. Mississippi and Missouri R. R. Co.*, 9 Ia., 487. 1859.

31. — In an action against a common carrier for loss of goods on a receipt or bill of lading, showing the destination of the goods to a point beyond the route of the carrier, it was held, that parol evidence is admissible to show the termini of such carrier's route, the usage as to carrying beyond the same, and the knowledge of such termini and usage by the consignor; and such usage, when known to the consignor, was held to enter into and form a part of the contract evidence by the bill of lading. *Id.*

32. Instructions. A common carrier who undertakes to transport goods over the whole or any part of his own route, and then to forward them to a designated destination beyond, is bound to transmit, with their delivery to the carrier next *en route*, all special instructions received by him from the consignor; and will be held liable for neglect to do so. *Little Miami R. R. Co. v. Washburn*, 22 Ohio St., 324. 1872.

33. Joint liability. Where two railway companies are sued on a joint contract for transportation, evidence, offered by one of them to prove that the other neglected to furnish cars is immaterial. *Sisson v. Cleveland and Toledo R. R. Co.*, 14 Mich., 489. 1866.

34. — Where several parties are associated for the transportation of freight from Louisville to New York, executing through bills of lading, and charging through freight, they will each be chargeable as common carriers between those points. *Cincinnati, Hamilton and Dayton R. R. Co. v. Spratt*, 2 Duvall (Ky.), 4. 1865.

35. — Where several common carriers are associated in a continuous line of transportation, and in the course of the business, goods are carried through the connected line for one price, under an agreement by which the

freight money is divided among the associated carriers, in proportions fixed by the agreement; if the carrier at one end of the line receives goods to be transported through marked for a consignee at the other end of the line, and on delivery of the goods takes pay for transportation through, the carrier, who so receives the goods, is bound to carry them, or see that they are carried, to their final destination, and is liable for an accidental loss happening in any part of the connected line. *Nashua Lock Co. v. Worcester and Nashua R. R. Co.*, 48 N. H., 339. 1869.

36. Marks. When railroad companies receive goods to carry, marked to a particular place, they are bound, *prima facie*, under an implied agreement from the mark or direction, to carry to and deliver at that place, although it be a place beyond their own lines of carriage. *Illinois Central R. R. Co. v. Frankenberg*, 54 Ill., 88. 1870.

37. — In the absence of any contract, a railway company, *it seems*, is not liable for losses of goods occurring beyond its own line, although the goods are received by it marked for a particular destination beyond such line. *Jenneson v. Camden and Amboy R. R. Co.*, 5 Penn. Law Jour. Rep., 409. 1856.

38. — In England, the rule is that where a railroad company, as a common carrier, receives property destined and directed for a point beyond its line, it is bound to deliver it to its place of destination without any contract to that effect; but, in the United States, the rule is established in most of the states, including Vermont, that a railroad company is liable for loss or injury occurring beyond the termination of its road only when it stipulates to deliver the property to a point beyond. *Morse v. Brainerd*, 41 Vt., 550. 1869.

39. — Where a railroad company received a box of goods for transportation, directed to a place beyond the terminus of its own road, and gave a receipt therefor, as follows:

“Vt. Cent. R. R. Co.,

“Burlington, Sep. 13, 1866.

[Mark and numbers.] Rec'd from W. R. Lewis
W. R. Lewis, Brooklyn, Iowa. 1 box, weight 350,

“Numbered and marked as above, which the company promises to forward by its road, and deliver to — or order, at its depot in —, he or they first paying freight, etc. N. B. If merchandise be not called for on its ar-

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rival, it will be stored at the risk and expense of the owner."

Held, that this was a contract to carry the goods to Brooklyn, Iowa. *Cutts v. Brainerd*, 42 Vt., 566. 1870.

40. — A corporation established to transport goods for hire between certain places, and receiving goods directed to a more distant place, is not responsible, beyond the end of its own route, as a common carrier, but only as a forwarder, unless it makes a positive agreement extending its liability. *Burroughs v. Norwich and Worcester R. R. Co.*, 100 Mass., 26. 1868.

41. — When a carrier receives goods to carry, marked for a particular place, he is bound, under an implied agreement from the mark or direction, to carry to and deliver at that place, although it be a place beyond his own line of carriage. *Illinois Central R. R. Co. v. Johnson*, 34 Ill., 389, 1864; see *Illinois Central R. R. Co. v. Cowles*, 32 ib., 116. 1863.

42. — Where a railroad company receives, for transportation, property addressed to a person at a point beyond the terminus of its road, it will be presumed to have agreed to deliver the property, in the same order and condition in which it was received, to the consignee. *Foy v. Troy and Boston R. R. Co.*, 24 Barbour (N. Y.), 332. 1856.

43. **Presumption.** In the absence of proof of authority to contract as agent for connecting lines, a carrier, which receives charges for carriage to places on such lines, is presumed to contract for the whole distance on its own account. *Condict v. Grand Trunk R. R. Co.*, 4 Lansing (N. Y.), 106. 1871.

44. **Rights of carriers.** A railroad company cannot be compelled, as a common carrier, to receive goods at stations along its line for transportation, on the requirement of the consignor that it shall deliver the goods at a point beyond or off its own line of road. *People ex rel. v. Chicago and Alton R. R. Co.*, 55 Ill., 95. 1870.

45. **Set-off.** In an action by a railroad company to recover freight of goods over a continuous line of transportation, of which its road forms a part, and the freight for which transportation is to be divided among the proprietors of the different parts of the line in certain stipulated proportions, the defendant may set off damage to the goods by

the fault of the carrier on any part of the line. *Fitchburg and Worcester R. R. Co. v. Hanna*, 6 Gray (Mass.), 539. 1856.

46. **Statutes.** The provision of the statute, that "whenever two or more railroads are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of said roads shall be liable as common carriers, for the safe delivery of such freight at such place," was intended to apply only to the company originally receiving the goods. *Smith v. New York Central R. R. Co.*, 43 Barbour (N. Y.), 225. 1864.

47. — A common carrier, who ships goods over a part of his route on a vessel which he does not own or charter, is not relieved from liability by the U. S. St. of 1851, ch. 43, if the goods are destroyed by an accidental fire on the vessel. *Hill M'fg Co. v. Boston and Lowell R. R. Co.*, 104 Mass., 122. 1870.

48. — By the act of 1847 (ch. 270), each successive railroad company forming a link in the chain of communication between the place of freighting and the place of destination, which agrees to convey property beyond the terminus of its own road, and receives the goods under such an agreement, is liable, as a common carrier, for the delinquencies of each of the other roads running in connection with it, over which the property shall subsequently pass on the route to the place of delivery. *Root v. Great Western R. R. Co.*, 2 Lansing (N. Y.), 199. 1860.

49. **Streetage.** Where the defendant accepted oats for transportation from Baltimore to Washington, and charged, in addition to the ordinary freight charges, for streetage to the foot of Sixth street, it was *held*, that the carrier was bound to deliver the goods at that point. Such duty, although not within the common law liability of the carrier, is the result of the implied agreement resulting from receiving payment therefor. *Baltimore and Ohio R. R. Co. v. Green*, 25 Md., 72. 1866.

50. **Transportation companies.** Where flour was brought to Ogdensburg by the N. T. Co., consigned to the plaintiffs at Concord, and to go over the railroad of the N. R. R. Co., and was deposited in a storehouse under the control of the N. T. Co.: and, according to the course of business for six or seven years, a clerk of that company forwarded to

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plaintiffs a way bill marked "duplicate," and headed "N.R.R.Co.," and dated "Ogdensburg Depot," but not signed by any one, reciting that said company had received the flour, and promising to deliver it to the consignees, subject to charges; and at the same time sent a duplicate way bill to the N. R. R. Co., which was entered by that company in its books; and the N. T. Co. also drew upon the consignees for the freight to Ogdensburg; after which, communications were had between the agents of the N. R. R. Co. and the consignees, without reference being had to the N. T. Co.; after which the flour was destroyed by fire; and defendants, being the trustees of the railway company, did not deny the receipt of the flour until after the suit had been brought. *Held*, that if the defendants had knowledge of such way bills at the time they were sent, they would be estopped from denying that they had received the flour. *Barter & Co. v. Wheeler*, 49 N. H., 9. 1869.

51. — It was for the jury on this evidence to find all the facts necessary to constitute such estoppel. *Ib.*

52. — That while the flour was held at Ogdensburg waiting means of transportation, defendants held it as common carriers. *Ib.*

53. — That where several companies associate and form a continuous line of carriers for the whole line, they are each jointly and severally liable for losses occurring on any part of their line. *Ib.*

54. — That where goods are delivered to a transportation company to be carried over its route over several railroads, an intermediate company is liable for the loss of goods happening on its part of the line. *Ib.*

55. — When a contract is made to carry goods over such a line, extending through different states, and a loss occurs, the rights of the parties will be governed by the laws of the state where the loss happens. *Ib.*

56. **When liability attaches.** When freights received by one railroad are to be carried over connecting roads, in the car in which they are shipped, without being transshipped to the cars of the connecting road, the liability of the connecting road does not commence till the car is delivered to, and received by the latter; and the first carrier is liable to the shipper till it shows such delivery. *Rome R. R. Co. v. Sloan*, 39 Ga., 636. 1869.

57. — Ordinarily when goods are shipped to be transported by several successive and connecting lines, they are to be considered in transit until they reach their final destination, and the peculiar liability of a common carrier exists continuously, although, for the convenience of the successive carriers, the goods may be temporarily deposited in depots or warehouses on the route. And the carrier in whose possession they are when destroyed or injured, is liable, as such, to the owner or consignee for the loss. *Wood v. Milwaukee and St. Paul R. R. Co.*, 27 Wis., 541, overruled as to these points. *Conkey v. Milwaukee and St. Paul R. R. Co.*, 31 Wis., 619. 1872.

58. — Where a steamboat connected with a railway at a wharf and certain goods were being transferred from the boat to the cars, the employes of both the boat and railway company acting in concert in the transfer, and before all the goods had reached the wharf, a fire broke out which stopped the work and destroyed the boat, wharf, cars and goods, it was *held*, that the railway company was not liable for any of the goods destroyed upon the boat. *Gass v. New York, Providence and Boston R. R. Co.*, 99 Mass., 220. 1868.

59. — If an arrangement is made between several connecting railroad companies, by which goods to be carried over the whole route shall be delivered by each to the next succeeding company, and each company so receiving them shall pay to its predecessor the amount already due for the carriage, and the last one collect the whole from the consignee, a reception of such goods by the last company, and a payment by it of the charges of its predecessor, will not render it liable for an injury done to the goods before it received them. *Darling v. Boston and Worcester R. R. Co.*, 11 Allen (Mass.), 295. 1865.

60. **When liability terminates.** The doctrine that when goods have arrived at their destination and been stored in the company's warehouse that the liability of the carrier ceases does not apply where the goods are consigned to a point beyond the company's route. *Hooper v. Chicago and Northwestern R. R. Co.*, 27 Wis., 81. 1870.

61. — In an action on the case, founded on the legal liability of a railroad corporation as a common carrier to recover for the loss of goods directed to N. Y., a place situated be-

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yond the terminus of such road, the declaration alleged that the defendant was a common carrier to N. Y. On the trial, it was admitted that the goods had been transported safely over the defendant's road and deposited on board a steamboat for N. Y., where they were burned. The plaintiff gave in evidence the defendant's charter containing the permission aforesaid, also an advertisement, published in a newspaper, stating that freight would be billed by the defendant to N. Y., and evidence that the plaintiff had been in the practice of sending freight to N. Y. over the defendant's road from the time it went into operation, and that the defendant had made no demands of the plaintiff for the freight of said goods, and then rested its cause. The defendant thereupon moved for a nonsuit which was granted. *Held*, that such nonsuit ought not to be set aside. *Naugatuck R. R. Co. v. Waterbury Button Co.*, 24 Conn., 468. 1856.

62. — Where a common carrier conveys goods over only a portion of the route between the points of shipment and consignment, and holds them for delivery to some connecting carrier, the latter is the owner's or consignee's agent to receive the delivery; and the liability of the former as a common carrier continues until the goods are ready for delivery to such agent, and he has had a reasonable time to take them away. Citing *Schneider v. Evans*, 25 Wis., 241; *Wood v. Crocker*, 18 Wis., 345; *Wood v. Milwaukee and St. Paul R. R. Co.*, 27 Wis., 541. 1871.

63. — Such "reasonable time" is the earliest practicable time after the first carrier is ready for delivery, and is not measured by any peculiar circumstances in the condition of the second carrier requiring for its convenience that it should have a longer time. *Ib.*

64. — Subject to these legal principles, the question as to what is a reasonable time is for the jury. *Ib.*

65. — Where the uncontradicted evidence for the plaintiff fails to show that the goods were not ready for delivery long enough before the accident to afford a reasonable opportunity for their removal, it is error to take from the jury the question whether the defendant carrier's liability was simply that of a warehouseman. *Ib.*

66. — It is not necessary to show a written or oral notice that the goods were ready for

delivery; but notice may be implied from the course of dealing between the parties, or the custom or usage of business. *Ib.*

67. — In the absence of any special agreement, or custom, where goods are delivered to a carrier to be transported to a point beyond his route, his duty as a carrier is not terminated by storing the goods in his warehouse at the end of the route. *Irish v. Milwaukee and St. Paul R. R. Co.*, 19 Minn., 376. 1872.

68. — Where the defendant has contracted to carry cotton and deliver the same in Charleston, it cannot avoid liability by showing that it safely delivered the goods, at its terminus, to another company for shipment to Charleston. *Kyle v. Laurens R. R. Co.*, 10 Richardson's Law (So. Car.), 382. 1857.

II. CONTRACT LIMITING LIABILITY.

69. Bill of Lading. It is not competent to limit the liability of the carrier by merely proving a usage on his part in giving bills of lading exempting him from certain classes of losses. *Illinois Central R. R. Co. v. Smyser*, 38 Ill., 354. 1866.

70. — Although a common carrier may issue a bill of lading, containing provisions restricting his common law liability, that is not conclusive upon the shipper, but he may show by parol that there was a different prior verbal agreement, under which the goods were shipped. *Baker v. Michigan Southern and Northern Indiana R. R. Co.*, 42 Ill., 73. 1866.

71. — If a carrier has acted under a bill of lading as delivered to the shipper and accepted by him, and a loss occurs from one of the perils mentioned in such bill, exempting the carrier from liability, no recovery can be had therefor. *Bostwick v. Baltimore and Ohio R. R. Co.*, 55 Barbour (N. Y.), 137. 1869.

72. Connecting lines. Where one railway company receives goods from another, to be carried under a contract between the latter company and the owner, it is entitled to the benefits of any stipulations in such contract affecting the liability of the carrier. *Manhattan Oil Co. v. Camden and Amboy R. R. Co.*, 52 Barbour (N. Y.), 72, 1868; *Same v. Same*, 5 Abbott's Pr., N. S. (N. Y.), 289, 1868; *Same v. Same*, 54 N. Y., 197, 1873; *Lamb v. Cam-*

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den and Amboy R. R. Co., 2 Daly (N. Y.), 454, 1869; *Maghee v. Camden and Amboy R. R. Co.*, 45 N. Y., 514, 1871; *Babcock v. Lake Shore and Michigan Southern R. R. Co.*, 43 Howard's Pr. (N. Y.), 317, 1872.

73. — Where a company has become liable under a contract for the shipment of goods over its own and other lines of road forming a continuous line, a contract or notice limiting its liability as to negligence on any such connecting line, is void as against public policy. *Cincinnati, Hamilton and Dayton R. R. Co. v. Pontius*, 19 Ohio St., 221. 1869.

74. — When a bill of lading made in Toledo, O., by a common carrier by water, stipulated to deliver the goods to the consignee at Concord, N. H., "the damages of navigation, fire and collision on the lakes, rivers and canal excepted, it was held, that this limitation did not extend to losses by fire on the railroads. *Barter & Co. v. Wheeler*, 49 N. H., 9. 1869.

75. — Where a common carrier has transported freight under a special contract limiting his liability, and by which he undertook for an agreed compensation to carry it to the terminus of his route, and then deliver it to another carrier, he has no authority to enter into a special contract on behalf of the owner with the next carrier, limiting or restricting the liability of the latter. *Babcock v. Lake Shore and Michigan Southern R. R. Co.*, 49 N. Y., 491. 1872.

76. — A railroad company may limit its liability as a common carrier to the line of its own road, by express contract, although the goods may have been received under a contract to send them to a point beyond the line of such company. *Detroit and Milwaukee R. R. Co. v. Farmers' and Millers' Bank*, 20 Wis., 122, 1865; *Chicago and Northwestern R. R. Co. v. Montfort*, 60 Ill., 175, 1871.

77. Effect of such contract. In a bill of lading, or receipt for freight, given by a railroad company, an exception in these words, "taken at the owner's risk," only exempts the company from liability as an insurer. *Mobile and Ohio R. R. Co. v. Jarboe*, 41 Ala., N. S., 644. 1868.

78. — A contract by a railway company limiting its liability as a carrier, does not relieve it from ordinary care in the performance of its duty. The most that it can do is to re-

lieve the company from those conclusive presumptions of negligence which arise when an accident happens that is not inevitable, and to require that negligence be actually proven. *Goldrey v. Pennsylvania R. R. Co.*, 30 Penn. St., 242. 1858.

79. — A clause in a bill of lading, given to a shipper of goods by a common carrier, exempting the carrier from liability for loss of the goods from certain causes, is binding upon the shipper, as a special contract between the parties. *Steinweig v. Erie R. R. Co.*, 43 N. Y., 123. 1870.

80. — But where such clause releases the carrier "from damage or loss to any article from or by fire or explosion of any kind," it does not release him from liability for damage by those means, resulting from his own negligence. *Ib.*

81. Fire. A bill of lading exempting a carrier from liability for "damage or loss by fire," will not exonerate the carrier from a loss by fire occasioned through his negligence. *Lamb v. Camden and Amboy R. R. Co.*, 46 N. Y., 271. 1871.

82. — A bill of lading contained "the dangers incident to railroad transportation, fire and all other unavoidable accidents excepted;" held that the exception of loss by fire was a limitation on the common law liability of carriers. *Colton v. Cleveland and Pittsburg R. R. Co.*, 67 Penn. St., 211. 1870.

83. — The goods having been burned, the burden of proof to show negligence was on the transporter. *Ib.*

84. — The exception was of fire, unavoidable or not, unless it was by the negligence of the carrier, which cannot be provided against in a contract. *Ib.*

85. — The exceptions restricted the liability of the carrier to that of a private carrier, and rendered it liable only for a want of ordinary care and skill. *Ib.*

86. — Where a contract limiting the liability of the carrier was made, stipulating that the carrier should not be liable for loss by fire, and a delay of six days was made in the shipment by reason of a disagreement between it and a connecting line, it was held, that the delay was unreasonable and that the carrier was liable for a loss occurring by fire during such delay. *Condict v. Grand Trunk R. R. Co.*, 54 N. Y., 500. 1873.

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87. Illegal contracts. The validity, nature, obligation and interpretation of a contract is, as a general rule, to be governed by the law of the place of performance; if the contract is void and illegal there, it will be so held everywhere. *McDaniel v. Chicago and Northwestern R. R. Co.*, 24 Ia., 412. 1868.

88. — Where a railway company undertook to transport from the city of Clinton and to deliver in Chicago a certain lot of cattle, it was *held*, that the contract being entire, and made and to be partly performed in this state, must be interpreted in accordance with the laws of this state. *Ib.*

89. — Therefore where the liability of the company as a carrier was limited by a stipulation inserted in it, such stipulation was void under ch. 113 of the laws of 1866. *Ib.*

90. Instructions. When a carrier accepts goods to be carried, with a direction on the part of the owner to carry them in a particular way, or by a particular route, he is bound to obey such directions, or he cannot avail himself of any exception in the contract. *Maghee v. Camden and Amboy R. R. Co.*, 45 N. Y., 514. 1871.

91. Negligence. Where an agreement is relied upon to exempt a common carrier from liability on account of the gross negligence of his employés, the terms of the contract ought to be so clear and explicit as to leave no doubt of its meaning. *French v. Buffalo, New York and Erie R. R. Co.*, 4 Keyes (N. Y.), 108. 1868.

92. — Carriers may limit their liability at least against ordinary negligence. *Baltimore and Ohio R. R. Co. v. Skeels*, 3 W. Va., 556, 1869; *Hannibal R. R. Co. v. Swift*, 12 Wallace, 262, 1870.

93. — Where the agreement between the common carrier and the owner of the goods provides, in general terms, that the same are transported at the "owner's risk," the carrier is liable only for damages resulting from his own personal negligence, or from the gross negligence of his employés. *French v. Buffalo, New York and Erie R. R. Co.*, 4 Keyes (N. Y.), 108. 1868.

94. — A common carrier may, by contract, restrict his liability even for gross negligence. *Baltimore and Ohio R. R. Co. v. Rathbone*, 1 W. Va., 87. 1865.

95. — A railroad company may restrict its

liability by special agreement, the carrier being still held responsible for gross negligence or willful misfeasance. *Illinois Central R. R. Co. v. Smyser*, 38 Ill., 354. 1865.

96. — The terms, "at owner's risk," in a bill of lading, in connection with other stipulations, *held*, to exempt the carrier only from ordinary negligence. *Baltimore and Ohio R. R. Co. v. Rathbone*, 1 W. Va., 87. 1865.

97. — A special contract of a common carrier that he shall not be liable for breakage, operates only to relieve him from his liability as insurer, and leaves him responsible for ordinary negligence, as any other bailee for hire. *Missouri Valley R. R. Co. v. Caldwell*, 8 Kan., 244. 1871.

98. Power to make such contracts. A common carrier may limit his common law liability by contract. *Wallace v. Matthews*, 30 Ga., 617, 1869; *Thayer v. St. Louis, Alton and Terre Haute R. R. Co.*, 22 Ind., 26, 1864; *Illinois Central R. R. Co. v. Frankenberg*, 54 Ill., 88. 1870.

99. — A stipulation by which the consignor agrees to assume all risk of loss or damage by fire, does not relieve the company from liability for a loss by fire caused by the negligence of its servants; and if placing the goods on an open, uncovered car, constitutes negligence, notice to the consignor, at the time of the shipment, that they would be carried on such a car, would not relieve the company from liability for the loss. *Montgomery and West Point R. R. Co. v. Edmonds*, 41 Ala., N. S., 667. 1868.

100. — A common carrier cannot contract against liability for loss from his own ordinary negligence. Such a condition is void as against public policy. *Indianapolis, Pittsburg and Cleveland R. R. Co. v. Allen*, 31 Ind., 394, 1869; *Michigan Southern and Northern Indiana R. R. Co. v. Heaton*, 37 Ind., 448, 1871.

101. — A contract limiting the liability of a carrier will not excuse him from the effects of his negligence. *Lamb v. Camden and Amboy R. R. Co.*, 2 Daly (N. Y.) 454, 1860; *Pennsylvania R. R. Co. v. McCloskey, adm'r*, 23 Penn. St., 526, 1854; *School District in Medfield v. Boston, Hartford and Erie R. R. Co.*, 102 Mass., 552, 1869; *Union Mutual Ins. Co. v. Indianapolis and Cincinnati R. R. Co.*, 1 Disney (Ohio), 480, 1857; *York Manufactur-*

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ing Co. v. Illinois Central R. R. Co., 1 Bissell (U. S. C. C.), 377, 1862; *Woodward v. Illinois Central R. R. Co.*, ib., 447, 1864; *Farnham v. Camden and Amboy R. R. Co.*, 55 Penn. St., 53, 1867.

102. — A bill of lading limiting the responsibility of the carrier, signed by his agent, delivered to the shippers, accepted by them and sent to their agent as authority to receive the goods, shows terms on which the shippers shipped the goods, and on which they were received. *Ib.*

103. — Where, in such case, the goods are transported to the place of destination, put into the shed of the carrier on its wharf, where it had four watchmen, and a fire, from an unknown cause, took place in its steamboat lying at the wharf (the boat being fully manned), which consumed the goods; *held*, that the burden of proof of negligence was on the shipper. *Farnham v. Camden and Amboy R. R. Co.*, 55 Penn. St., 53, 1867.

104. — A contract to exonerate a carrier from all damage that "might happen" to the goods, will not release him from the effect of his negligence or misconduct. *Sager v. Portsmouth, etc., R. R. Co.*, 31 Me., 228, 1850.

105. — The burden of proof to show negligence or misconduct in such case, is on the plaintiff. *Ib.*

106. — The common law liability of a common carrier for the safe carriage of goods may be limited and qualified by special contract with the owner; provided such contract do not attempt to cover losses by misconduct or negligence. *York Company v. Illinois Central R. R. Co.*, 3 Wallace, 107, 1865.

107. — Thus a contract to exempt a common carrier from loss by fire was held valid, the fire not having been occasioned by the fault or negligence of the carrier. *Ib.*

108. — When the responsibility is limited by special contract, the burden of proving negligence is on the shipper. *Kansas Pacific R. R. Co. v. Reynolds*, 8 Kan., 623, 1871.

109. Notice to limit liability. A notice limiting the liability of a carrier, even though brought home to the knowledge of the shipper, will not exempt the carrier from liability for negligence. *Blumenthall v. Brainerd*, 38 Vt., 402, 1866. *Mann v. Birchard*, 40 ib., 326, 1867.

110. — If such notice could limit the lia-

bility of the carrier, knowledge of it in other transactions by the agent of the owners of the goods, in this transaction, would not affect the principals. A notice to the agent to bind the principal must be in the same transaction. *Ib.*

111. — Although a carrier's liability may be limited by express contract, a general notice will not have that effect, even though brought home to the knowledge of the shipper. *Ib.*

112. — The common law liability of a common carrier may be restricted by a notice from him, brought to the knowledge of the owner of the goods. *Sager v. Portsmouth, etc., R. R. Co.*, 31 Me., 228, 1850.

113. — But no notice or contract will exonerate the carrier from the effects of his misconduct or negligence. *Ib.*

114. — A common carrier cannot limit his liability by a notice brought home to the knowledge of the shipper. *Moses v. Boston and Maine R. R. Co.*, 32 N. H., 523, 1856; *Railroad Co. v. Manufacturing Co.*, 16 Wallace, 318, 1872; *Michigan Central R. R. Co. v. Hale*, 6 Mich., 243, 1859.

115. — The common law liability of a common carrier may, however, be restricted by a special contract. The case of the *Michigan Central R. R. Co. v. Ward*, 2 Mich., 588, overruled. *Ib.*

116. — A public notice will not discharge a common carrier from his legal liability to answer for an accidental loss or destruction of the goods in his possession. *Moses v. Boston and Maine R. R. Co.*, 24 N. H., 71, 1851.

117. — Although a common carrier cannot, by a general notice to such effect, free itself from all liability for property by it transported, yet by notice brought to the knowledge of the owner, it may reasonably qualify its liability. *Smith v. North Carolina R. R. Co.*, 64 N. C., 235, 1870.

118. — A common carrier may, by special contract with the owner of the property to be transported, so change his relation as to become a private carrier; but a general notice to the public will not be evidence of such contract, even if the existence and contents of such notice are brought home to the party. *Kimball v. Rutland and Burlington R. R. Co.*, 26 Vt., 247, 1854.

119. — But where the company has one

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rate of transportation without the risk of a common carrier, and a higher rate with such risk, if the owner of the property elect to pay the lower rate, he cannot hold the company as a common carrier. *Ib.*

120. — A notice to restrict the common law liability of a carrier, which was given by the carrier to a person who was simply directed by the owner to deliver the goods to the carrier, was held insufficient, in the absence of any knowledge of, and assent to, such notice, on the part of the owner. *Fillebrown v. Grand Trunk R. R. Co.*, 55 Me., 462. 1867.

121. — Though a railway company may limit its liability by notice, yet the terms of the notice must be clear and explicit, and the person with whom the carrier deals must have knowledge of the terms of the notice; and where the notice is in the English language and the passenger is a German, it is incumbent upon the carrier to prove the knowledge by the passenger of the limitation in the notice. *Camden and Amboy R. R. Co. v. Baldauf*, 16 Penn. St., 67. 1851.

122. — Where the notice is printed upon a ticket, it must be in a language understood by the passenger, or else it must be explained to him. *Ib.*

123. — Carriers cannot, by special agreement, discharge themselves from ordinary care. *Ib.*

124. — A portion of a certain quantity of wool was delivered to the D. and M. R. R. Co. by the owner, and received by the agent of the company for transportation, with the understanding that the balance should be sent to the depot as soon as the company should give notice that cars were ready to ship it. The owner sent up the wool, which was accepted by the company, whereupon the owner signed a shipping request furnished to him, to the effect that said company would forward all of said wool, according to certain specific conditions endorsed thereon, and limiting the company's liability. Part of the wool was lost before the balance was shipped. *Held*, that whatever might have been the effect of such a notice, if given before the delivery of the property at the depot, it came too late to affect the question of a prior delivery to and acceptance by the company as a common carrier. At the time of the receipt of the no-

tice, plaintiffs had a right to consider it as intended to refer only to the liability of the company in respect to the carriage of the property. *Detroit and Milwaukee R. R. Co. v. Adams*, 15 Mich., 458. 1867.

125. Receipt. If a shipper takes a receipt for his goods from the carrier, containing conditions limiting the liability of the carrier, with a full knowledge on the part of the shipper of such conditions, and intending to assent to the restrictions contained in them, it becomes his contract as fully as if he had signed it. *Illinois Central R. R. Co. v. Frankenberg*, 54 Ill., 88. 1870.

126. — Plaintiffs agreed with a common carrier of freight for the transportation of certain bales of cotton at a specified rate of freight. At the time the agreement was made no bills of lading or shippers' receipts were given by the carrier, but after the goods had been shipped, receipts were sent to the shippers containing a clause exempting the carrier from liability for loss by fire, but this clause was not brought to the notice of the shippers until after the cotton had been destroyed by fire. *Held*, that the carrier was liable for the loss. *Lamb v. Camden and Amboy R. R. Co.*, 4 Daly (N. Y.), 483. 1873.

127. — The acceptance from a carrier of a receipt for goods in which is a clause limiting its liability, is only *prima facie* evidence that the owner assented to the conditions. *Strohn v. Detroit and Milwaukee R. R. Co.*, 21 Wis., 554. 1867.

128. — If the owner had previously entered into a parol agreement, he had a right to presume that the receipt contained nothing contrary to that agreement. *Ib.*

129. — The plaintiffs should have been permitted to prove that the goods were delivered under such oral agreement, and that the receipt was not delivered until some days afterwards. *Ib.*

130. — A carrier may stipulate for a limitation of his responsibility, so far as he is an insurer against losses by accident or mistake; but he cannot exempt himself from losses caused by neglect of that degree of diligence which the law casts upon him or his character of bailee. Public policy and fair dealing cannot be frustrated by the design and circumvention of artfully prepared printed receipts thrust upon the public, without the op-

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portunity of fair assent, in the press and hurry of railroad travel. *Levering v. Union Transportation and Ins. Co.*, 42 Mo., 88, 1867; see also *French v. Buffalo and Erie R. R. Co.*, 2 Abbott's Ct. of Ap. Dec. (N. Y.), 196, 1868.

131. Release. A release of all damages that might occur within one year from the date of the release was held valid. *McCann v. Baltimore and Ohio R. R. Co.*, 20 Md., 202, 1863.

132. Statute. The parties may fix such reasonable rates as they may agree upon, and they may make such limitations to the liability of the carrier as they think proper. The railroad act of 1850 does not fix the terms of shipment. *Nelson v. Hudson River R. R. Co.*, 48 N. Y., 498, 1872.

133. — The General Railroad Law (Session Laws 1855, p. 173), does not prevent a railway company from restricting, by special contract, its common law liability as a carrier. *McMillan v. Michigan Southern and Northern Indiana R. R. Co.*, 16 Mich., 79, 1867; *Heffron v. Same*, ib.; *King v. Same*, ib.

134. — The act of 1863, providing that railway companies shall not by contract limit their liability as common carriers, is not inconsistent with the rights of the charter of the Mobile and Ohio R. R. Co. *Mobile and Ohio R. R. Co. v. Franks*, 41 Miss., 494, 1867.

135. Terms of contract. A contract limiting the liability of a carrier will have no greater operation given it than the language used plainly indicates that the parties intended that it should have. *Menzell v. Railroad Co.*, 1 Dillon (U. S. Cir. Ct.), 531, 1870.

136. — While it is competent for common carriers to provide by contract for such exemptions, it must be done in clear and unambiguous terms. *Edsall v. Camden and Amboy R. R. Co.*, 50 N. Y., 661, 1872.

III. DAMAGES.

1. Delay.

137. Acts of a third person. Where it is shown that the delay beyond the ordinary time was solely imputable to the reckless act of a third party the carrier will not be responsible for the delay. *Conger v. Hudson River R. R. Co.*, 6 Duer (N. Y.), 375, 1857.

138. Blockade of freight. A railway com-

pany may on account of unusual press of business, or inadequacy of rolling stock, decline to receive freight, but if it receive the freight it must be forwarded without delay or the company will be liable for the damages caused thereby. *Faulkner v. South Pacific R. R. Co.*, 51 Mo., 311, 1873.

139. — An instruction that "press of freight will not excuse failure to carry goods in ordinary time, where such press had existed for a long time, and was known to the company when they received the goods, unless they notified the shipper," was held to be erroneous. *Peet v. Chicago and Northwestern R. R. Co.*, 20 Wis., 594, 1866.

140. — There is no invariable rule requiring freight to be carried in the order in which it was received, without regard to its character and condition, or its liability to perish. *Id.*

141. — A railroad company receiving goods in Wisconsin to be carried by its own and connecting lines to Buffalo, N. Y., held, not to be excused for a failure to transport to the end of its own line at Detroit, and deliver, or offer to deliver, to the next carrier, merely by the fact, which its agents knew, that there was a block of freight at Suspension Bridge (over Niagara river), which created a block at Detroit, and the further fact that there was no room for the goods in the defendant's depot at Detroit, specially where it is not clear that the general block of freight for the east at the bridge would have prevented the transportation of plaintiff's goods to Buffalo. *McLaren v. Detroit and Milwaukee R. R. Co.*, 23 Wis., 138, 1868.

142. — A railway company having its road properly equipped and in good order, is not liable, in the absence of a special contract, for delay occasioned by an unusual quantity of freight being delivered to it for shipment. *Wibert v. New York and Erie R. R. Co.*, 12 N. Y., 245, 1855; *Same v. Same*, 19 Barbour (N. Y.), 36, 1854; *Jones v. New York and Erie R. R. Co.*, 29 ib., 633, 1859; (disapproving *Kent v. Hudson River R. R. Co.*, 22 ib., 278.)

143. Burden of proof. The burden is on the plaintiffs to show that the defendants failed to exercise ordinary care and diligence in carrying the goods, but unusual and unexplained delay is *prima facie* evidence of want of ordinary care. *Mann v. Birchard*, 40 Vt., 326, 1867.

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144. Connecting lines. Where a carrier agrees to carry goods to Buffalo known to be destined to Albany or New York, and his default or delay causes damage to the shipper from the non-arrival of the goods in a reasonable time at Albany, he is responsible for such damage as much as if it had actually occurred at Buffalo. *Sisson v. Cleveland and Toledo R. R. Co.*, 14 Mich., 489. 1866.

145. — Railroad companies, as common carriers, may make valid contracts to receive freight at, or to convey it to points beyond the limits of their own road; and thus become liable for the acts and neglects of other carriers not under their control. *Noyes v. Rutland and Burlington R. R. Co.*, 27 Vt., 110. 1854.

146. Contract. A railroad company is bound by its freight agent's agreement to carry goods within a specified time, if it be a reasonable time. *Strohn v. Detroit and Milwaukee R. R. Co.*, 23 Wis., 126. 1868.

147. — A mere statement by the agent that the ordinary time for transportation over a proposed route is a certain number of days, does not constitute an agreement to carry in that time. *Ib.*

148. Conversion. A mere delay in the delivery of goods, is not a conversion of the property; nor will it entitle the owner to recover the value thereof. *Briggs v. New York Central R. R. Co.*, 28 Barbour (N. Y.), 515. 1858.

149. Corn. Where corn was received by a railroad company to be transported to a point, the usual time for reaching which was two and one-half to three days, and the shipment did not reach its destination, a part of it until eleven days, and a part forty-five days after it was shipped: *held*, that this was such delay as would render the company liable for the resulting damages. *Illinois Central R. Co. v. McClellan*, 54 Ill., 58. 1870.

150. — In an action against a railroad company to recover for injury to a quantity of corn, occasioned by delay in the transportation, the company cannot claim exemption from liability under a clause in the bill of lading which releases it from loss on perishable property. Mature, merchantable corn cannot be regarded as of that character. *Ib.*

151. Cotton. A carrier, upon being applied to by the owner to deliver certain cotton (then at its depot and in its possession for

transportation) to another railroad company, declined to do it, or to allow the owner to do it — promising to deliver it itself, within three days. *Held*, that it was gross negligence for such carrier to allow the cotton to remain undelivered for several months afterwards and until it became rotten by exposure to the weather. *Glenn v. Charlotte and South Carolina R. R. Co.*, 63 N. C., 510. 1869.

152. Duty of carrier. A carrier is responsible in damages for a failure to ship goods in a reasonable time. *Rome R. R. Co. v. Sullivan*, 32 Ga., 400, 1861; *Kent v. Hudson River R. R. Co.*, 22 Barbour (N. Y.), 278, 1856.

153. Duty of shipper. The party injured must make all reasonable efforts to reduce his damages as much as possible. *Vicksburg and Meridian R. R. Co. v. Ragsdale*, 46 Miss., 438. 1872.

154. Expenses. The consignee cannot recover for the time and expenses of an agent and team, while waiting for the goods at the place of destination, without showing that defendant had notice, at the time of contracting for the transportation of the goods, that such agent of the owners would be waiting to receive them. *Briggs v. New York Central R. R. Co.*, 28 Barbour (N. Y.), 515. 1858.

155. Machinery. In an action against a common carrier, for not delivering machinery in proper time, the measure of damage is the value of the use of the machinery during the period of improper detention. *Priestly v. Northern Indiana and Chicago R. R. Co.*, 26 Ill., 205. 1861.

156. — Where a part of a machinery was consigned to a defendant as plaintiff's agent, to be forwarded to him, and defendant negligently detained it, whereby the whole machinery was kept idle, it was *held*, that the measure of damages was not what might have been made by the machinery while it was idle, but the legal interest on the capital invested, the price of the hire of hands necessarily unemployed during the time, the cost of sending for the missing machinery, and all other damages that resulted, necessarily, from defendant's negligence. *Foard v. Atlantic and North Carolina R. R. Co.*, 8 Jones' Law (N. C.), 235. 1860.

157. — Where machinery was consigned to the agent of a railroad company to be for-

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warded to the plaintiff over its road, and it was negligently detained for a time, it was held, that the defendant was not liable as a common carrier for this neglect, but only as bailee. *Ib.*

158. — Where the defendant failed to deliver, in a reasonable time, a boiler constructed for a steam saw-mill, the measure of damages would be as follows: The actual expense incurred, as well as the reasonable time and trouble in traveling to ascertain what had become of the boiler, and the expense incurred in preparations for connecting the boiler with the fixtures and machinery of the saw mill, and interest on the value of the property during the time of detention. *Davis v. Cincinnati, Hamilton, etc. R. R. Co.* 1 Disney (Ohio), 23. 1855.

159. Measure of Damages. Where goods are contracted to be sold at a price fixed, to be delivered at a particular place, and a carrier promises to transport and deliver them in due time, with full notice that the goods are sold if forwarded seasonably, the measure of damages for a breach of his contract by which the consignor loses the sale, is the difference between the contract price and the value of the goods when actually delivered. *Denning v. Grand Trunk R. R. Co.*, 48 N. H., 455 1869.

160. — Where there was a contract to carry freight at a particular time, proof that its transportation was prevented by an unexpected rush of freight is not admissible. *Ib.*

161. — Testimony that the purchaser of the goods was informed, after they were shipped, that they would soon arrive, and that he was satisfied, is admissible. *Ib.*

162. — If goods are shipped to be sold, the enhanced price at place of delivery is to be considered in estimating the damages. But where the property shipped is not for sale this rule is not sufficient. There can be no fixed rule of compensation, but this much may be considered as well settled: 1. The natural consequences of the breach must always be considered; 2. Such consequences as the parties are presumed to have contemplated; 3. Damages not the direct and natural consequence of the breach shall not be considered unless by the terms of the agreement; 4. Loss of profits in business cannot be allowed, unless the data of estimation are so definite and certain that they can be ascertained reason-

ably by calculation, and then the party in fault must have had notice, either from the nature of the contract itself, or otherwise that such damages would ensue from nonperformance; 5. Speculative profits cannot be considered; 6. If machinery is transported, its rental price and expenses of idle hands may be considered. *Vicksburg and Meridian R. R. Co. v. Ragsdale*, 46 Miss., 458. 1872.

163. — In an action against a common carrier for damages in not reasonably transporting goods, the decline in their market value, between the time when they actually arrived at their place of destination, and when, in the exercise of proper diligence on the part of the carrier, they might have so arrived, is a material element proper for the consideration of the jury in ascertaining the actual damages sustained by the shipper. *Weston v. Grand Trunk R. R. Co.*, 54 Me., 376. 1867.

164. — Where flour delivered to be transported to New York for sale, was not delivered there in a reasonable time, the measure of damages is the depreciation in its value in the New York market, between the time when it should have been delivered and that at which it was delivered — it having actually been sold at a diminished price. *Peet v. Chicago and Northwestern R. R. Co.*, 20 Wis., 594, 1866; *Galena and Chicago Union R. R. Co. v. Roe*, 18 Ill., 488, 1857; *Faulkner v. South Pacific R. R. Co.*, 51 Mo., 311, 1873; *Cutting v. Grand Trunk R. R. Co.*, 13 Allen (Mass.), 381, 1866; *Ward v. New York Central R. R. Co.*, 47 N. Y., 29, 1871; *Sisson v. Cleveland and Toledo R. R. Co.*, 14 Mich., 489, 1866.

165. — In such case the inquiry as to the values should be limited to the place of delivery. *Kansas Pacific R. R. Co. v. Reynolds*, 8 Kan., 623. 1871.

166. — Where goods are delivered to a carrier, and they are not transported according to his undertaking, but are injured or destroyed, the rule of damages is the value of the goods at the place to which they were to be carried, less the freight. *Michigan Southern and Northern Indiana R. R. Co. v. Caster*, 13 Ind., 164, 1859; see also *Holden v. New York Central R. R. Co.*, 54 N. Y., 662, 1873.

167. — Contract price. The contract price should be taken as the basis for estimating the damages; otherwise, the market price at the place of delivery, at the time the grain

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should have reached there. *Illinois Central R. R. Co. v. McClellan*, 54 Ill., 58. 1870.

168. — In an action to recover damages for the nonperformance of a contract to transport flour from one place to another, and to deliver the same at the latter place, on or before a specified day, the measure of damages is the difference between the contract price of the flour, had it arrived at the place of delivery on the day specified, and the price for which it was actually sold in the market, on its arrival. *Medbury v. New York and Erie R. R. Co.*, 26 Barbour (N. Y.), 564. 1858.

169. Neglect to forward goods. Where the agent of a railroad company for the delivery of freight, authorized to make all necessary arrangements as to the time and place of its delivery, agrees to forward freight by another line, if this agreement is neglected, the railroad company will be liable. *Michigan Southern and Northern Indiana R. R. Co. v. Day*, 20 Ill., 375. 1858.

170. Particular case. The defendant, a railway company, held guilty of negligence in delaying to forward goods under the facts of this particular case. *Coffin v. New York Central R. R. Co.*, 64 Barbour (N. Y.), 379. 1872.

171. Place of computation of damages. Damages for delay are to be appraised at the place of destination of the property. And the place of destination, in this sense, must, in the absence of any express contract to deliver it at any particular place, be where the route of the carrier ends. *Marshall v. New York Central R. R. Co.*, 45 Barbour (N. Y.), 502. 1866.

172. Plank. Plank to construct a plank-road was delivered at a station of a railroad, to be transported to another station; the company did not transport it; if liable in damages, the measure would be the difference of value of the plank at the first station and the station to which it was to be carried, deducting cost of transportation; provided, such lumber could be obtained at the latter station, and that the carrier should compensate for the delay from his failure. *Pennsylvania R. R. Co. v. Titusville Plankroad Co.*, 71 Penn. St., 350. 1872.

173. Pleading. Such damages as are presumably necessarily the result of the breach of the contract need not be specially pleaded,

but if other special damages are claimed, they must be stated. *Vicksburg and Meridian R. R. Co. v. Ragsdale*, 46 Miss., 458. 1872.

174. — A suit against a carrier for a breach of his contract as such, should be upon the bill of lading, under the Code, where such bill is given, and embraces the terms of the contract. *Indianapolis and Cincinnati R. R. Co. v. Remmy*, 18 Ind., 518. 1859.

175. Strikes. A railroad corporation is responsible for damages resulting from a delay to transport freight in the usual time, which was caused by a great number of its servants suddenly and wrongfully refusing to work. *Blackstock v. New York and Erie R. R. Co.*, 20 N. Y., 48, 1859; *Same v. Same*, 1 Bosworth (N. Y.), 77, 1857.

176. Unusual press of business. A railroad company is not liable for damages with reference to expected profits in a case where no special contract is made, and a delay happened in the transportation, in consequence of an unusual press in business, the company having a reasonable equipment for all ordinary purposes, and having forwarded the goods with as much expedition as practicable. It is liable for any injury to the goods during the delay. A railroad company cannot be relieved from its contract to deliver goods at a particular place, by showing that the next carrier would not receive the goods from it at the terminus of its line. *East Tennessee and Georgia R. R. Co. v. Nelson*, 1 Coldwell (Tenn.), 272. 1860.

177. — The law implies that goods shall be delivered at their destination within a reasonable time. Nothing relieves from this obligation but the act of God, the public enemy, the act or conduct of the owner, or a special contract. *Vicksburg and Meridian R. R. Co. v. Ragsdale*, 46 Miss., 458. 1872.

178. — The law does not attempt to fix what is a reasonable time. Each case must be governed by the circumstances surrounding it. *Id.*

179. — Where the company has a reasonable equipment for all ordinary business, unusual and extraordinary press of business is a sufficient excuse for delay. *Id.*

180. Veal. A Massachusetts statute prohibits the sale of veal killed when less than four weeks old. The plaintiffs, residents of Vermont, were not shown to have knowledge

Damages.

of this statute. *Held*, that the fact, if proved that some of the veals sent by the defendants' railway to Massachusetts to be sold, were within the provisions of this statute, would not avail defendants as a defense to an action for want of care in transporting the goods, and the statute could only be considered so far as it might affect the value of the veal. *Mann v. Birchard*, 40 Vt., 326. 1867.

181. **War.** The fact that a railway is under military control in time of war, is a sufficient excuse for delay in making shipment of goods. *Illinois Central R. R. Co. v. Ashmead*, 58 Ill., 487. 1871.

182. **Weather.** In the absence of a special contract, the obligation of a carrier of goods is to transport them by the usual route proposed by him to the public, and to deliver them within a reasonable time. He must use reasonable expedition, but is not bound to use extraordinary exertions, or extra expense, to surmount obstacles caused by the weather. *Empire Transportation Co. v. Wallace*, 68 Penn. St., 302. 1871.

183. — The established route of the carrier was by rail to Philadelphia, and by water to Boston. He was not bound to send goods by rail from Philadelphia when there was an obstruction to water navigation. *Ib.*

184. — Where a railway company knows that its road is blockaded by snow, and that goods cannot be forwarded within a reasonable time, it is its duty to so inform a shipper upon receiving goods, or it will be liable for damages for delay in shipment. *Great Western R. R. Co. v. Burns*, 60 Ill., 284. 1871.

185. **What delay is unreasonable.** When a box, shipped at Adrian for Chicago (the usual railroad time of transportation being three days) on the 29th October, arrived at Chicago on the 3d of November, and was not delivered by the freight agent until the 15th of the latter month, this was held so unreasonable a delay as to entitle the owner to damages. *Michigan Southern and Northern Indiana R. R. Co. v. Day*, 20 Ill., 375. 1858.

2. Damages generally.

186. **Damages by weather.** Although the goods are not taken by the consignee within the time fixed for the removal, yet the carrier

has no right to cast them away, or leave them where they will be open and exposed to injury from the elements. *Cook v. Erie R. R. Co.*, 58 Barbour (N. Y.), 312. 1870.

187. — After the arrival of goods at their place of destination, the consignee commenced removing them, but residing at a distance of twenty miles from the depot, with only one team, he could not conveniently take more than one load per day. The goods were thrown out of the car, upon the ground, on the company's premises, and by directions of their agent; and while in this situation, were wet and damaged by the rain, for want of shelter. *Held*, that the question whether the defendant had taken proper care of the goods, was a question for the jury, and it was properly submitted to them. *Ib.*

188. **Delivery.** A lot of wheat was delivered to the M. & M. R. R. Co. at E., to be consigned to E. & W. at M., and on the next morning, after the arrival of the train, the consignee called for the wheat and it could not be found, though landed on the platform the night previous. *Held*, that the company was liable for its value. *Milwaukee and Mississippi R. R. Co. v. Fairchild*, 6 Wis., 403. 1859.

189. **Evidence.** The owner of goods suing for damages must show that they were in a good condition when they came to the possession of the defendant, as a part of the evidence that they have been injured while in his custody. *Smith v. New York Central R. R. Co.*, 43 Barbour (N. Y.), 225, 1864; *Same v. Same*, 41 N. Y., 620, 1869.

190. **Interest.** Interest may be allowed as damages upon the value of goods lost in shipment. *Kyle v. Laurens R. R. Co.*, 10 Richardson's Law (So. Car.), 382. 1857.

191. **Measure of damages.** The rule of damages in case of the loss of goods by a common carrier, is their value at their place of destination, at the time of the loss, with interest from that time, deducting the freight where it has not been paid. *Blumenthall v. Brainerd*, 38 Vt., 402. 1866.

192. — While the measure of damages is the value of the cotton at the point of destination, the defendant has no cause of complaint that the proof is confined to the value of the cotton at the point of shipment, or the place where it was burnt on the line of the road;

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as goods are presumed to be worth as much or more at the place of destination than at the point of shipment, till that presumption is rebutted by proof. *Rome R. R. Co. v. Sloan*, 39 Ga., 636. 1869.

193. — Where goods have been lost in transit, their value at the place of destination is the measure of damages, and no deduction should be made on account of commissions. *Kyle v. Laurens R. R. Co.*, 10 Richardson's Law (So. Car.), 382. 1857.

194. — The application of the general rule in an action for damages for injuries done to goods in course of transit, that the measure of damages is the difference between the market value of the goods, as delivered, and what their value would have been if they had not been damaged, is not always just and proper. *Winne v. Illinois Central R. R. Co.*, 31 Ia., 583. 1871.

195. — It was therefore *held*, in an action for damages to a lot of flour, that the plaintiff might recover what it cost to put the flour in a saleable condition, after its arrival at the place of consignment, it appearing that such expenditure was beneficial to the defendant by reducing the damages which it would have sustained under the general rule. *Ib.*

196. *Nursery stock.* In an action for damages resulting from the negligence of a carrier in transporting nursery stock, it was for the jury to determine from the evidence whether the carrier was guilty of negligence, and whether the damaged condition in which the stock was afterwards found resulted from that negligence. *Congar v. Galena and Chicago Union R. R. Co.*, 17 Wis., 477. 1863.

197. *Partial loss.* A common carrier is not liable for the whole value of property damaged by his want of care, so long as its character is not so changed but that it may be applied to the ordinary uses of such property, though he will be answerable for the depreciation in its value by reason of its being rendered unfit for some particular use. *Hackett v. B. C. and M. R. R. Co.*, 35 N. H., 390. 1857.

198. *Property not the subject to traffic.* Where property is destroyed by the negligence of a carrier in transit, the measure of damages, where such property has not been the subject of traffic, is the fair market value of the property at or near the place of its

destruction; so held in a case where a horse had been injured in transit. *Harris v. Panama R. R. Co.*, 3 Bosworth (N. Y.), 7. 1858.

199. *Value.* Evidence of value of thirty barrels of whisky, etc., considered, and *held*, that a statement of its value would be considered as at the place of its destination. *Toledo, Peoria and Warsaw R. R. Co. v. Kichler*, 51 Ill., 157. 1869.

IV. LOSSES BY FIRE.

1. *Liability as carriers.*

200. *Burden of proof.* Because goods were destroyed in a railroad car, by an accidental fire, the carrier is not thereby released. It is the duty of the carrier to show what becomes of goods; the burden of proof is upon him. *Porter v. Chicago and Rock Island R. R. Co.*, 20 Ill., 407. 1858.

201. *Connecting lines.* The defendant was a joint-stock corporation organized for the purpose of conducting the business of a common carrier by water between N. and L., and had made a contract with a railroad company, whose line ran from L. to S., by which it was agreed that its boats should run daily in connection with certain trains upon the railroad, that through freight received for transportation over the route of both companies should be carried at reduced rates, that the receipts for such freight should be divided in certain proportions between them, that the railroad company should build a wharf and depot in L., where both companies could transact their freight business, the defendant paying a rent for its use of the same, and which contained other minor provisions directed to the same general purpose of securing a through-freight business for the benefit of both. Goods having been shipped at N. for transportation to S., the defendant gave a written receipt for them as received "on board the Norwich and Worcester boat, bound for S." *Held*, that in the absence of further evidence of an express contract, the defendant was only bound to carry the goods to L., and there deliver them to the railroad company. *Converse v. Norwich and New York Transportation Co.*, 33 Conn., 166. 1865.

202. — *Held*, also, that their liability was

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between the companies, which was known to the owner of the goods, that in such cases a single bill for the amount of the freight from N. to S. should be made out by the defendant, and collected and receipted by the agent of the railroad company at S. on delivery. *Ib.*

203. — The railroad company and steamboat company had a covered wharf in common at their common terminus, used both as a depot and wharf, and it was the established usage for the steamboat company to land goods for the railroad on the arrival of its boats in the night, upon a particular place in the depot, where they were taken by the railroad company the next morning, both companies having equal possession of the depot. Freight received by the steamboat company for delivery to the railroad company was landed in the depot and at the place in question during the night of Saturday, and was burned with the depot in the afternoon of Sunday following, the railroad company having done no act in the meantime accepting delivery. *Held*, that the steamboat company had delivered the goods, and was not liable for their loss. *Ib.*

204. — The defendant was a common carrier of passengers and freight by railroad from Providence, R. I., to Groton, Conn., connecting at Providence with a railroad from Boston, and at Groton with steamboats for New York, the three having formed for several years a through line for passengers and freight from Boston to New York. The line had a standing advertisement in a Boston newspaper that cars would leave the station there at half-past five, P. M., every week day, connecting on three days named with the steamboat Commonwealth, and on the alternate days with the steamboat Plymouth Rock, for New York, and that through tickets were furnished and baggage checked through to sundry places beyond New York. The defendant also, by handbills and placards, advertised those two boats as running between Groton and New York, in connection with its road. The plaintiffs, who had for a long time been in the habit of sending by the line, shipped a quantity of goods by it at Boston for New York, on the 28th day of December, taking bills of lading signed by an agent of all the companies forming the line, by which it was provided that the companies

not affected by the fact that there was a usage should not be liable for any injury to freight in the course of transportation arising from accidental delays, and that no package of goods, if lost, should be deemed of greater value than \$200, unless specially receipted for at a greater valuation. The plaintiffs procured the bills of lading printed and kept them in blank, to be filled up by themselves as needed. The steamboat Plymouth Rock, which was the regular boat for December 28th, had been taken off for necessary repairs, and the Commodore, a much smaller boat, belonging to the same owners, and which they were accustomed to put on in the place of either of the regular boats when taken off for repairs, was running in her place. By reason of her small capacity, a large quantity of freight, which came by railroad from Boston on the evening of the 28th of December, including a part of the goods of the plaintiffs, and which the Plymouth Rock would have been able to take, could not be carried, and had to be discharged, as was the custom in such cases, into the depot of the defendant at Groton, to wait for the boat of the next day, and during the night was destroyed by fire with the depot. In a suit brought by the plaintiffs for the value of the goods lost, in which the jury returned a verdict for the plaintiffs for the full value of the goods, without reference to the limitations in the bills of lading, it was *held*, on a motion of the defendants for a new trial:—

I. That the advertisement was obviously published for the information of passengers and not of freighters, and that therefore the court below erred in instructing the jury that, in determining whether there was a contract on the part of the defendant that the Plymouth Rock should be the boat for the night in question, they should particularly consider the advertisement.

II. That there was nothing in the representation of the defendant as to the boats regularly running in connection with its road that constituted a binding stipulation that one of the boats should not be taken off for necessary and usual repairs, and another temporarily substituted for it.

III. That on the arrival of the goods at Groton, the defendant was bound to forward by the boat of that evening, only so much of

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the freight as the boat could take, and was not responsible for the delay of the rest.

IV. That all that could be required of defendant was to take reasonable care of the goods left over, until they should be taken by the boat of the next day.

V. That if the defendant was liable at all, it was only to an amount not exceeding \$200 for each package. *Lawrence v. New York, Providence and Boston R. R. Co.*, 36 Conn., 63. 1869.

205. — Where a railroad company had an agreement with a teamster, by which goods were carried to a point beyond the line of its railroad, although the company had no interest in the profits of such transportation, it was *held*, that where the goods were destroyed by fire in the depot of the company, while awaiting transportation by said teams, the liability of the company, under the facts of this case, was that of a common carrier. *Lawrence v. Winona and St. Peter R. R. Co.*, 15 Minn., 390. 1870.

206. **Contract.** A special contract for the carriage of goods, construed with reference to damages caused by sparks. *Steinwig v. Erie R. R. Co.*, 43 N. Y., 123. 1870.

207. — **Limiting liability.** Where a railroad company, being unprovided with the means of arresting sparks, gave notice that it would transport cotton at half rates, in case it were relieved from risk as to fire, and thereupon an agent of the owner shipped cotton upon the road at half rates: *held*, that bare proof of destruction by fire whilst being transported by the company, would not entitle the owner to recover damages for such loss. *Smith v. North Carolina R. R. Co.*, 64 N. C., 235, 1870; see also *New Orleans, etc., Ins. Co. v. New Orleans, etc., R. R. Co.*, 20 La. An., 302, 1868; *Levy v. Pontchartrain R. R. Co.*, 13 ib., 477, 1871.

208. — The Pennsylvania R. R. Co. gave a receipt to F. B. & Co. for oil to be delivered to "Leech at the company's freight station, Philadelphia;" appended to the receipt was "Rate to Red Hook, 65 cents;" also, "This oil is carried only on open cars and entirely at the owner's risk from fire and leakage, whilst in the possession of the railroad company, or carriers, while standing or in transit." The freight was to be paid at Red Hook. Mentioning Red Hook as the ultimate destination and payment of freight there, was at most

no more than an engagement to forward to that place. *Camden and Amboy R. R. Co. v. Forsyth*, 61 Penn. St., 81. 1869.

209. — The limitations as to liability only apply to the Pennsylvania R. R. Co. *Ib.*

210. — The Camden and Amboy R. R. Co. having given a receipt to "Leech, agent of the Pennsylvania R. R. Co." for the oil to be transported to New York, and it having been destroyed by fire between Philadelphia and Red Hook, it was *held*, that it was liable as a common carrier, there being no other contract with it than its receipt, which did not limit its liability. *Ib.*

211. **Mistake.** Goods shipped by rail for C., were plainly marked "J. Weil & Bro.," but the station agent entered them on the way-bill as "T. Weil & Co." When J. Weil & Bros. called for the goods at C., they were told that there was nothing for them; and the mistake was not discovered until the goods were destroyed with the depot by fire. *Held*, that the carrier was liable. *Meyer v. Chicago and Northwestern R. R. Co.*, 24 Wis., 566. 1869.

212. — A consignee of goods arriving by railroad sent to the depot a teamster, who knew the place to which the goods were to go, but did not know the marks of the bales: the teamster demanded the goods of the freight agent of the company, who, after a superficial examination, said that the goods had already been delivered. The teamster pointed out some bales, and asked if those were not the goods, as in fact they were. The freight agent turned over one of the bales so as to exhibit the marks, and said those were not the goods, but came from another place. The teamster went away without the goods. *Held*, that the agent was guilty of negligence in not delivering the goods; and the goods being destroyed by accidental fire during the following night, the corporation was responsible for their value. *Stevens v. Boston and Maine R. R. Co.*, 1 Gray (Mass.), 277. 1854.

213. **Place of delivery.** Transportation by steamboats and railroads is necessarily such, that the wharves of the former and depots of the latter are their place of delivery. *Jeffersonville R. R. Co. v. Cleveland*, 2 Bush. (Ky.), 468. 1867.

214. — What is a "reasonable opportunity" of receiving and removing freight after its arrival, will depend upon the peculiar circum-

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stances of each case — whether the freight arrived at its destination out of time, etc. *Id.*

215. Reasonable time for taking away goods. A consignee cannot, after notice of the arrival of property for him, defer taking it away while he attends to his other affairs. *Hedges v. Hudson River R. R. Co.*, 49 N. Y., 223. 1872.

216. — Where goods arrived at their place of destination on the defendant's road, at 11 o'clock A. M., were unloaded into its depot between 1 and 3 P. M., and were probably ready for delivery to the consignee about 4 P. M., and the depot was closed as usual at 6 P. M., and was destroyed with the goods, by fire, the next morning before business hours: *held*, that it was not error to find that, after the goods were ready for delivery a reasonable time for the consignee to take them away had not elapsed before their destruction, and that defendant continued liable for them as a common carrier. *Parker v. Milwaukee and St. Paul R. R. Co.*, 30 Wis., 689. 1872.

217. — Goods for the plaintiffs, transported over defendant's railway, reached their destination near sundown and were taken from the cars and placed in the warehouse of the company about dark Saturday night, and a few minutes afterwards, the warehouse was closed for the night. The warehouse was about three-quarters of a mile from plaintiffs' place of business. Their cartman had called for the goods on Saturday afternoon, about three o'clock, and was told by the freight agent that he need not come again that day, as it would be late before the train would arrive. He was informed about dusk that the goods had come, but made no efforts to get them, as it was about time for the warehouse to close. Before Monday morning the goods and warehouse were burned, without fault of defendant. *Held*, that the defendant was liable for the goods as a common carrier. *Wood v. Crocker*, 18 Wis., 345. 1864.

218. — Where goods, transported by railroad, after reaching their place of destination, are before delivery to the consignees, and while yet remaining in the freight car, destroyed by fire—the consignees using due diligence in regard to taking them away—the carrier is liable. *Hedges v. Hudson River R. R. Co.*, 6 Robertson (N. Y.), 119. 1868.

219. — Certain wool was delivered by

plaintiff to defendant at Exeter, N. H., to be carried to Boston, and there to be delivered to the consignee. The wool arrived at Boston at defendant's freight house, between one and three o'clock in the afternoon. In the usual course of business, from two to three hours were required to unload the freight from the cars into the warehouse, and the gates were closed at five o'clock, so that no goods could be removed from the warehouse after that hour till next morning. During the night the warehouse and wool were consumed by fire. *Held*, that the jury were warranted in finding that the consignee had not a reasonable opportunity to take the wool into his possession before the fire, and that defendant was liable as a common carrier, notwithstanding it might be proven that before the fire the wool had been placed upon the platform in the warehouse, from which such goods were usually delivered, separate from other goods, and ready for delivery. *Moses v. Boston and Maine R. R. Co.*, 32 N. H., 523. 1856.

220. Unavoidable casualty. Fire cannot be considered, in itself, an unavoidable danger, and in case of loss from that cause, the defendant is bound to show the origin or cause of the fire, to bring himself within the exception, otherwise the presumption is, it might have been avoided by proper care. *Union Mutual Ins. Co. v. Indianapolis and Cincinnati R. R. Co.*, 1 Disney (Ohio), 480. 1857.

2. Liability as warehousemen.

221. When liability is that of a warehouseman. Where a railroad corporation, being a common carrier, has a warehouse at which it receives goods for transportation, if goods are delivered there with instructions to forward presently, while the goods remain in the warehouse for the convenience of the company, until they can be forwarded in the usual course of business, the railroad company holds them as a common carrier, and is liable for them as such. *Moses v. Boston and Maine R. R. Co.*, 24 N. H., 71. 1851.

222. — But if the goods are kept back in the warehouse for the convenience of the owner, and by his order, while they are so detained the railroad company will not be liable as a common carrier, but as a depository only. *Id.*

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223. — The liability of the carrier ceases, and it becomes responsible as a warehouseman, upon the arrival of the goods at the point of destination, and their deposit there, in the warehouse of the company, to await the convenience of the consignee. *Francis v. Dubuque and Sioux City R. R. Co.*, 25 Ia., 60, 1868.

224. — A railway company undertook to carry goods for F. from C., the place of shipment to A., where F. resided. The goods arrived at A. on time, about 8 o'clock P. M.; but F. was not there to receive them, nor was he notified of their arrival: they were placed in the company's warehouse ready for delivery. During the night the warehouse and goods were burned. *Held*, that the company was not liable as a common carrier. *Ib.*

225. — A different rule might have prevailed if they had not arrived on time. *Ib.*

226. — The carrier is bound to deliver the goods to the consignee or such person as he may direct; and until such delivery, or that which is equivalent, the liability of the carrier continues. *Angle v. Mississippi and Missouri R. R. Co.*, 18 Ia., 555. 1865.

227. — The absence or failure of the consignee to receive the goods will not absolve the carrier from responsibility. He must make reasonable efforts to place them in proper hands, and if this cannot be done he may take care of the goods by holding them himself. *Ib.*

228. — In the absence of special circumstances or rules, he may lodge them with suitable persons for the owners, and whether held or thus lodged the duties of the carrier cease; but if, according to the uniform course of business, goods not demanded within the specified time are disposed of and kept in a particular manner, or in a designated building, he cannot terminate his liability by lodging them with some third person not authorized to receive them. *Ib.*

229. — If they are delivered to a person as the agent of the owner, he must show the fact of such agency, or circumstances which, in the opinion of the jury, would justify such delivery. *Ib.*

230. — Where one of the rules of the company required that goods should be taken away within twenty-four hours after their removal from the cars at their destination, and

if not thus removed they should be placed in store and storage charged thereon; it was *held*, that if placed in store after the twenty-four hours, the liability of the carrier would be changed to that of a warehouseman; but that a delivery of the goods within the twenty-four hours, to a person who had no authority to receive them, did not change the liability of the carrier, notwithstanding that the owner did not make demand for them until after the expiration of the time mentioned. *Ib.*

231. — The agent of a common carrier in charge of the general business of the carrier at a particular place, has the *prima facie* power to bind his principal by contracts for the storage of goods, but cannot make a valid contract inconsistent with the established rules of the principal which were known to the other party. *Ib.*

232. — When the consignee has notice of the arrival of his goods, and agrees with the carrier, for their mutual convenience, that the goods be left over night in the freighthouse, the liability as a common carrier has ceased, and the goods being destroyed by fire during the night, the carrier cannot be held as an insurer. *Fenner v. Buffalo and State Line R. R. Co.*, 44 N. Y., 505, 1871; reversing *Same v. Same*, 46 Barbour (N. Y.), 103, 1866.

233. — Where A. delivered to a railroad company for transportation, a quantity of hay, which was placed on platform cars; the next day, when the company was about to send it forward, A. requested that it should not be taken away until he could first see the party to whom it was sold, which request was complied with, and the next day the hay was ignited by sparks from a passing locomotive, and a portion of it burned. *Held*, that from the moment A. requested the hay to be detained, the liability of the company was that of a warehouseman only. *St. Louis, Alton and Terre Haute R. R. Co. v. Montgomery*, 39 Ill., 335. 1866.

234. — Where goods transported by a railroad company arrive at the place of destination, and are placed upon the platform of the depot, at the usual place of discharging goods, ready for delivery to the consignee in good order, and he is notified of their arrival, and pays the freight upon them, the liability of the company as a carrier is at an end. *New Albany and Salem R. R. Co. v. Campbell*, 12 Ind., 55. 1859.

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235. — The plaintiff brought suit for the value of goods burned in defendant's freight-house, which were part of a lot that he was delivering for transportation, his evidence tended to show that the company had "authority and direction" from him to transport the goods as fast as delivered; and defendant's evidence tended to show that the goods burnt were kept in the freight-house for his convenience, to await the delivery of the whole lot before beginning the transportation. *Held*, that the defendant had good ground of exception to a ruling of the judge, that it was liable as a common carrier if it had "either such authority or direction" to transport the goods as delivered. *Watts v. Boston and Lowell R. R. Co.*, 106 Mass., 466. 1871.

236. — A railroad company may terminate its liability by storing the goods after their arrival, and if they are not removed within a reasonable time, its liability will be that of a warehouseman only. *Derosia v. Winona and St. Peter R. R. Co.*, 18 Minn., 133. 1872.

237. — A common carrier may terminate his liability as a carrier by storing the goods in a warehouse where no notice can be given to the consignee. *Northrop v. Syracuse, etc., R. R. Co.*, 3 Abbott's Ct. of Ap., Dec. (N. Y.), 386. 1867.

238. — It is the duty of the consignee to give information to the carrier before the arrival of the goods, so that the carrier may know where to give notice to the consignee. If such information is not given, the carrier may be exonerated by storing the goods after having first made due inquiry to ascertain the residence of the consignee. *Pelton v. Rensselaer and Saratoga R. R. Co.*, 54 N. Y., 214. 1873.

239. Instructions of court. Where a railway company is sued for goods destroyed by fire while in its control, the goods having arrived at their destination and been stored in the warehouse of the company, and is sued for negligence as a warehouseman, it is error to assume in the instructions to the jury that it was sued as a common carrier. *Porter v. Chicago and Northwestern R. R. Co.*, 20 Ia., 73. 1865.

240. Mistake. Goods shipped by railroad were retained several days after arrival at the place of destination, in the company's depot, and were then transferred to the store of care-

ful and responsible warehousemen. No notice was received by the consignee of the transfer to the warehouse, and after such transfer the consignee was informed, upon inquiry at the railroad office, that the goods had not arrived. Subsequently the goods were destroyed by the burning of the warehouse. *Held*, that the carrier was responsible for the direct results of the false information given by its employé, and the jury having found that the destruction of the goods was the direct result thereof, the court refused to disturb the finding. *Jeffersonville R. R. Co. v. Cotton*, 29 Ind., 498. 1868.

241. Pleading. Where the petition seeks to make defendant liable as a warehouseman, and the allegations are denied by the answer, such denial does not confer upon the plaintiff the right to recover against the defendant in some other capacity, as in that of a common carrier. *Id.*

242. Wool waste. After evidence had been given, tending to show that "wool waste" was stored in the depot along with plaintiffs' goods, and that it could be distinguished from ordinary wool by its external appearance, by those accustomed to handle the latter, plaintiffs were entitled to show that such wool waste was liable to spontaneous combustion. *Whitney v. Chicago and Northwestern R. R. Co.*, 27 Wis., 327. 1870.

243. — An instruction that "if there was stored in defendant's depot, with plaintiff's property, ordinary wool sacks, appearing from all external indications to be wool, but in fact containing wool waste, negligence on that account could not be imputed to the company unless it appeared that such waste was not a proper article of storage, and that some of defendant's servants knew, or had reason to think that such sacks contained waste instead of wool"—coupled with another instruction that, "if the depot was burned by reason of the spontaneous combustion of wool waste stored therein, and if the servants in charge of the depot, by the exercise of that care and caution which ordinarily prudent men exercise in the care of their own property, would have discovered such dangerous article, and so stored it that in case of spontaneous combustion, it would not have endangered the entire contents of the building, and if they failed to do so, defendant

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was chargeable,"—*held*, to be a full and correct statement of the law on that subject. *Ib.*

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244. Act of God. In case of loss or damage to goods while in the hands of a common carrier, the burden of proof is on the carrier to show that loss was occasioned by the act of God or the public enemies. *Winne v. Illinois Central R. R. Co.*, 31 Ia., 583, 1871; *Bansemmer v. Toledo and Wabash R. R. Co.*, 25 Ind., 434, 1865.

245. — Common carriers are bound to deliver goods carried by them subject only to contingencies arising from the act of God, or from the public enemy. *Angle v. Mississippi and Missouri R. R. Co.*, 18 Ia., 555, 1865; *Bansemmer v. Toledo and Wabash R. R. Co.*, 25 Ind., 434, 1865.

246. — A snow storm which blocks up a railway is an act of God, and will excuse a carrier for delay. *Ballentine v. North Missouri R. R. Co.*, 40 Mo., 491. 1867.

247. — Where a common carrier shows that a loss was by some *vis major*, as by a flood, he is excused without affirmatively proving that he was guilty of no negligence. *Railroad Co. v. Reeves*, 10 Wallace, 176. 1869.

248. — If negligence is asserted to exist, the proof of such negligence rests upon the other party. *Ib.*

249. — The maxim, *causa proxima non remota spectatur*, applies to such cases as to other contracts and transactions; and ordinary diligence is all that is required of the carrier to avoid or remedy the effects of the overpowering cause. *Ib.*

250. — Where the act of God is the proximate cause, the carrier is excused though his own negligence may have contributed as a remote cause. *Ib.*

251. — Where a freshet destroyed a railroad bridge and caused delay in the shipment of cotton, and where the cotton was injured by bad handling, it was *held*, that the company was liable for the injury occasioned by bad handling, but not for the delay. *Lipford v. Charlotte and South Carolina R. R. Co.*, 7 Richardson's Law (So. Car.), 409. 1854.

252. — If the carrier has departed from the line of duty, and has violated his contract, and while thus in fault, and in consequence of that fault, goods being carried are injured, by an act of God, which would not otherwise have produced the injury, then the carrier is liable. *Michaels v. New York Central R. R. Co.*, 30 N. Y., 564. 1864.

253. Agency. The fact that a mere agent, having charge of goods, contracted for their transportation without disclosing the name of the owner, does not deprive the owner of his right of action against the carrier for the loss of the goods. *Ames v. St. Paul and Pacific R. R. Co.*, 12 Minn., 412. 1867.

254. — Where an agent, without disclosing the name of his principal, makes a contract with a common carrier to transport the property of the principal, the latter may maintain an action in his own name against the carrier, to recover damages for the loss of the property. *Elkins v. Boston and Maine R. R. Co.*, 19 N. H., 337. 1849.

255. Assignment of cause of action. A right of action against a common carrier, for negligence in not transporting and delivering personal property, is assignable, so as to authorize the assignee to sue in his own name, under the code. *Smith v. New York and New Haven R. R. Co.*, 28 Barbour (N. Y.), 605, 1858; *Same v. Same*, 16 Howard's Pr. (N. Y.), 277, 1857.

256. — Where a common carrier has possession of the property of A., and also similar property of B., and through mistake delivers the property of A. to a third person upon the order of B., and when the mistake is discovered the carrier pays to A. the value of the property; the carrier can recover the value thereof from the person to whom it is delivered. *Hudson River R. R. Co. v. Lounsberry*, 25 Barbour (N. Y.), 597. 1857.

257. Bailment. Where, by the custom of a railroad company, persons whose grain is shipped by its road are entitled to have the empty bags carried "free," this is not a gratuitous bailment so as to exempt the company from liability except for gross negligence, in case such empty bags are lost. *Pierce v. Milwaukee and St. Paul R. R. Co.*, 23 Wis., 387. 1868.

258. — Where goods are shipped upon a railroad for transportation, the consignor may

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sue for their non-delivery, though he be but a bailee. *Great Western R. R. Co. v. McComas*, 33 Ill., 185. 1864.

259. — In such case either the bailee or the bailor may maintain an action against the carrier for the loss of the property. *Elkins v. Boston and Maine R. R. Co.*, 19 N. H., 337. 1849.

260. **Burden of Proof.** The burden of excusing the non-delivery of freight is upon the carrier. *Chapman v. New Orleans, Jackson and G. N. R. R. Co.*, 21 La. An., 224. 1869.

261. **Clothing.** A third person rolled up the plaintiff's coat in a bundle with his own coat, and placed his own name and address upon the bundle, and delivered it to the defendant, who was a common carrier, for transportation. *Held*, that the plaintiff might maintain an action against the defendant to recover damages for the loss of his coat. *Elkins v. Boston and Maine R. R. Co.*, 19 N. H., 337. 1849.

262. **Defective Cars.** The fact that a person who delivered goods to a railroad company for carriage, accepted a defective car for their conveyance, knowing such defect, does not excuse the carrier for the loss of the goods through such defect, in the absence of any agreement upon the part of the shipper assuming the risk. *Pratt v. Ogdensburg and Lake Champlain R. R. Co.*, 102 Mass., 557. 1869.

263. **Evidence.** A verdict for the defendant sustained under the evidence. *Cohen v. Rome R. R. Co.*, 45 Ga., 293. 1872.

264. — On receipts of the W. & A. R. R. Co., in Georgia, for twelve bales of cotton consigned to B. & S. in Charleston, and proof that the S. C. R. R. Co., usually received cotton sent as this was, and delivered it on such receipts in Charleston, it was *held*, that the evidence was insufficient to charge the latter company. *South Carolina R. R. Co. v. Bradford and Saunders*, 10 Richardson's Law (So. Car.), 307. 1857.

265. — Parol evidence that a corporation established by law in another state has held itself out through its agents, as a common carrier over a railroad in Massachusetts, is *prima facie* evidence sufficient of its capacity to contract for such carriage. *McCluer v. Manchester and Lawrenceburg R. R. Co.*, 13 Gray (Mass.), 124. 1859.

266. — The consignor of cotton, who is the owner thereof, may maintain his action against a common carrier for the loss of the cotton; and the consignee, who is a mere factor, may be a witness for him. *Western and Atlantic R. R. Co. v. Kelley*, 1 Head. (Tenn.). 158. 1858.

267. — In an action to recover damages of a railway company for injury to a lot of flour, during its transportation, the evidence of a witness, who only saw a part of the flour examined at the place of destination is admissible in behalf of the plaintiff. The objection that he only saw a part of the flour does not affect his competency. *Winne v. Illinois Central R. R. Co.*, 31 Iowa, 583. 1871.

268. — In a suit against a common carrier for the value of household goods lost, it is competent for plaintiff to ask a witness as to value, whose opinion is based upon a knowledge of the articles lost, and not on his skill as an expert, his opinion as to their value in bulk. The plaintiff is not obliged to restrict the examination to the value of each article, and in that way arrive at their total value; nor is it incumbent on him to show the process by which the conclusion of the witness is reached. *Seyfarth v. St. Louis and Iron Mountain R. R. Co.*, 52 Mo., 449. 1873.

269. — In an action by the owner of goods against a common carrier, a cartman employed by the plaintiff to deliver the goods, is a competent witness for the plaintiff to prove the delivery, without a release, though the defendant offer to prove to the court that the goods were lost by the misconduct of the witness. *Moses v. Boston and Maine R. R. Co.*, 24 N. H., 71. 1851.

270. **Forwarding.** A railroad company that undertakes to carry goods over its road, and forward them to a place beyond the termination of its line of transportation, is bound to deliver the goods to the consignee, with notice of the ultimate destination and ownership of such goods. *Selma and Meridian R. R. Co. v. Butts*, 43 Ala., 385. 1869.

271. — The notice must be given by some agent or servant of the company, especially charged with that duty, and in a reasonable time after the goods have reached the point of reshipment, from which they are to be forwarded. In such a case, notice to one member of the firm who are consignees, is suffi-

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cient; it need not be given to each member of the firm. *Ib.*

272. — The New York and Erie R. R. Co. received goods for transportation directed to a point beyond the terminus of its route, and known to be so by the shipper. At the time of receiving them the agent of the company told the shipper that it would not be necessary for him to have any one at the terminus to receive the goods, but that they would be shipped right through to the place of their ultimate destination. There being no evidence that the company received, or agreed to receive, freight for the entire distance, *held*, that the company was not liable, as a common carrier, for the safe carriage and the delivery of the goods at their final destination. It was liable, as a common carrier only, to the terminus of its road, and thereafter its liability was that of a forwarder. *Dillon v. New York and Erie R. R. Co.*, 1 Hilton (N. Y.), 231. 1856.

273. — For the plaintiffs doing business in Columbia, goods were shipped from New York to Charleston to the care of the S. C. R. R. Co., whose course of business it was to receive and forward goods so addressed: *Held*, that the company was not liable as a carrier until the goods were received for carriage. As a forwarding agent it would be liable for not taking all the care that a prudent man would do about his own business. *Maybin and Van Wirt v. South Carolina R. R. Co.*, 8 Richardson's Law (So. Car.), 240. 1855.

274. Flood. A railroad company which negligently delays the transportation of goods delivered to it as a common carrier, and then transports them safely to their destination, is not responsible for injuries to the goods by a flood while in its depot at that place, although the goods would not have been exposed to such injury but for the delay. *Denny v. New York Central R. R. Co.*, 13 Gray (Mass.), 481. 1859.

275. — An unusual and extraordinary flood in a river is such an act of God as excuses a common carrier from his liability, at all events for goods he has undertaken to transport; but even in such a case, the carrier is bound to exercise the care of a very prudent man to preserve the goods entrusted to him for carriage. *Wallace, Superintendent, etc., v. Clayton*, 42 Ga., 443. 1871.

276. — The fact that the carrier has done what is usual, is not sufficient to exempt him from a charge of negligence. He must show that he has done what was necessary to be done under all the circumstances. *Wing v. New York and Erie R. R. Co.*, 1 Hilton (N. Y.), 235. 1856.

277. Freezing of fruits, etc. W. shipped 144 barrels of potatoes by the B. C. & N. Y. R. R. for New York, paying that company the freight for the entire distance. The potatoes were delivered by that company to the N. Y. & E. R. R. Co. at C., to be transported to New York. While in their custody and on the deck of a barge in the North river, they were frozen. *Held*, that the N. Y. & E. R. R. Co. was liable to the owner for the injuries occasioned to the potatoes by freezing. *Ib.*

278. — In an action against a common carrier for damages caused by the freezing of certain casks of wine, where it appeared in evidence that the cold weather was not the sole, nor entirely the proximate, cause of the injury, and that the loss would not have taken place nor the damage occurred, had not the negligence and inattention of defendant co-operated with the cold: *held*, that plaintiff was entitled to recover for the loss of the merchandise. Where no restriction is stipulated for, the common carrier is held liable as an insurer, and is responsible in that high degree of diligence commensurate with the duties he assumes. And his liabilities will extend to agencies which the violence of nature causes in consequence of his negligence or defective means. *Wolf v. American Express Co.*, 43 Mo., 421. 1869.

279. — If a railroad train of nine cars, loaded with various lots of freight, becomes obstructed by a snow storm so that four of the cars must be left behind on a cold night without shelter, and the conductor is able to select which cars shall be left, and knows that one car contains goods which will be injured by freezing, he is not bound, as matter of law, to take that car forward rather than other cars containing goods of which in respect to their liability to injury by freezing he knows nothing. *Sweetland v. Boston and Albany R. R. Co.*, 102 Mass., 276. 1869.

280. — Where potatoes were left by the plaintiff at a certain depot under a contract for their transportation to Chicago, on the

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same day, and they were not shipped until next day, it was not error, in an action for injuries to the same by freezing *in transitu*, as alleged, in consequence of delay in shipment, to permit a witness to testify as to their condition when seen by him in the warehouse of the consignee at Chicago, a week or more after they were shipped. It was a question to be determined upon the whole evidence, whether the potatoes were frozen *in transitu*, or after their arrival in Chicago. *Curtis v. Chicago and Northwestern R. R. Co.*, 18 Wis., 312. 1864.

281. — Nor was it error to permit the witnesses to give their opinion as to the weather, and whether it was cold enough to freeze them while on the cars and in the store-room at Chicago. *Ib.*

282. — If a carrier cannot carry all the property received at the same time for transportation, he may give preference to perishable property, over that which is not perishable; and if either must wait it should be the latter. *Marshall v. New York Central R. Co.*, 45 Barbour (N. Y.), 502. 1866.

283. — Where a railway company receives fruits for carriage, it will be held to the obligations and duties required in the carriage of that kind of goods. *Reed v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 3 Houston (Del.), 176, 1865; *Truax v. Same*, *ib.*, 233.

284. Fruits; contract. An arrangement made with a committee of a peach growers' convention, to run a special train during the peach season, making certain connections, such an arrangement being duly advertised by the company, will not constitute a special contract with the peach growers of the state, or with any one of them. *Ib.*

285. Handling of goods. A carrier is liable for injury to goods by careless handling, where they have been properly packed for shipment. *Culbreth v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 3 Houston (Del.), 392. 1866.

286. Inevitable accident; cars thrown from the track. The company cannot excuse itself, as for an inevitable accident, by showing that the cars were thrown off the track by accidentally running over a man; if it appear that the man was a drover attending to cattle on the train, and fell off because no proper place was provided for such attend-

ants, and he was compelled to stand on the bumpers. Even if he fell off by his own carelessness, this does not excuse the company for putting him in a position where his carelessness is productive of injury to others. *Goldney v. Pennsylvania R. R. Co.*, 30 Penn. St., 242. 1858.

287. Instructions. A common carrier will be held liable for damage to goods, resulting from disobedience to directions, given by the owner and assented to by the carrier, respecting the mode of conveyance. *Sager v. Portsmouth, etc., R. R. Co.*, 31 Me., 228. 1850.

288. — Where the owner has given the carrier instructions to forward immediately, goods which are to be afterwards delivered by a cartman, and the cartman at the time of the delivery, without authority from the owner gives contrary directions, the owner is not bound by such directions of the cartman, nor can the carrier protect himself by them. *Moses v. Boston and Maine R. R. Co.*, 24 N. H., 71. 1851.

289. — Although a deviation from the instructions of the shipper may be made in case of an unforeseen necessity, such deviation cannot be made for the mere convenience of the carrier, without rendering the carrier liable for the risk of consequent injury or loss. *Johnson v. New York Central R. R. Co.*, 33 N. Y., 610, 1865; reversing *Same v. Same*, 31 Barbour (N. Y.), 196, 1857; and *Same v. Same*, 39 Howard's Pr. (N. Y.), 127, 1870.

290. — Where goods are delivered for shipment erroneously marked, and subsequently, before shipment, the direction is corrected with the assent of the carrier, such change does not affect the liability of the carrier as an insurer. *Dunson v. New York Central R. R. Co.*, 3 Lansing (N. Y.), 265. 1870.

291. — Instructions to forward goods forthwith, may be inferred from an established course of dealing between the owner and carrier, without direct evidence of such instruction. *Moses v. Boston and Maine R. R. Co.*, 24 N. H., 71. 1851.

292. — So the assent of the carrier to the delivery of goods may be inferred from a like course of dealing without any express act or assent of the carrier or his agents in relation to the particular goods in question. *Ib.*

293. Intermediate consignees. In regard to the payment of freight, intermediate con-

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signees stand in the same attitude as respects the carrier of the goods, as the ultimate consignees and owners assume. *Canfield v. Northern R. R. Co.*, 18 Barbour (N. Y.), 586. 1854.

294. — A request, in a bill of lading, to pay freight, on condition that the property is delivered, is addressed to every consignee named; and the acceptance of the property subject to charges, creates an implied undertaking to pay those charges. *Ib.*

295. — An intermediate consignee to take care of, and forward, the goods, cannot without special authority in the bill of lading, adjust the matter of damages on account of losses or injuries thereto; and has no right to insist upon such adjustment as a condition of paying the freight to which the goods were subject when they came into his hands. *Ib.*

296. **Leakage.** Where a cask of brandy was shipped by the plaintiff, at S., on the defendant's railroad, consigned to a person at O., which was proved to have been in good order when it left the plaintiff's store to be delivered to the defendant, and to have been received by the defendant's agent, but when it was delivered to the consignee, the cask was injured and leaking, and a portion of the contents gone; *held*, that the justice was warranted in finding, upon this evidence, that the cask was in good order when delivered. *Howe v. Oswego and Syracuse R. R. Co.*, 56 Barbour (N. Y.), 121. 1867.

297. — Where brandy was shipped by railway, and a part was lost by leakage, it was *held*, that in the absence of any proof that the remainder was of less value per gallon, by reason of such leakage, it was the duty of the consignee to receive it and hold the company liable only for the portion that was lost. *Ib.*

298. — H. delivered to the Central Ohio R. R. Co., at Newark, Ohio, two hundred and fifty barrels of coal oil to be transported to Bell Air, in the same state, by the said company, thence by way of the Baltimore and Ohio R. R. to Baltimore, and thence by steamer to New York, there to be delivered to S., or his assigns. The oil was delivered to the Baltimore and Ohio R. R. Co. at Bell Air, and reached Baltimore, where, upon being taken from the cars of the company, it was placed in an open lot near the company's warehouse on Locust Point, and thence forwarded to New York, where, upon its arrival,

it was ascertained there was a deficiency in quantity of sixty-seven barrels. *Held*, that the responsibility of the proper custody and storage of the oil after it was unladen from the cars in Baltimore, attached to the Baltimore and Ohio R. R. Co. as a warehouseman and forwarder, and it was bound to use ordinary care and diligence in its protection. *Baltimore and Ohio R. R. Co. v. Schumacher*, 29 Md., 168. 1868.

299. **Leased lines.** A railroad corporation cannot dispute its liability for freight delivered to it to be carried over a railroad leased to it, on the ground that the lease is void. *McCluer v. Manchester and Lawrence R. R. Co.*, 13 Gray (Mass.), 124. 1859.

300. — A railroad company which has leased a portion of another railroad connecting with its own is not exempted from liability to the owner of goods delivered to it at a depot on the portion so leased, by any agreement with the proprietors of that road. *Ib.*

301. **Lien for carriage.** A common carrier who has received goods from a wharfinger, with whom they have been deposited by their owner without authority to forward them, has no lien on them for freight against the owner. *Clark v. Lowell and Lawrence R. R. Co.*, 9 Gray (Mass.), 231. 1857.

302. — A common carrier, receiving goods from a wrongdoer, has no lien thereon against the rightful owner, even for freight which he has paid to a previous carrier, by whom the owner had directed them to be carried. *Stevens v. Boston and Worcester R. R. Co.*, 8 Gray (Mass.), 262. 1857.

303. **Loading.** The duty which a railroad company, in the management of its trains, owes to a shipper of freight while lading the same, is the exercise of that ordinary care which every man owes to his neighbor. *Stinson v. New York Central R. R. Co.*, 32 N. Y., 333. 1865.

304. **Marks.** Where a common carrier receives goods marked for a particular place beyond the terminus of his route unaccompanied by any directions as to their transportation and delivery, except such as may be inferred from the marks themselves, he is *prima facie* bound to carry and deliver them according to the marks. *Angle & Co. v. Mississippi and Missouri R. R. Co.*, 9 Iowa, 487. 1859.

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305. — The marks upon bales of cotton are no evidence of a contract as to their shipment. *Rome R. R. Co. v. Sullivan*, 25 Ga., 228. 1858.

306. — Where goods are delivered to a carrier marked for a particular destination, without any directions as to their transportation and delivery, except the marks on the goods, the carrier is only bound to transport and deliver them according to the established usage of his business. *Hempstead v. New York Central R. R. Co.*, 28 Barbour (N. Y.), 485. 1858.

307. Missent goods. A railroad company is not liable for a mistake made by its agent in Chicago in forwarding goods directed to a point near the line of its road in Iowa, such agent having used due care and diligence, although its agents in Iowa knew the proper route for sending the goods. *Congar v. Chicago and Northwestern R. R. Co.*, 24 Wis., 157. 1869.

308. — The plaintiff was guilty of contributory negligence in omitting the name of the county in marking the goods, where there were two places of the same name in the state. *Ib.*

309. — A railroad company, whose road ended in Boston, received at a way station goods addressed to St. Louis, which it agreed to convey to Boston, and forward thence by the Merchants' Express. But instead of delivering them to the Merchants' Express at Boston, it forwarded them to New York by other carriers, who there delivered them to a company styled the Merchants' Express and Transportation Co., which conveyed them thence to St. Louis, at a cost greater than that of the Merchants' Express. *Held*, that the railroad company was liable to the consignor of the goods for the difference in cost; and that it was immaterial that its general freight agent was ignorant of the Merchants' Express line from Boston, and failed to be informed of it upon inquiry of several persons. *Proctor v. Eastern R. R. Co.*, 105 Mass., 512. 1870.

310. Money. A person carrying a large sum of money in a carpet bag cannot, by keeping the possession of such carpet bag, avoid the payment of freight upon such money. *Hutchings v. Western and Atlantic R. R. Co.*, 25 Ga., 61. 1858.

311. — Common carriers are not liable for

the loss of money packed among other goods in a box in such a way as to deceive and mislead them. To be held liable they should be told of the contents. *Chicago and Aurora R. R. Co. v. Thompson*, 19 Ill., 578. 1858.

312. — An emigrant having packed and shipped a quantity of gold coin in the center of an ordinary dry goods box, filled with clothing and household goods: *held*, if this was calculated to deceive the company as to the value of the contents, and by no reasonable inference could it have been supposed that the box contained coin, the company will not be held liable as a common carrier. *Kuter v. Michigan Central R. R. Co.*, 1 Bissell (U. S. C. C.), 35. 1853.

313. Mistake; payment. The defendants applied to the agent of a railroad company to transport fifty thousand laths from M. to H., and inquired the expense of transportation. The latter having asked how many bundles that quantity would make, a companion of the defendants, to whom they referred the inquiry, replied, five hundred, but said agent understood him to say one hundred, and he thereupon gave the defendant the price of transporting one hundred bundles as the price of transporting five hundred bundles, which price the defendants agreed to pay. *Held*, that the misunderstanding of the agent in regard to the quantity of laths, prevented that meeting of the minds of the parties which was essential to a contract between them. *Hartford and New Haven R. R. Co. v. Jackson*, 24 Conn., 514. 1856.

314. — Such corporation having discovered the misunderstanding, and, although conscious that the defendants had no knowledge of it, forwarded said laths. *Held*, in an action brought to recover the price of transportation, at the usual rates, that this circumstance did not preclude the plaintiffs from claiming, on the trial, that such a mistake occurred, but was merely evidence, to be submitted to the jury, of the plaintiff's assent to the price, as understood by the defendants. *Ib.*

315. — Where, on such trial, the defendants claimed that the transmission of the laths by the plaintiff constituted, in law, an assent by it to the terms of the contract, as understood by the defendants, and that the plaintiff was therefore precluded from showing that there was any such mistake, and the

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court instructed the jury in conformity with such request, it was *held*, that such instruction was erroneous. *Ib.*

316. Negligence. It is negligence in a carrier to omit to furnish for its vehicles any improvement known to practical men, and which has actually been put into practical use; but a failure to take every possible precaution which the highest scientific skill might suggest, is not, of itself, negligence. *Steinweg v. Erie R. R. Co.*, 43 N. Y., 123. 1870.

317. — The want of suitable vehicles, in which to transport articles, is negligence on the part of the carrier. *Sager v. Portsmouth, etc., R. R. Co.*, 31 Me., 228. 1850.

318. Notice of arrival of goods. A carrier should give notice of the arrival of goods. *Sprague v. New York Central R. R. Co.*, 52 N. Y., 637. 1873.

319. — No notice to the consignee, where the goods arrive on time, is necessary to reduce the liability of the company from that of a common carrier to that of a warehouseman. *Southwestern R. R. Co. v. Felder*, 46 Ga., 433. 1872.

320. — The consignee, after notice of the arrival of the goods, is bound to take them away within a reasonable time. *Culbreth v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 3 Houston (Del.), 392. 1866.

321. — Common carriers are excused from personal delivery of goods, but in lieu of delivery they must give notice to the consignee of the arrival of the goods, and their liability as carriers continues until the consignee has a reasonable time to remove the property. *Michigan Central R. R. Co. v. Ward*, 2 Mich., 538. 1853.

322. — Under the charter of the Michigan Central R. R. Co., its liability as a common carrier does not cease until notice is given to the consignee. After such notice the company is liable only as a warehouseman. *Ib.*

323. — That company cannot, under its charter, limit its liability as a carrier. *Ib.*

324. — Notice to the consignee of the arrival of goods is not necessary to terminate the liability of a railway company as a carrier. *Chicago and Alton R. R. Co. v. Scott*, 42 Ill., 132. 1866.

325. — Where it is the custom of the company to give notice of the arrival of freight, it is its duty to do so, and a failure to do so

will render it liable for the difference in value of the goods between the time of arrival and the time when the notice was actually given. *New Orleans, Jackson and Great Northern R. R. Co. v. Tyson*, 46 Miss., 729. 1872.

326. — The consignee should sell the freight for the market price, and cannot hold the company liable for its full value. *Ib.*

327. — It is a very extreme case that would justify the consignee in refusing to receive the goods. *Ib.*

328. — If notice of the arrival of goods, requiring their removal in twenty-four hours, is given, it does not follow that the liability as carrier continues for that time; such a notice only implies that the goods may remain twenty-four hours free of charge. *Richards v. Michigan Southern and Northern Indiana R. R. Co.*, 20 Ill., 404. 1858.

329. — Where freight is carried from station to station, if the owner is not ready to receive it at its destination, the duty of the carrier is discharged by placing it in the warehouse of the company without giving notice to the owner or consignee. *Neal v. Wilmington and Weldon R. R. Co.*, 8 Jones' Law (N. C.), 482. 1862.

330. — Goods were shipped on a railway for a place thirty-six miles distant, the shipper was at their destination in three days' time to receive them, and occasionally for twelve days, and they had not arrived; the freight agent then informed him that he would give notice of their arrival; they arrived six days afterwards. *Held*, that the company was bound to give the shipper notice. *Tanner v. Oil Creek R. R. Co.*, 53 Penn. St., 411. 1866.

331. — The facts in the case did not entitle the shipper to treat them as lost, and bring suit for their value. *Ib.*

332. — Where a carrier of goods notifies the consignee of their arrival, and that they must be unloaded and taken away by a specified day, and then causes the goods to be unloaded before that time, and they receive injury in consequence, the carrier is liable as such, for the damage. *Cook v. Erie R. R. Co.*, 58 Barbour (N. Y.), 312. 1870.

333. — Where the consignee lives at a distance of eighteen miles from the place of destination of goods, the carrier is not required to notify him of their arrival. But if

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he has an agent at the place of delivery known to the carrier, such agent should be notified. *Pinney v. St. Paul and Pacific R. R. Co.*, 19 Minn., 251. 1872.

334. Order of shipment. The ordinary business of a railway is the measure of its obligation to furnish transportation. In case of a sudden influx of freight, it will be required to ship in the order of time in which it is offered. *Ballentine v. North Missouri R. Co.*, 40 Mo., 491. 1867.

335. Owner accompanying goods. The liability of the carrier is not lessened by the fact that the goods are loaded by the owner, or that the owner accompanies the property and keeps watch for its safety. *Hannibal R. Co. v. Swift*, 12 Wallace, 262. 1870.

336. Owner's right to resume possession. Where a party delivers to a railroad company, chattels to be transported from the point of delivery to another designated point on its line, and pays the charges for such transportation in advance, he has the right, as against the company to resume the exclusive possession and control of his chattels before they have reached their destination, whenever and wherever he can do so without unreasonable interference with the business of the company. *Cleveland and Pittsburg R. R. Co. v. Sargent*, 19 Ohio St., 438. 1869.

337. — If he do thus resume exclusive possession and control of his chattels, during the time within which the company might, without unreasonable delay, proceed in the performance of its contract of affreightment, and receive them in good order and condition, he thereby absolves the company from further responsibility on their account. *Ib.*

338. — A railroad company having no interest in a contract for through transportation made between other parties, cannot prevent the consignee from stopping the goods before reaching its line of road. If it carries the goods over its line in spite of the objections of the consignee, it will have no right to collect any freight or expenses. *Withers v. Macon and Western R. R. Co.*, 35 Ga., 273. 1866.

339. — The shipper cannot, by notice to the carrier, compel him to stop the goods at an intermediate point, when the goods are shipped to a consignee. *Pinnix v. Charlotte and South Carolina R. R. Co.*, 66 N. C., 34. 1872

340. Partial loss. Where a part, only, of property transported by a common carrier, is injured, and the remainder is safely carried to the point of destination, the consignee or owner cannot, in consequence of the injury to a part reject the part uninjured, and hold the carrier liable for the whole. *Michigan Southern and Northern Indiana R. R. Co. v. Bivens*, 13 Ind., 263, 1859; *Shaw v. So. Car. R. R. Co.*, 5 Richardson's Law (So. Car.), 462. 1852.

341. — The carrier is not made liable for the whole, by a failure to offer to deliver the uninjured part. A carrier by railroad is not bound to make personal delivery of the property to the consignee, nor to offer to deliver it. *Quere*, whether he must give notice of its arrival. *Ib.*

342. Parties to action. The plaintiff, who carried on business in her own name, having possession of certain goods, claiming to own them, delivered them to the defendant's agent, for the purpose of being transported. In an action on the case for the loss of the goods, it was held, that the plaintiff was entitled to recover, although some third person might have an interest in her business, as the legal interest in the contract resided in her. *Mayall v. Boston and Maine R. R. Co.*, 19 N. H., 122. 1848.

343. Passenger train. The plaintiff sent by a passenger train a quantity of merchandise, expecting to go himself in the same train, but did not. The goods were lost without any gross negligence in the carrier, or any conversion by him. Held, that the carrier was not liable for the loss. *Collins v. Boston and Maine R. R. Co.*, 10 Cushing (Mass.) 506. 1852.

344. — Evidence that the conductor of a railway passenger train had carried goods and eggs to market for an individual, does not tend to show that the company is a common carrier of goods by such trains, where it does not appear that he rendered such services by virtue of any authority derived from the company, or that any compensation was received for them, either by the company or himself. *Elkins v. Boston and Maine R. R. Co.*, 3 Foster (N. H.), 275. 1851.

345. — One instance of the transportation of goods by a railway passenger train, and of the payment of freight for them, does not tend

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to prove that the company exercises the business of a common carrier by such trains, as a public employment, or undertakes to carry goods in such way for persons generally; and is not competent evidence to be submitted to the jury as tending to prove it to be a common carrier of goods by such trains. *Id.*

346. — The plaintiff delivered certain articles to a ticket master to be transported by a passenger train, and requested him to label them, which he promised to do, but which it did not appear was done. It was neither his duty nor the duty of the company to affix labels on articles. *Held*, that as there was nothing to indicate the owners name, or the place to which the articles were to be sent, and as the promise of the ticket master did not bind the company, they were not liable for the loss of the articles. *Id.*

347. Pleadings. The declaration did not charge that defendant received certain cotton in its character of common carrier, and the presiding judge charged the jury that they might find the defendant liable as such for the loss of the cotton. On appeal by defendant, *held*, that in this there was error, and a new trial was ordered. *Smith v. King's Mountain R. R. Co.*, 3 So. Car., N. S., 53. 1871.

348. — Under a declaration in contract, which alleges the receipt by the defendant, as a common carrier of goods for transportation to the plaintiff, and the injury of the goods, "though the fault of the defendant," while in its care and custody, and before delivery to the plaintiff, the plaintiff may recover for an injury of the goods through actual negligence of defendant. *Medfield School Dist. v. Boston, Hartford and Erie R. R. Co.*, 102 Mass., 552. 1869.

349. — In a suit against a common carrier, for failure to deliver goods, the complaint must show that after the carrier received the goods to be transported, a reasonable time had elapsed, in due course of transportation, for the delivery of the goods, before the demand was made, and also that the defendant's reasonable freights and charges have been paid or tendered, or a reason given for not having done so. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Gent*, 35 Ind., 39. 1871.

350. Poultry. The defendant was a carrier of freight by a steamboat making daily trips from Bridgeport to New York, and was

accustomed to carry dressed poultry for the plaintiffs, who were dealers in that article, and who lived upon a railroad running into Bridgeport. It was their custom to send the poultry packed in boxes by the railroad, in season for the boat, to be forwarded by the agents of the railroad by the boat, unless there was reason to fear that the boat would be detained, and in that case, by the New York railroad; and in several cases where the boat was detained, the agents of the boat had transferred the poultry to the railroad, for the evening freight train to New York. A quantity of poultry was sent by the plaintiffs by the railroad on the 13th of May, and delivered on board the boat, packed in ice, and directed to certain poultry dealers in New York, and a receipt taken for the boxes, stating their contents, signed by the clerk of the boat. The delivery was in season for the trip of that day, but the boat was detained by the fog and did not leave until the 15th of May. The delay was unavoidable. No care however was taken of the poultry by the persons in charge of the freight, and in consequence the ice melted, and the poultry became injured. *Held*, that the defendant was liable. *Held*, that it was no excuse that the clerk of the boat signed the receipt without examination, and had no actual knowledge of the contents of the boxes. *Peck v. Weeks*, 34 Conn., 145. 1867.

351. Receipt. A receipt given by the consignees of goods to the carrier, acknowledging their receipt in good order, and in which the consignees are requested to notice any errors therein in twenty-four hours, or the carrier will consider himself discharged, does not estop the consignor from suing the carrier for damages caused by negligence in transporting the goods, although no notice was given thereof to the carrier. *Sanford v. Housatonic R. R. Co.*, 11 Cushing (Mass.), 155. 1853.

352. — Where the agent of a railroad company, signed a receipt for a lot of furniture for shipment, among which was specified "1 cradle," which had a carpet wrapped around it, was bound with cords, and contained a valise with wearing apparel in it, and the agent was informed what the cradle contained; it was *held*, that the company was bound to carry not only the cradle, but also the goods then in it, and was liable for their loss. *Harmon v.*

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New York and Erie R. R. Co., 28 Barbour (N. Y.), 323. 1858.

353. — The statement in a receipt given by a railroad company that goods were received in good order, is not conclusive evidence of that fact, but may be rebutted. *Illinois Central R. R. Co. v. Cowles*, 32 Ill., 116. 1863.

354. — A receipt for goods, given in the usual form by a common carrier, implies an agreement to transport the goods to their destination if upon the carrier's line. *Landes v. Pacific R. R. Co.*, 50 Mo., 346. 1872.

355. Seizure on legal process. A common carrier is exonerated from his obligation to his bailor, where the property of the latter is taken by legal process, and where the carrier immediately notifies the owner of such taking. *Bliven v. Hudson River R. R. Co.*, 36 N. Y., 403. 1867.

356. Special contract. The mere promise of a carrier to forward freight, (already *en route*), without any additional consideration, by an earlier train than usual, is not evidence from which a special contract will be inferred. *Railroad Company v. Reeves*, 10 Wallace, 176. 1869.

357. Title. A carrier who contracts with a corporation to transport goods for it, cannot defend an action for damages resulting from its negligence in transporting such goods, on the ground that the corporation could not lawfully acquire title to them. *Farmers' and Millers' Bank v. Detroit and Milwaukee R. R. Co.*, 17 Wis., 372. 1863.

358. — Acts done by corporations in violation of their charters are not necessarily void. They may by such acts acquire title to property and transmit it to others. *Ib.*

359. — A common carrier cannot dispute the title of the person delivering goods for shipment by setting up adverse title in himself, or in third persons, which is not being enforced against him. *Wallace, Sup't. v. Matthews*, 39 Ga., 617. 1869.

360. — The carrier is the agent of the consignor from whom he receives the property, and is not at liberty to dispute the consignor's title in an action brought by him. *Great Western R. R. Co. v. McComas*, 33 Ill., 185. 1864.

361. — When the contract is executory, and the consignee is only bound to pay for the goods when delivered to him by a given

day, and at a particular place, the consignor is the owner of the goods until delivered, and the proper person to sue the carrier if he fails to deliver the same. *East Tennessee and Georgia R. R. Co. v. Nelson*, 1 Coldwell (Tenn.), 272. 1860.

362. — The shipper of goods, who has contracted for their safe conveyance, may sue for injuries in their transportation, although the title of the goods has vested in the consignee. *Hooper v. Chicago and Northwestern R. R. Co.*, 27 Wis., 81. 1870.

363. Trover. Goods were sent by a sealed railroad car, to be delivered unbroken at the place of destination. The railroad company on the way opened the car and transferred the goods to another. The owner refused to receive them and brought trover. *Held*, that if the goods were removed for the convenience of the carrier, and were afterwards delivered without loss of quantity, and without injury, the carrier would not be liable in trover. *Tucker v. Housatonic R. R. Co.*, 39 Conn., 447. 1872.

364. Unloading. Railway companies are liable for want of ordinary care in their servants in unloading freight from their cars, though the consignee has neglected to unload it, knowing it to be the rule of the carriers that he must unload freight, and that if he did not unload it within a certain time the carriers would. *Kimball v. Western R. R. Co.*, 6 Gray (Mass.), 542. 1856.

365. Vendor and Vendee. As a general rule, an action against a carrier for the loss of goods sent by a vendor to a vendee, must be brought in the name of the consignee; for the law infers that, by the delivery to the carrier, the goods become the property of the consignee, and this though the consignor pay the freight; but where, by agreement between the vendor and vendee, the goods did not become the property of the latter, and he was at no risk in regard to them until they actually reached him, the consignor should sue. *Madison, Indianapolis and Peru R. R. Co. v. Whitesel*, 11 Ind., 55. 1858.

366. — Where the purchaser of a chattel (being dissatisfied with it) reshipped it to the vendor, and afterwards — the chattel not having come to the vendor's hands — paid him therefor: *held*, that the right of action against the carrier for its loss was in such purchaser.

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Ralph v. Chicago and Northwestern R. R. Co., 32 Wis., 177. 1873.

367. War: loss of goods; destruction by soldiers. A common carrier may, for reasonable cause, refuse to receive goods, but if he once receive them, he becomes an insurer, and it is no excuse to show that the military authorities were using the road in removing troops, and that the troops destroyed the goods. *Porcher v. Northeastern R. R. Co.*, 14 Richardson's Law (So. Car.), 181. 1867.

368. — A party can recover damages only when they are the natural and necessary consequence of the act complained of. The act of public enemies is an excuse to a carrier for a loss of goods delivered to him, if the loss was not occasioned by his own negligence or want of proper care. The carrier is bound to transport and deliver the goods within a reasonable time, and without unnecessary delay, but his failure so to do will not make him responsible for losses not occasioned by such delay. *Clark v. Pacific R. R. Co.*, 39 Mo., 184. 1866.

369. — To exonerate a common carrier upon the ground that the goods were lost through the act of the public enemy, he should establish that fact by clear and satisfactory evidence. *Van Winkle v. South Carolina R. R. Co.*, 38 Ga., 32, 1868; *Flash, Hartwell & Co. v. New Orleans, Jackson and Great Northern R. R. Co.*, 23 La. An., 353, 1871.

370. War of 1861. The shipment of tobacco from Charlotte to Columbia, on the 4th day of February, 1865, cannot be deemed the proximate cause of its loss by the burning of Columbia by Gen. Sherman, on the 17th of the same month. *Pinnix v. Charlotte and South Carolina R. R. Co.*, 66 N. C., 34. 1872.

371. — Destruction of whisky by a provost marshal, under the authority of the Confederate States, in 1862, cannot be claimed as the act of a public enemy, by a railroad company situated within the limits of that government, and recognizing its control. *Patterson v. North Carolina R. R. Co.*, 64 N. C., 147. 1870.

372. Warehouseman. A railway company is bound to store goods upon their arrival if not delivered, unless there is some well known usage to the contrary. *McHenry v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 4 Harrington (Del.), 448. 1846.

373. — Where goods have been carried to

their place of destination and there deposited in the carrier's warehouse, to await the owner's convenience in taking them away, the carriers are only subject, in respect to such goods, to the responsibilities of warehousemen. *McCarty v. New York and Erie R. R. Co.*, 30 Penn. St., 247. 1858.

374. — The owner of such goods is bound to take notice of the usage of the carrier to store them on their arrival at their place of destination. *Id.*

375. — This is the rule, although the consignee has had no opportunity to remove the goods before they have been destroyed by fire. *Norwoy Plains Co. v. Boston and Maine R. R. Co.*, 1 Gray (Mass.), 263. 1854.

376. — The warehouse or depot at the town or station to which goods are shipped by railroad, is the proper place of delivery to the consignee. When they are discharged from the cars, and, in the absence of the consignee, are safely stored in the company's warehouse, the liability of the railroad company as a common carrier is terminated, without notice to the consignee of the arrival of the goods. *Bansemer v. Toledo and Wabash R. R. Co.*, 25 Ind., 434. 1865.

377. — When goods are thus stored, the character of a warehouseman attaches to the company, and as such it is required to keep the goods in store for the consignee for a reasonable time, without additional reward. But during such time the company is only liable as a warehouseman. *Id.*

378. — After goods have arrived and been stored at the station where they were destined, the carrier is not liable except for negligence after a reasonable time has elapsed for their removal. *Thomas v. Boston and Providence R. R. Co.*, 10 Metcalf (Mass.), 472. 1845.

379. — After the goods are safely stored and protected from the weather, and from trespassers, and ready for delivery, the railroad company becomes a warehouseman liable only for ordinary care. *Ayres v. Morris and Essex R. R. Co.*, 5 Dutcher (N. J.), 393. 1862.

380. — A gratuitous bailee is liable only for gross neglect. *McCombs v. North Carolina R. R. Co.*, 67 N. C., 193. 1872.

381. — In an action against a railroad company to recover for property stolen from it while in its care, as a warehouse-

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man, evidence is competent in defense to show that it exercised the same degree of care in relation to the property that was usually exercised in the vicinity in relation to such property by other railroad companies. *Cass v. Boston and Lowell R. R. Co.*, 14 Allen (Mass.), 448. 1867.

382. — Where the owner of goods carried by railroad is present at their arrival, and is told that the railroad company cannot store them for want of room, and he still leaves them on their hands, they may be chargeable as depositories, if they assume the care of the goods by putting them in their storehouse. *Smith v. Nashua and Lowell R. R. Co.*, 27 N. H., 86. 1853.

383. — They may refuse to store them, and if they do nothing with them, or merely put them off their premises, without damage, they will not be chargeable. *Ib.*

384. — But if, after such refusal, they assume any care of the goods, it will be competent for the jury to find a waiver of the refusal, and an assumption of the duties of depositories. *Ib.*

385. — There is no presumption where the owner is notified that the carrier cannot store the goods, and is requested to take them away, but he still leaves them, that he has made the carrier's servants his own, although they may be forbidden to contract for the keeping of the goods at the risk of the carrier. *Ib.*

386. — The evidence being conflicting as to whether the defendants were to deliver certain mules at M., or to deliver them to another railroad company at M., the employes of the company having permitted them to escape while being transferred from the one railway to the other, it was *held* proper to make the distinction between the duties of the company as common carriers and as warehousemen, and to submit to the jury the question of fact as to which capacity the defendant acted. *North Missouri R. R. Co. v. Akers*, 4 Kan., 453. 1868.

387. — Where the goods arrive at the place of destination, and are placed in the warehouse of the company, the liability of a warehouseman commences, and from that time it is bound only for the use of ordinary care and the burden of proof in case of loss is on the bailor. *Jackson v. Sacramento Valley R. R. Co.*, 23 Cal., 269. 1863.

388. — Where in such action the proofs render it uncertain whether the goods were lost while being transported or after being deposited in the warehouse, and there is no proof of the want of ordinary care, a new trial will be ordered. *Ib.*

389. — A railway company is not liable as a common carrier, for property deposited in its warehouse to await orders for its transportation from the owner. *Michigan Southern and Northern Indiana R. R. Co. v. Schurtz*, 7 Mich., 515. 1859.

390. — And where the company is prohibited in its charter from charging storage, it is only liable as a gratuitous bailee in such case. *Ib.*

391. — In the absence of any usage, especial circumstances or agreement, the liability of railway companies for goods in warehouse awaiting delivery is that of common carriers. *Buckley v. Great Western R. R. Co.*, 18 Mich., 121. 1869.

392. — If anything remains to be done by the consignor of goods or his agents after their delivery to a railroad company, before they are ready for transportation, the company is only responsible for them as a warehouseman, and not as a common carrier. *Judson v. Western R. R. Co.*, 4 Allen (Mass.) 520. 1862.

393. — Where the distance on a railroad, over which a commodity was carried, was very short, and the consignee lived sixteen miles from the road, and no agent was present to receive it on its arrival, it was *held*, that the depositing of the commodity in the company's warehouse at the point of delivery, exonerated it from the liabilities of a common carrier. *Hilliard v. Wilmington and Weldon R. R. Co.*, 6 Jones' Law (N. C.), 343. 1859.

394. — Suit to recover the value of goods shipped by railroad from C. to K. The goods were safely carried to K., and the consignee not being present to receive them, were there stored in the company's warehouse, which was reasonably secure. During the night the goods were destroyed by some unknown person, who entered the warehouse through a grain shoot. *Held*, that the liability of the railroad company as a common carrier was terminated when the goods were discharged from the cars and stored in the warehouse. *Cincinnati and Chicago R. R. Co. v. McCool*, 26 Ind., 141. 1866.

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395. — The defendant, a railroad company, having transported for the plaintiff eighteen bales of cotton, held the same at its warehouse to be called for by him, but ultimately delivered to him but sixteen. The two other bales had been in some manner lost. In assumpsit against the defendant as a warehouseman for the nondelivery of the two bales, the plaintiff having offered no proof of negligence except what was to be inferred from the receipt and non-delivery of the bales, and the defendant not having explained how the bales had been lost or in any manner accounted for them, nor shown that it had exercised reasonable care to prevent their loss, the court ruled that the defendant, to relieve itself from responsibility for the goods, was bound to prove either a delivery to the plaintiff or that it had exercised ordinary care in keeping them, and that under the circumstances the burden was not on the plaintiff to show the manner of the defendant's negligence by means of which the loss occurred. *Held*, that this ruling, in the circumstances of the particular case, was correct. *Boies v. Hartford and New Haven R. R. Co.*, 37 Conn. 272. 1870.

396. — In the case of depositaries for hire where the goods are lost, the authorities are not agreed as to whether the burden of proof of negligence is on the owner of the goods or of reasonable care on the depositary. In England, it is held that the burden is upon the owner, but the courts in this country have in some cases held otherwise. *Id.*

397. Weight and Measurement. Although the Central R. R. Co. cannot charge for cotton both as "weight freight" and as "measurement freight," it may charge for either one or the other. Act of Sept. 1, 1856; *Central R. R. Co. v. Hearne*, 32 Tex., 546. 1870.

398. — A quantity of coal was shipped for the port of B., consigned to a railroad company having its terminus there, and to be transported by the latter to W. The bill of lading stated the quantity and the freight per ton. The railroad company paid the freight to the master of the vessel, and transported all the coal received to W. On being weighed there after the delivery, it was found to fall short several tons from the amount stated in the bill of lading. It was the custom of the railroad company, known to the parties for whom the coal was transported, not to weigh

coal thus delivered, but to depend on the bill of lading; but in the present case, the agents of the road could with ordinary care have observed a deficiency in the quantity. *Held*, that the railroad company had not made itself liable for the deficiency in the coal, and that it was entitled to the full amount of the freight paid to the master of the vessel. *Nauvaton R. R. Co. v. Beardsley Seythe Co.*, 33 Conn., 218. 1866.

399. — To establish the weight of 19 bales of cotton burned on defendant's railroad, it is competent for a witness to state the average weight of the lot of 33 bales, of which the burned bales were a portion, and then fix the weight of the 19 bales by approximation. *Smith v. North Carolina R. R. Co.*, 68 N. C., 107. 1873.

400. When liability as a carrier attaches. A carrier is presumed to be a bailee for hire, and it is not necessary to prove payment in order to hold him in his capacity of common carrier. *Winne v. Illinois Central R. R. Co.*, 31 Iowa, 583. 1871.

401. — The liability of a railroad company as a common carrier for goods delivered to it attaches only when the duty of immediate transportation arises. So long as the shipment is delayed for further orders as to the destination of the goods or for the convenience of the owners, the liability of the company is that of a warehouseman. *Barron v. Eldredge*, 100 Mass., 455. 1868.

402. When the carrier's liability ceases. The liability of a railroad company as a common carrier of goods continues, after the arrival of the car containing them at its point of destination, until they are unloaded and put into a reasonably safe and suitable place for their reception. *Rice v. Boston and Worcester R. R. Co.*, 98 Mass., 212. 1867.

403. — Where the consignee is absent from the terminus of the carrier's route, and has no agent to whom delivery can be made or notice given, the carrier may terminate his liability as carrier, by depositing the merchandise in a warehouse; although it is otherwise as to an intermediate carrier. *Northrop v. Syracuse and C. R. R. Co.*, 5 Abbott's Pr., N. S. (N. Y.), 425. 1867.

404. — When goods are shipped by railroad to a specified point, whence the owner intends to remove to their final destination,

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the railroad company is not an intermediate carrier, and the rules applicable are those which govern at a place of destination. *Fenner v. Buffalo and State Line R. R. Co.*, 44 N. Y., 505, 1871; reversing *Same v. Same*, 46 Barbour (N. Y.), 103. 1866.

405. — The liability of a common carrier by railway terminates, if the goods, after reaching their destination, are properly stored in any warehouse. *Davis v. Michigan Southern and Northern Indiana R. R. Co.*, 20 Ill., 412. 1858.

406. — Where the bill of lading shows that the goods transported were shipped to the owner as consignee, "care of the railroad company," to be delivered at a station on the railroad, if the goods are transported with the usual expedition, and the owner or his agent is not at the depot ready to receive them, they may be deposited in the warehouse of the company, and from such deposit the liability of the company as a common carrier ceases. *Mobile and Girard R. R. Co. v. Prewitt*, 46 Ala., N. S., 63. 1871.

407. — A railway company may terminate its liability as a common carrier within a reasonable time after the arrival of goods at their place of destination, by depositing them in the warehouse of a responsible third person. *Alabama and Tennessee Rivers R. R. Co. v. Kidd*, 35 Ala., N. S., 209. 1859.

408. Whisky. In an action for failure to deliver a quantity of whisky, it is competent for the carrier to show that the excise tax on such whisky was unpaid, as that would affect its value. *Toledo, Peoria and Warsaw R. R. Co. v. Kichler*, 48 Ill., 438. 1868.

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409. Bill of lading. A bill of lading is not conclusive evidence of title in the consignee, but any presumption arising therefrom may be repelled by parol evidence. *Hooper v. Chicago and Northwestern R. R. Co.*, 27 Wis., 81. 1870.

410. — Where flour was by the shipper sold "to arrive at Boston," the title remained in him till such arrival. *Ib.*

411. — Where a bill of lading of goods destined to Boston, provided for their transportation from the point of shipment on de-

fendant's road to its Chicago station, but stated nothing as to what was to be done with them there, the shipper (in an action for injuries done to them between said station and the depot of the next carrier), might show a practice of shippers to give, and of defendant to comply with, directions as to delivering goods to the next carrier, such evidence not tending to vary or contradict the bill of lading. *Ib.*

412. — From the face of the bill and the nature of the transaction, it would be inferred that the defendant was to transfer the goods to the next carrier. *Ib.*

413. — The plaintiff was presumed to have contracted with reference to such known custom. *Ib.*

414. — The cartman transferring the goods from defendant's depot to that of another carrier is the agent of defendant, and does not act as an independent carrier. *Ib.*

415. Cars of one company carried by another. Where a common carrier undertakes to carry an article for a compensation, the legal presumption is, that he does it subject to his common law liability—and this presumption holds till disproved. *Pennsylvania R. R. Co. v. New Jersey R. R. Co.*, 3 Dutcher (N. J.), 100. 1858.

416. — But where a railroad company takes a car through on its own trucks, over its railroad, and has the sole charge of it, it is as to the article transported, a common carrier. *Ib.*

417. — A railroad company engaged in business as a common carrier, agreed with the plaintiff to furnish the motive power to draw his cars, laden with his property, over its railroad, the plaintiff being bound to load and unload the cars, and to furnish brakemen to accompany them on the road, who were to be under the control of the defendant's conductor. *Held*, that the defendant assumed the liabilities of a common carrier, and was liable as such for an injury to the cars of the plaintiff, and his property therein. *Mallory v. Tioga R. R. Co.*, 39 Barbour (N. Y.), 488. 1862.

418. Change of route. The defendant having contracted to ship goods over its line from B. to M., delivered the goods to a propeller instead for shipment, and they were lost. *Held*, that it was incumbent on the de-

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pendant to show that such change of the manner of shipment was made under circumstances exonerating it from liability. *Le Sage v. Great Western R. R. Co.*, 1 Daly (N. Y.), 306. 1863.

419. Coal: damages by careless unloading. A railroad company, having undertaken to carry assorted coal from one place to another on its road, immediately on the arrival of the cars containing it at the point of destination, without notifying the consignee, discharged the coal on the bare ground so as to mix the different sorts and mingle soil with them. *Held*, that it was liable in damages to the consignee. *Rice v. Boston and Worcester R. R. Co.*, 98 Mass., 212. 1867.

420. Condition of goods. From proof of a certain state of facts at a certain time in respect to the condition of goods, the jury may presume that the same continued up to the time the evidence shows a different state of facts to have existed. *Laughlin v. Chicago and Northwestern R. R. Co.*, 28 Wis., 204. 1871.

421. — Thus when goods were shipped by three successive carriers, and when delivered to the consignee (although there was no external evidence of the fact), the box was found to have been opened, and certain goods taken out, the jury may presume, in the absence of evidence to the contrary, that the box remained unopened until it came into the possession of the last carrier, and that the loss occurred through his fault. *Ib.*

422. — When goods are to be delivered to the care of one person, for another as owner, the owner is the consignee. *Jeffersonville R. R. Co. v. White*, 6 Bush (Ky.), 251. 1869.

423. Contract. Where a railway company, through its agent, agreed to ship flour from Niles, and deliver it "on board at Detroit," the company was held liable as a common carrier until the flour was delivered on board the vessel at Detroit, and the company was held liable for the destruction of the property by fire in its warehouse at Detroit. *Moore v. Michigan Central R. R. Co.*, 3 Mich., 23. 1853.

424. — Where the owner talked with defendant's agent about shipping certain goods, and the rate, and how they should be marked, but the shipper did not accept the agent's proposition at the time, but about eighteen days afterwards delivered the goods at the de-

pot marked as directed, it was *held*, that the conversation between the agent and shipper did not amount to a contract. *Ricketts v. Baltimore and Ohio R. R. Co.*, 61 Barbour (N. Y.), 18. 1871.

425. Custom. Where an agent of a railroad company was introduced in its behalf, to prove that certain goods were not delivered to the company as a common carrier, it was competent for this purpose to show that it was the custom of the company to weigh, mark and book such goods; those in question not having been so treated. *Vaughan v. Raleigh and Gaston R. R. Co.*, 63 N. C., 11. 1868.

426. — Where the contract is silent upon the subject, evidence of custom may be introduced as to the place where a railway company usually delivers its freights. *Alabama and Tennessee Rivers R. R. Co. v. Kidd*, 29 Ala., N. S., 221. 1856.

427. — On the trial of an action against a railroad company for the loss of goods transported by it, it appeared that the servants of the company had placed the goods upon an open and exposed platform at the place of destination, from which they were stolen, no notice of their arrival having been given to the consignee. The defendant offered to show that, by a well known and long established custom of the company, goods were deemed delivered when safely deposited at the platform of the station; and were considered, by the custom and printed rules of the company, to be thereafter at the risk of the owner. *Held*, that the offer was properly refused, on the ground that if such a custom were admissible, it would not have been available, as the goods in this case were not "safely deposited" at the platform, without which no foundation was laid for the proof. *Browning v. Long Island R. R. Co.*, 2 Daly (N. Y.), 117. 1867.

428. Conversion by carrier. Where, owing to the war of 1861, a railway company could not deliver certain goods shipped over its line, it was held liable for the value of the goods, it appearing that they had been converted by the company to its own use. *Baltimore and Ohio R. R. Co. v. Morehead*, 5 W. Va., 293. 1872.

429. Delivery — to carrier. Where spirituous liquors are ordered of a dealer in Boston to be forwarded to the purchaser in New

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Hampshire by railroad, the sale is complete the moment the goods are delivered to the carrier, and the sale must be regarded as made in Massachusetts. *Garland v. Lane*, 46 N. H., 245. 1865.

430. — In order to charge a common carrier for the loss of property, it is necessary that it should be delivered to him, or his agent, for transportation. But such delivery may be either actual or constructive. *Merriam v. Hartford and New Haven R. R. Co.*, 20 Conn., 354. 1850.

431. — If a common carrier agree, that property intended for transportation by him, may be deposited at a particular place, without any express notice to him, such deposit merely, would amount to constructive notice, and be a sufficient delivery. *Ib.*

432. — And such agreement may be shown, by proof of a constant practice and usage by the carrier, to receive property left for transportation, at a particular place, without any special notice of such deposit. *Ib.*

433. — Where goods were delivered, in the usual manner, for transportation, by a common carrier, on his private dock, and in his exclusive use, for the purpose of receiving property to be transported by him; it was *held*, that such delivery was a good delivery to the carrier to render him liable for the loss of the goods, although neither he nor his agent was otherwise notified of such delivery. *Ib.*

434. — Where the defense to an action against a common carrier for the loss of goods was placed solely on the ground of a want of notice to him of delivery, and the court instructed the jury, that the delivery, if in accordance with the usage claimed to be proved by the plaintiff, was sufficient, without submitting to the jury the question of fact whether such usage influenced the plaintiff in his conduct; it was *held*, that the charge was not exceptionable, by reason of such omission. *Ib.*

435. — If a heavy article has been carried by a truckman to the depot of a railroad corporation, and injured while being loaded upon the cars, the company is liable therefor if it had accepted and taken charge of the same; and in such case it cannot show the carelessness of the truckman as a defense. *Merritt v. Old Colony, etc., R. R. Co.*, 11 Allen (Mass.), 80. 1865.

436. — Where goods were deposited on the stoop of a freight house, no one being there to receive them, and the cartman subsequently informed the freight agent that the owner of the goods would call and order where they should go; but there was no proof that any such direction was ever given by the owner; it was *held*, that the carrier was not in default, and could not be made liable, for not transporting the goods. *Spade v. Hudson River R. Co.*, 16 Barbour (N. Y.), 383. 1853.

437. — Where goods are placed in a car of a railroad company, with its assent, for the purpose of shipment, the car being under its exclusive control, the goods thereby pass into the possession of the company as effectually as if they had been delivered in its warehouse. *Illinois Central R. R. Co. v. Smyser*, 38 Ill., 354. 1865.

438. — So where a car load of cotton was loaded upon a car provided by the carrier for the purpose, upon a side track, and while standing there the cotton accidentally took fire and was injured thereby, the carrier was held liable for the loss, although there had been no receipt or bill of lading given for the property. *Ib.*

439. — An action cannot be maintained against a railroad company as a common carrier for the loss or destruction of goods deposited on the roadside, at a place where there was no regular station, and no agent, although a conductor of a freight train had promised to stop and take them. *Wells v. Wilmington and Weldon R. R. Co.*, 6 Jones' Law (N. C.), 47. 1858.

440. — To render a common carrier liable for goods to be carried by him, the fact that the goods were actually delivered to him or to some person authorized to act in his behalf, must be established. *Grosvenor v. New York Central R. R. Co.*, 39 N. Y., 34, 1868; *Same v. Same*, 5 Abbott's Pr. N. S. (N. Y.), 345, 1868.

441. — *by carrier.* Without a special contract to that effect, a railway company is not bound to deliver freight to the consignee, unless such is its custom. *New Orleans, Jackson and Great Northern R. R. Co. v. Tyson*, 46 Miss., 729. 1872.

442. — Certain goods were directed to J. F. Roberts, Roxbury, Mass. There was no such person in Roxbury, and no person there

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was known or passed by that name. Collins, whom the plaintiff well knew as Collins, had represented that there was such a person there, and had induced the plaintiffs to consign the goods at Brattleboro to that address. Collins then went to Boston, and upon the arrival of the goods employed one Clough, a truckman, to get them at this depot and deliver them to a dealer in Boston, representing himself to Clough as the J. F. Roberts to whom the goods were addressed. Clough obtained the goods, giving his own receipt therefor, and paid the freights and delivered the goods to Collins, without any knowledge of the fraud, and Collins sold the goods and obtained the money and left the country, and plaintiffs were never able to recover the money of him. *Held*, that the defendant was liable as a common carrier for the loss. *Winslow v. Vermont and Massachusetts R. R. Co.*, 42 Vt., 700. 1870.

443. — All classes of carriers are responsible for loss of goods by delivery of goods to the wrong person. *Ib.*

444. — Carriers are responsible as such, and not as warehousemen, where such misdelivery has been made immediately after the arrival of the goods. *Ib.*

445. — Where goods were delivered to the agent of a railroad company at B., labelled "L. W. B., care of S. U., Troy," no direction being given to the agent except by the labels, it was *held*, that the company promised on its part that it would carry the goods to Troy and deliver them to U.; and that a delivery thereof to U. was a full performance of the contract, whatever might become of the goods afterwards, notwithstanding the goods delivered to U. were received and taken charge of by him as the agent of the company. *Bristol v. Rensselaer and Saratoga R. R. Co.*, 9 Barbour (N. Y.), 158. 1850.

446. — Railway companies are liable as common carriers for goods received by them, to be transported over their roads for hire, though not yet laden on their cars. *Fitchburg and Worcester R. R. Co. v. Hanna*, 6 Gray (Mass.), 539. 1856.

447. — Where bulky articles of freight are landed from a vessel in the customary manner upon a public wharf, with due notice to the consignee (he being the owner), who pays the freight and takes steps toward removing

them, and is afforded a reasonable opportunity of doing so, the legal custody is transferred to him, and if he necessarily delays the removal, he does so at his own risk. *Goodwin v. Baltimore and Ohio R. R. Co.*, 50 N. Y., 154. 1872.

448. — Whether a common carrier who has transported property over his line and stored it in his warehouse awaiting delivery to the consignee, who has not yet been notified of its reception, continues to be liable as a carrier, *quære?* *McMillan v. Michigan Southern and Northern Indiana R. R. Co.*, 16 Mich., 79, 1867; *Heffron v. Same, ib.*; *King v. Same, ib.*

449. — to agent. Where an order was given to a firm of warehousemen, authorizing them to receive from a railway company all goods shipped to the drawer, after which the firm was dissolved, and a new firm composed of a part of the members of the old firm was formed, *held*, that the new firm derived no authority from the order to receive the goods of the drawer. *Angle & Co. v. Mississippi and Missouri R. R. Co.*, 9 Iowa, 487. 1859.

450. — The facts and circumstances tending to show the agency of such new firm are admissible, although such facts and circumstances were unknown to the company when the goods were delivered. *Ib.*

451. — damage. A quantity of sheet-iron, consigned to the plaintiffs at New York, and transported by the defendant, was unloaded upon the wharf, in New York. The plaintiffs received notice of the arrival of the iron, and received a small portion of the iron uninjured. On sending for the remainder, they were unable to get it until some days, by reason of other freight having been so placed that the iron could not be reached. While it was in this position, it was damaged by rain. *Held*, that the defendant was bound to deliver the goods at the usual place, and to deliver them in a conveniently reasonable manner for their removal; and that the defendant was liable in this case for the damages. *Goodwin v. Baltimore and Ohio R. R. Co.*, 58 Barbour (N. Y.), 195. 1870.

452. — contract. A contract to deliver 300 barrels of flour in lots of 100 each, payment to be made for each lot on delivery thereof, is severable; and acceptance of payment for each lot on delivery was not a waiver of any rights of the seller arising out of

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the unauthorized delivery of the first lot by the railroad company without payment made. *Smyer v. Chicago and Northwestern R. R. Co.*, 22 Wis., 403. 1868.

453. — Goods were shipped from Baltimore to St. Louis, and the receipt contained the following stipulation: "the responsibility of the company is to terminate when the goods are unloaded from the cars, and that goods intended for *all railroad* shall be marked 'through by rail,' and river goods *via* Wheeling or Parkersburg must be marked on this ticket." The goods were damaged in transit after passing out of the hands of defendant. *Held*, that as under certain contingencies the goods might be transported in part by boat, the "unloading of the cars" referred to in the receipt, meant at the terminus of defendant's road. *McCann v. Baltimore and Ohio R. R. Co.*, 20 Md., 202. 1863.

454. — **conversion.** Where goods are transported by a railroad company and, upon their reaching the place of destination, are stored in a warehouse and no notice given of their arrival, under a notice published in a newspaper that all goods not taken away within a given time would be thus disposed of: *held*, that such delivery was erroneous, but did not amount to a conversion of the goods. *Rome R. R. Co. v. Sullivan*, 14 Ga., 277. 1853.

455. — **custom.** There was a custom that a railroad company should deliver freight on the platform of minor stations whose business would not justify a warehouse, to be received there by the consignee on discharge from the car. *Held*, a good custom. *McMasters v. Pennsylvania R. R. Co.*, 69 Penn. St., 374. 1871.

456. — To relieve a carrier, the custom must be clearly proved, and that the employer knew it, or was presumed to know it by reason of its generality in the neighborhood. *Ib.*

457. — **demand.** It is the duty of the consignee to repair to the depot or place of delivery, for his goods, and the carrier cannot be sued for non-delivery unless there has been a refusal to deliver on request. *Michigan Southern and Northern Indiana R. R. Co. v. Bivens*, 13 Ind., 263. 1859.

458. — **fictitious consignee.** In an action brought by the consignor against a carrier, for the value of the goods, the claim was that

the consignee had assumed a fictitious name, or had falsely pretended to be doing business as a copartnership, for the purpose of obtaining the goods without payment. *Held*, that the truth or falsity of the representations should have been ascertained by the plaintiff before he parted with his property. The omission to do so was his negligence, and not that of the carrier. *Price v. Oswego and Syracuse R. R. Co.*, 53 Barbour (N. Y.), 599. 1871.

459. — Where a common carrier, without requiring evidence of identity, delivers goods to a stranger, which have been fraudulently ordered by the latter in the name of a fictitious firm, and which have been shipped in compliance with the order directed to the fictitious firm, he is liable to the consignor for their value. *Price v. Oswego and Syracuse R. R. Co.*, 50 N. Y., 213. 1872.

460. — **misdelivery.** Where an article was delivered to a common carrier, to be delivered to a factor, at a certain market, who had been instructed not to sell until ordered, and such carrier delivered it to a factor at a different market, who had no instructions concerning it, and was by him immediately sold, upon its appearing that the article in question rose in price, from that day until the suit was brought; *held*, that in a suit against such common carrier, the plaintiff was entitled to recover the highest price attained by the article within that period. *Arrington v. Wilmington and Weldon R. R. Co.*, 6 Jones' Law (N. C.), 68. 1858.

461. — The receipt of the proceeds of the sale from the factors making it, was no bar to the recovery of damages for this misfeasance. *Ib.*

562. — The owners of a lot of flour which had been brought to B. by a railroad company, and which remained at the railroad depot, sold fifty barrels thereof and gave to the purchasers an order upon the company for the delivery thereof, and the purchasers upon presenting the same received another order, or "flour check," for the same, which according to the usual course of business was delivered to a clerk who had charge of the actual delivery of flour from the depot, and who was accustomed to keep such "flour checks," and take receipts upon the back thereof for flour actually delivered. This clerk delivered twenty-two barrels of flour to the purchasers,

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and twenty-eight barrels to other persons not authorized to receive them. *Held*, that the company was liable to the purchasers for the value of the twenty-eight barrels, without regard to the question of its due care or negligence. *Hall v. Boston and Worcester R. R. Co.*, 14 Allen (Mass.), 439. 1867.

463. — Misdelivery by a carrier of an article intrusted to him to be carried is a conversion. *Claphin v. Boston and Lowell R. R. Co.*, 7 Allen (Mass.), 341. 1863.

464. — If dutiable goods, which are sent into the United States from Canada, are marked to the care of another person than the consignee, in order that such person may pay the duties, under an arrangement by which such goods came in bond, this gives to the agent no authority to change their destination; and a carrier, who, knowing the limited authority thus conferred upon the agent, upon his order delivers them to persons not entitled to receive them, is liable for a conversion. *Ib.*

465. — Goods consigned to the owner, at Nashville, Tenn., to the care of N. W. & Co., Louisville, Ky., were delivered to M. & Co., at Louisville, to be stored and forwarded by them to the owner at Nashville; M. & Co. delivered the goods to a party who was not authorized to receive them, and in consequence thereof, they were not delivered to the owner. The owner was entitled to a judgment against the carrier, and the carrier was entitled to a judgment against M. & Co., as for a conversion for the value of the goods. *Jeffersonville R. R. Co. v. White*, 6 Bush (Ky.), 251. 1869.

466. — **partial delivery.** If upon the arrival at the place of their destination of goods delivered to a railroad corporation for transportation, the agent of the owner of the goods, in the presence of the station master of the corporation, removes a portion of them from the car in which they have been transported, saying that he will come again for the rest, and some of the rest are afterwards lost from the car or from the freight house of the corporation, it is a question for the jury, in an action by the owner of the goods against the corporation for the loss, whether the delivery to the plaintiff's agent of the portion of the goods taken by him from the car was intended by the parties for a delivery of the whole or only of the por-

tion taken. *Sessions v. Western R. R. Co.*, 16 Gray (Mass.), 132. 1860.

467. — A shipper is not bound to take a remnant of his goods in whatever condition they may be identified and offered to him. *Chicago and Rock Island R. R. Co. v. Warren*, 16 Ill., 592. 1855.

468. — **place of delivery.** Where a hog-head of molasses, instead of being landed on a platform, the usual place for heavy articles, was lost in an attempt to deliver it to the plaintiff at an unusual and unfit place, the company was *held* responsible. *Benbow v. North Carolina R. R. Co.*, Phillip's Law (N. C.), 421. 1868.

469. — The consignee of goods is presumed to be the owner; but this presumption may be rebutted. *Congar v. Galena and Chicago Union R. R. Co.*, 17 Wis., 477. 1863.

470. — Goods were forwarded from Whitewater to Mt. Carmel upon the following order: "Forward us the following bill of nursery stock to Bridgeport, Ill. Terms, our notes at six and twelve months. * * * * All the above stock to be properly packed and delivered at the railroad depot at Whitewater, free; freight and charges to be paid by us on delivery at Bridgeport." *Held*, that the words "delivered at the depot at Whitewater, free," must be understood to mean merely that the consignees were not to be at any expense for the packing of the goods and hauling them to the depot. That the delivery which was to change the ownership was the one at Bridgeport. That where payment is to be made in the notes of the vendees, the property in the goods does not vest in the vendees until the giving of the notes. *Ib.*

471. — **receipt.** A railroad company has the right to require a receipt, showing that goods when delivered to the owner, were in good order; and the owner has an equal right to examine the goods to be delivered, before executing such receipt. Such examination should be made at the place of delivery before removal. *Skinner v. Chicago and Rock Island R. R. Co.*, 12 Ia., 191. 1861.

472. — Where a railroad company has freight in its warehouse in good condition ready for delivery, it is not bound to take a receipt for each portion as it is taken away, but they may require a receipt for the whole before any part thereof is removed. *Ayres v.*

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Morris and Essex R. R. Co., 5 Dutcher (N. J.), 393. 1862.

473. — time. Common carriers are bound to deliver goods within a reasonable time, and if they fail to do so, they are answerable for the damages occasioned by the delay, unless they disprove negligence. *Nettles v. South Carolina R. R. Co.*, 7 Richardson's Law (So. Car.), 190. 1854.

474. — The measure of damages in such cases is reasonable loss and expense occasioned by the delay, together with the difference between the value of the goods when and where delivered and their value at the time and place where they ought to have been delivered. *Ib.*

475. — The doctrine of technical abandonment is not applicable to carriers as to insurers. *Ib.*

476. — teamster. A teamster, employed by a mill-owner to deliver flour to a railroad company for transportation, has no power, by virtue of such employment, to authorize the delivery of the flour by the company to a third party. *Sawyer v. Chicago and Northwestern R. R. Co.*, 22 Wis., 403. 1868.

477. — A statement by such teamster, (who was known by the company to be in the owner's employ), that the flour was for such third party, did not imply that it was to be delivered by the company to him without further instructions from the owner. *Ib.*

478. — waiver. Plaintiff shipped goods consigned to J. D., Boston. After their arrival at Boston, the carrier delivered them to the Pawnors' Bank, which bank received them as security for a loan to one M. Subsequently, the consignee called at the bank, designated a portion of the goods to be held as security for the loan to M., and from time to time thereafter took portions of the remainder to the store of M., where they were sold with his consent. *Held*, that although the original delivery might have been erroneous, and the carrier liable to the consignor, such liability was discharged by the subsequent acquiescence of the consignee in the delivery. *O'Dougherty v. Boston and Worcester R. R. Co.*, 1 N. Y. Sup. Ct., 477. 1873.

479. — In this case, parol evidence was held admissible to show the customary place for the reception of freight by a carrier, the freight not having been delivered at

the depot. *Homesley v. Elias*, 66 N. C., 330. 1872.

480. Express company. A private arrangement between a railroad company and an express company, for the transportation of light freight, will not relieve the railroad company from liability, as a common carrier, for packages received on the cars from persons having no notice of the arrangement. *Langworthy v. New York and Harlem R. R. Co.*, 2 E. D Smith (N. Y.), 195. 1853.

481. — It is immaterial whether the article was given at the cars, to the agent of the express company, or to a baggage master, or other agent of the railroad company. *Ib.*

482. Former adjudication. A judgment in a suit between consignor and consignee, for the price of goods destroyed in the freight house of a railroad, rendered in favor of the consignee on the ground that the property never passed to him, owing to an insufficient delivery to the railroad company as a carrier, does not estop the consignor to maintain a suit against the company, as a carrier for neglect to forward the goods. *Finn v. Western R. R. Co.*, 102 Mass., 283. 1869.

483. Letter. Where a letter was written to B. at Rome by the agent of the East Tennessee and Georgia R. R. Co., in response to a letter from B., which letter B. showed to M. *Held*, that the shipment of goods by M. upon the faith of such letter did not, without notice to the railroad company, constitute the letter as a contract between the railway company and M. *East Tennessee and Georgia R. R. Co. v. Montgomery*, 44 Ga., 278. 1871.

484. Payment under a mistake. Where the owner of property in possession of a carrier is compelled to pay money in order to obtain his property, and the sum charged is either paid under mistake or compulsion, it may, if erroneous, be recovered back in an action. The payment will not be treated as voluntary. The same rule will prevail if such payment is made under an agreement that it shall not be regarded as voluntary. *Lafayette and Indianapolis R. R. Co. v. Pattison*, 41 Ind., 312. 1872.

485. Rules. A regulation or usage of a railroad company requiring all claims against it for damages, by reason of loss or injury to goods transported by it, to be made within ten days after the delivery at the station, *held*,

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unreasonable; and that an offer to prove it was properly rejected. *Browning v. Long Island R. R. Co.*, 2 Daly (N. Y.), 117. 1867.

486. Shortage. In an action by a carrier against an intermediate consignee for a deduction of freight, by virtue of an alleged custom permitting shortage to be deducted when it did not arise from the fault of a prior carrier: *held*, that the action was properly brought, if the deduction was made under protest, and the carrier had not accounted with the owner of the cargo when suit was commenced. *Strong v. Grand Trunk R. R. Co.*, 15 Mich., 206. 1867.

487. — A custom that an intermediate carrier, who received property subject to charges, may deduct from the freight earned by a prior carrier the value of any deficiency between the quantity delivered and that stated in the bill of lading, and that the prior carrier shall not be allowed to show that an error occurred in stating the amount in the bill of lading, is not such a valid custom as the court will enforce. *Ib.*

CATTLE.

See CARRIAGE OF LIVE STOCK; INJURY TO DOMESTIC ANIMALS.

1. Collision: injury to cars. An action cannot be maintained by a railway company against the owner of cattle for damages occasioned by the cars coming in collision with the cattle on the road, while it remains unclosed. *Jenkins v. New Orleans, Opelousas and Great Western R. R. Co.*, 15 La. An., 118. 1860.

2. — A railroad lay open to the highway, which ran by the side of it, for 59 rods. The defendant, who lived near by, had milked his cows in the highway, where they were left to be driven to a pasture on the other side of this place. A boy who had charge of them started them along and stopped a short time at a neighboring house for a cow to be milked which he was to drive with them, and while he was waiting, the cows strayed upon the railroad track. It was 8 o'clock in the evening, in July, and nearly dark, and a train of cars was then overdue on the railroad. The train soon came along, ran over one of the cows, and was thrown off the track, and badly

damaged. In a suit brought by the railroad company, the defendant claimed that the plaintiff had not exercised proper care, and a large amount of evidence was introduced on both sides on the subject. The jury returned a verdict for the defendant, and the plaintiff moved for a new trial on the ground that the verdict was against the evidence. *Held*,

I. That the negligence of the defendant was of the grossest kind.

II. That upon the question of the plaintiff's negligence, the preponderance of the evidence was in its favor, and the jury ought to have so decided.

III. But that this preponderance was not so great as to evince that the jury were unable to understand or, in fact, misapprehended the law or the evidence, or that they were influenced by partiality, prejudice or other improper motive; and a new trial was denied. *Housatonic R. R. Co. v. Knowles*, 30 Conn., 313. 1862.

CATTLE GUARDS.

See INJURIES TO DOMESTIC ANIMALS.

1. Constitutional law. The legislature has the power to require existing railway companies, and all hereafter incorporated, to maintain cattle-guards at all crossings, or to respond in damages for all cattle injured by their trains through such omission. This subject comes clearly within the police power of the state, and such requirement cannot be regarded as destroying vested rights or impairing the obligation of any contract contained in the charters of such corporations. *Thorpe v. Rutland and Burlington R. R. Co.*, 27 Vt., 140. 1854.

2. Contract; specific performance. A suit for specific performance will not lie upon a covenant by a railroad company to maintain and keep in repair the cattle guards upon the lands of the plaintiff. *Columbus and Shelby R. R. Co. v. Watson*, 26 Ind., 50. 1866.

CERTIFICATES OF DEPOSIT.

1. The holder of a certificate of deposit having commenced suit by a foreign attach-

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ment, surrendered it and took new certificates, *held*, that the action could be maintained thereon. *Manuel v. Mississippi R. R. Co.*, 2 Penn. St., 198. 1845.

CERTIORARI.

1. **Affidavits.** Opposing affidavits may be read on motion for a common law *certiorari*. *Saratoga and Washington R. R. Co. v. McCoy*, 5 Howard's Pr. (N. Y.), 378. 1851.

2. **Assessment of damages.** Proceedings on the assessment of damages in the case of land taken by a railroad company, under the authority of an act of assembly, may be removed into the supreme court by *certiorari*. *Schuler v. Northern Liberties and Penn Tp. R. R. Co.*, 3 Wharton (Penn.), 555. 1838.

3.— Where the statute gives an appeal from an assessment, for a right of way, a *certiorari* will be sustained; it appearing that the petitioner had not notice of the assessment, or an opportunity to appeal. *Joliet and Chicago R. R. Co. v. Barrows*, 24 Ill., 562. 1860.

4. — Where the judgment in proceedings for the condemnation of land is defective in matters of form, the proper course is to apply to the court in which the judgment was obtained for a correction of the record, and not to the supreme court for a *certiorari*. *St. Paul and Sioux City R. R. Co. v. Murphy*, 19 Minn., 500. 1873.

5. — A writ of *certiorari* will not be issued to quash the proceedings of county commissioners in determining the amount of compensation to be paid by a street railway company for extending its track over a bridge, the title to which has become vested in the commonwealth by the expiration of the franchise of the corporation which built it, because at the hearing they cited towns interested in the subject to appear before them, and also listened to suggestions from private persons; especially if no objection thereto was made at the time of the hearing. *Salem and South Danvers R. R. Co. v. County Comrs of Essex*, 9 Allen (Mass.), 563. 1865.

6. — If the proceedings of the county commissioners, in estimating damages for land taken for a railroad, are irregular, the remedy is to be sought by an application for a *certio-*

rari, and not by an application to the commissioners for a jury to revise the damages. *Fitchburg R. R. Co. v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 58. 1849.

7. — A railroad company was proceeding, under its charter, to condemn part of a turnpike, which the railroad was to cross; pending the proceedings, they were brought before the superior court by a writ of *certiorari*, issued at the instance of the turnpike company, and the writ having been returned, was quashed. The charter of the railroad company provides for the confirmation of the inquisitions by the county courts, if no cause be shown to the contrary, and no appeal from the judgment of the confirmation is provided for. Upon appeal from the order quashing the *certiorari*, *held*, that the writ was properly quashed by the superior court for want of jurisdiction over the subject matter at that stage of the proceedings; the want of power in the railroad company to condemn the property (if they had no such power), could not have been shown as cause against the confirmation of the inquisition. *Baltimore and Havre de Grace T. Co. v. Northern Central R. R. Co.*, 15 Md., 193. 1859.

8. **Equalization of taxes.** In making a return to a writ of *certiorari* requiring the board of equalization to certify to the proceedings had before them in relation to equalizing the value of property, the clerk can only return such documents and orders as remain on file. It is not his duty to take down or preserve the evidence. *Central Pacific R. R. Co. v. Placer Co.*, 32 Cal., 582. 1867.

9. — The statute does not require the board of equalization to take down or preserve such evidence. *Ib.*

10. — A writ of *certiorari* was sued out against the board of equalization of Placer Co. The return to the writ embraced all the proceedings and matters connected with an assessment in controversy, except the evidence. The petitioners then moved for a further writ requiring the evidence to be certified up. *Held*, that the motion should be denied, as there was no showing that the evidence was in writing or that it was preserved in any manner by the clerk. *Central Pacific R. R. Co. v. Placer Co.*, 34 Cal., 352. 1867.

11. **Highway.** A writ of *certiorari* will lie to remove the record of the laying out of a

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highway by selectmen. *Boston and Maine R. R. Co. v. Folsom*, 46 N. H., 64. 1865.

12. — The writ will be refused where the errors are merely formal and technical. *Id.*

13. — The writ will not lie to correct an erroneous assessment of damages by the selectmen, as a specific remedy by appeal is given by statute. *Id.*

14. **Justice of the peace.** Where a justice certifies that certain facts were proved on the trial, and as to others, though he can't recapitulate the evidence, yet enough was proved to warrant the judgment, this court cannot, on *certiorari*, say there was no evidence to warrant such judgment. *Paterson and Ramapo R. R. Co. v. Ackerman*, 4 Zabriskie (N. J.), 535. 1854.

15. — *Certiorari* is not a proper remedy to authorize a review of the judgment of a justice of the peace, in a case of trespass. *Chicago and Rock Island R. R. Co. v. Fell*, 22 Ill., 333. 1859.

16. — In an affidavit for *certiorari* to a justice's court, errors alleged were: 1st. That the justice erred in refusing to dismiss the cause for defective service of process. 2d. That the court erred in rendering judgment in favor of the plaintiff and against the defendant. 3d. That judgment should have been for defendant. *Held*, that the second and third allegations of error were not sufficiently specific to raise any question on the merits, and must be understood as referring only to the decision of the justice on the motion to dismiss. *Fowler v. Detroit and Milwaukee R. R. Co.*, 7 Mich., 79. 1859.

17. — A writ of *certiorari* to a justice of the peace, is distinct and separate from an appeal. *Chicago and Rock Island R. R. Co. v. Whipple*, 22 Ill., 337. 1859.

18. — A *certiorari* to remove proceedings before two justices to recover possession of land bought at sheriff's sale, brings into the Common Pleas nothing but the record of the proceedings before the magistrates and jury, and on writ of error, nothing else is before the supreme court. *Oakland R. R. Co. v. Keenan*, 56 Penn. St., 198. 1867.

19. **Lateral railways.** Where the exceptions to the report of the viewers are overruled in the court below, and no appeal has been taken, a *certiorari* will lie. *Hall's Appeal*, 56 Penn. St., 238. 1867.

20. **Municipal corporations.** Proceedings under the "bonding acts" have always been reviewed on *certiorari*. *Ayres v. Lawrence*, 63 Barbour (N. Y.), 454. 1872.

21. **When the writ will issue.** A writ of *certiorari* may issue to all inferior tribunals and jurisdictions, in cases where they illegally exceed their jurisdiction, and there is no appeal or other mode of directly reviewing their proceedings. *Doolittle v. Galena and Chicago Union R. R. Co.*, 14 Ill., 381. 1853.

22. — The only cases in which the writ of *certiorari* will lie are those in which an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy or adequate remedy. *Central Pacific R. R. Co. v. Placer County*, 43 Cal., 365. 1872.

23. — A *certiorari* will not be issued upon suggestion that parts of the charge of the court below, not appearing by the bill of exceptions to have been excepted to, are not in the record. *Stimpson v. West Chester R. R. Co.*, 3 Howard, 554. 1844.

CHAMPERTY.

1. **What constitutes champerty.** An agreement between an attorney and his client that the attorney shall receive as a contingent fee a certain portion of the amount recovered against the other party, is not void as being champertous. The case of *Boardman and Brown v. Thompson*, 25 Ia., 487, distinguished from the present one. *McDonald v. Chicago and Northwestern R. R. Co.*, 29 Ia., 170. 1870.

2. **Motion.** An objection that a bill in equity was filed under an agreement made between the plaintiffs and certain other parties, which is void for champerty, ought to be raised formally, by answer, and not by a motion to take the bill from the files. *Sperry v. Erie R. R. Co.*, 6 Blatchford (U. S. C. C.), 425. 1869.

CHANGE OF CARS.

See PASSENGERS.

Practice — When Change will be Allowed — Act of Two States.

CHANGE OF VENUE.

1. **Practice.** By the act of the 14th of April, 1834, a railroad company may remove an action pending against it in court, to another county, at any time before the jury is sworn. And upon the affidavit, required by the act, having been made by the president of the company, it is error in the court to proceed further. *Railroad Co. v. Cummins*, 8 Watts (Penn.), 450. 1839.

2. — When a summons has been served, and the complaint filed, the case is pending sufficiently to entitle a party to remove it to an adjoining judicial district, if the presiding judge is a party to the suit. Ch. 20, acts of 1870-1. *Carter v. Western North Carolina R. R. Co.*, 68 N. C., 346. 1873.

3. — A motion for change of venue cannot be made, before a written demand for the required change is made, under § 126 of the Code. *Vermont Central R. R. Co. v. Northern R. R. Co.*, 6 Howard's Pr. (N. Y.), 106. 1851.

4. — Where an order is made, changing the place of trial in a cause to another county, the change is effected at once. The transfer of the papers is a subsequent clerical duty. *Fisk v. Albany and Susquehanna R. R. Co.*, 41 Howard's Pr. (N. Y.), 365. 1870.

5. — Where a change of venue is granted in a civil action in the circuit court or court of common pleas because of an objection to the county, under §§ 207, 208, and 209 of the Code, the cause may be sent on such change to a county in another judicial circuit or district. *Miller v. Toledo, Wabash and Western R. R. Co.*, 33 Ind., 535. 1870.

6. **When change will be allowed.** — Where the venue in a cause is laid in a county where there has been and still is great and extensive excitement in regard to the subject matter for which the suit is brought, and many of the citizens of the county are interested in the event, the venue on that account will be changed. *Udall v. Long Island R. R. Co.*, 2 Howard's Pr. (N. Y.), 138. 1846.

7. — The circumstances justifying a change of venue considered. *People v. Long Island R. R. Co.*, 16 Howard's Pr. (N. Y.), 106, 1858; *Same v. Same*, 4 Parker's Cr. (N. Y.), 602, 1858.

8. — In order to warrant a change of venue, it must appear that a fair trial cannot be had in the county where it is laid, by positive evi-

dence or facts, and not by the mere opinion of the witnesses. *Murray v. New Jersey R. R. Co.*, 3 Zabriskie (N. J.), 63. 1850.

CHARTER.

See BRIDGES; CONSTITUTIONAL LAW; DIRECTORS; EMINENT DOMAIN; INJUNCTIONS.

1. **Act of two states.** It is no cause of forfeiture of a charter from Pennsylvania that the same corporation has obtained a charter from another state. *Commonwealth v. Pittsburgh and Connellsville R. R. Co.*, 58 Penn. St., 26. 1868.

2. — All the rights of the commonwealth against her own corporation will be enforced, without regard to immunities claimed from process beyond her territories and within the jurisdiction of another state. *Id.*

3. — The action of such corporation as a Maryland corporation against the Pennsylvania corporation, brought to declare an act of assembly void, is not a violation of a duty to the state of Pennsylvania. *Id.*

4. — The mere intention of a corporation to violate its duty is not a cause of forfeiture. *Id.*

5. — A corporation endued with the capacities and faculties it possesses by the coöperating legislation of two states, cannot have one and the same legal being in both states. Neither state could confer on it a corporate existence in the other. *Ohio and Mississippi R. R. Co. v. Wheeler*, 1 Black, 286. 1861.

6. — Two such corporations cannot unite in a suit in a court of the United States against a citizen of either of the states which chartered them. *Id.*

7. — A corporation chartered in two states, with the same capacities and powers, and intended to accomplish the same objects, exercising the same powers and fulfilling the same duties in both states, is a distinct and separate body in each state. *Allegheny County v. Cleveland and Pittsburgh R. R. Co.*, 51 Penn. St., 228. 1865.

8. — A charter granted by two states to a company to construct a railroad, is not only a contract with the company, but a compact between the states. It is to be liberally con-

Acceptance — Branch Roads — Effect of Amendment.

strued. Like a treaty, it is the law of all the contracting states, not subject to interpretation by the local usages of either. The same construction must be made in both. *Cleveland and Pittsburgh R. R. Co. v. Spear*, 56 Penn. St., 325. 1867.

9. — There is no legal difficulty in the way of the creation of a single corporation by the concurrent action of two or more states, nor of the creation of a new corporation out of two or more corporations already existing, nor of the creation by one state of such a corporation where one of the constituent corporations is a foreign one. *Bishop v. Brainerd*, 28 Conn., 289. 1859.

10. Acceptance. Acceptance of an act of assembly by a corporation, may be inferred from the exercise of corporate powers, or other unequivocal acts on its part; but this presumption cannot prevail against direct proof. *Lyons v. Orange, Alexandria, etc. R. R. Co.*, 32 Md., 18. 1869.

11. Amendment. Under the section of the revised statutes declaring that the charter of every corporation thereafter to be granted shall be subject to alteration, suspension and repeal, in the discretion of the legislature, the legislature has power to alter and amend railroad charters granted since the revised statutes; although there is no clause in the charter reserving to the legislature the right to alter or amend it without the consent of the company. *Suydam v. Moore*, 8 Barbour N. Y., 358. 1850.

12. — A charter granted by the legislature, since the passage of the act of 1846, concerning corporations, is subject to alteration or repeal, although it contains no words in express terms so declaring. *State v. Person*, 3 Vroom (N. J.), 134. 1866.

13. — acceptance. The acceptance of an amendment to its charter, is a power incident to a corporation, and its exercise belongs to the board of directors, if there be no other active governing body in whom it is vested. *Dayton and Cincinnati R. R. Co. v. Hatch*, 1 Disney (Ohio), 84. 1855.

14. — An acceptance of an amendment to a charter may be implied from corporate acts. *Bangor, Oldtown and Milford R. R. Co. v. Smith*, 47 Me., 34. 1859.

15. Associates of the Jersey Company. The third section of the "act to incorporate

the associates of the Jersey company" (Pamph. L. 1804, p. 370), enacts as follows: "That the said associates shall have the privilege of erecting or building any docks, wharves and piers, opposite to, and adjoining the said premises in Hudson river, and the bays thereof, so far as they may deem it necessary for the improvement of the said premises, or the benefit of commerce, and to appropriate the same to their own use. Held, that this section merely gave the associates a privilege or license to build docks, wharves and piers in the waters of the Hudson river, and the bays aforesaid, in the manner therein mentioned, and when so built, to appropriate them to their own use, and conferred upon them no power to transfer or convey such privilege or license to any other corporation. *Morris Canal and Banking Co. v. Central R. R. Co.*, 1 C. E. Green's Ch. (N. J.), 419. 1863.

16. Atlantic, etc. R. R. Co. The charters of the Atlantic and Pacific and South Pacific of Missouri Railroad Companies — construed. *Dinsmore v. Atlantic and Pacific R. R. Co.*, 46 Howard's Pr. (N. Y.), 193. 1873.

17. Branch roads. A reservation, in the charter of a railroad company, of a right to authorize other corporations to enter upon and use such railroad, extends to a branch railroad purchased from another company whose charter contained no such reservation. *Lexington and West Cambridge R. R. Co. v. Fitchburg R. R. Co.*, 14 Gray (Mass.), 266. 1859.

18. Effect of amendment. An amendment to the charter of a railway company authorizing a material change in the route, is not binding on the stockholders who have not assented thereto. And, upon the abandonment of the original route, such stockholders are released from their subscriptions. *Hester v. Memphis and Charleston R. R. Co.*, 32 Miss., 378. 1856.

19. — The act of 1836, amending the charter of the N. O. & C. R. R. Co., required the company to pay to the state a certain amount of money, to be used by the state for certain internal improvements. Held, that the state had the right to recover, whether the improvements had been commenced or not. *State v. New Orleans and Carrollton R. R. Co.*, 3 Robinson (La.), 418. 1843.

20. — The Franklin Canal Company built a railway from Erie to the Ohio state line,

Power to Amend.

which was forfeited to, and taken possession of by the state. The right to use the road was afterwards given by act to the C. P. & A. R. R. Co., to construct and use a road along the F. C. Co.'s road, and to connect its road with any other road legally authorized to come into Erie. The second section required the C. P. & A. Co. to purchase the road already built at a certain price. The E. & N. E. R. R. Co. had built a road from Erie eastwardly, which by act of the legislature had been declared forfeited. *Held*, that the C. P. & A. R. R. Co. might build a road or purchase that already built. That the C. P. & A. R. R. Co. might connect its road with the E. & N. E. Co.'s road, — that it was a legally constructed road for the purposes of the act under which the plaintiffs claim. That the legality of the E. & N. E. Co.'s road cannot be enquired into collaterally. That a party in possession of anything is presumed to have a good title, as between other persons. *Cleveland, Painesville and Ashtabula R. R. Co. v. Erie*, 27 Penn. St., 380. 1856.

21. Power to amend. The legislature may, by general laws, impose upon railroad companies new conditions, not contained in their charters. *Nelson v. Vermont and Canada R. R. Co.*, 26 Vt., 717. 1854.

22. — The legislature has power to determine in what manner a railroad company whose charter was made subject to the duties, liabilities and restrictions of R. S., ch. 44, shall exercise its franchise, and to make changes in the level, grade and connections thereof, and to direct the construction of a new connecting tract, if this is necessary in order to preserve the continuity of the road; and to provide in what manner, and under whose supervision, the work shall be done, and how paid for. *Fitchburg R. R. Co., v. Grand Junction R. R. Co.*, 4 Allen (Mass.), 198. 1862.

23. — The right of the legislature to amend, alter or repeal the charter of a railroad company under the Gen. Stats., ch. 68, § 41, includes authority both to withdraw powers granted to the corporation, and to confer new powers on it and require their exercise, and is independent of the assent of the corporation. *Mayor, etc., of Worcester v. Norwich and Worcester R. R. Co.*, 109 Mass., 103. 1871.

24. — When the act of incorporation con-

tains no provision for the liquidation of the affairs of the company, and the charter has been forfeited, it is competent for the legislature, by a subsequent enactment, to make such provision. *Haynes v. Carter*, 9 La. An., 265. 1854.

25. — Where the charter is silent as to the manner in which amendments to it may be accepted, the majority of the stockholders have no power to accept amendments. The charter is a contract, not only with the state, but between the stockholders. The majority of a corporation may control the management of its business, but cannot change the terms of the contract by which the stockholders were originally associated. *New Orleans, Jackson and Great Northern R. R. Co. v. Harris*, 27 Miss., 517. 1854.

26. — An acceptance of an amendment to a charter by a majority of the stockholders, without the consent of the minority, is void. *Ib.*

27. — An act, general in its terms, and applicable to all railroads, is within the meaning of the statute of 1831, ch. 503, empowering the legislature to modify the charters of corporations; and affects the charter of any company which contains no express limitation to the contrary. *Bangor, Oldtown and Milford R. R. Co. v. Smith*, 47 Me., 34. 1859.

28. — The power to alter or modify a charter is restrained to the powers and franchises granted by the charter. It does not authorize the legislature to change the object of the incorporation, or to substitute another for it. An alteration or modification is necessarily of the grant or thing to be altered or modified, and cannot be done by substituting a different thing; that would be a change. *Zabriskie v. Hackensack and New York R. R. Co.*, 3 C. E. Green's Ch. (N. J.), 178. 1867.

29. — The act of December 31, 1859, incorporating the Cape Girardeau and State Line Railroad, was not void under article IV, § 27 of the present constitution, as being an act of special legislation. That clause was obviously intended to have a prospective operation, and to apply only to laws passed after the adoption of the constitution. And the amendment of February 18, 1869, permitting the company to build the road to the state line through or near Bloomfield, was valid under § 3, article XI of the constitution,

Banking — Central R. R. Co. of N. J.

which section empowered the legislature to make subsequent amendments to charters already in operation. *State ex rel. v. Cape Girardeau and State Line R. R. Co.*, 48 Mo., 468. 1871.

30. — The act of 1868, which professed to amend the charter of the Louisiana and Missouri River Railroad was illegal and void, and did not constitute a new charter of said road. *State ex rel. v. Saline County Court*, 51 Mo., 350, 1873; *State ex rel. v. Callaway County Court*, ib., 395.

31. — The Boston and Providence R. R. Co., having accepted its act of incorporation passed since the act of 1830, ch. 81, by which the legislature reserved power to amend, alter or repeal, at pleasure, all acts of incorporation which should be subsequently passed, is bound by any reasonable alteration or amendment of its charter. *Roxbury v. Boston and Providence R. R. Co.*, 6 Cushing (Mass.), 424. 1850.

32. Banking. A railway company whose charter confines its business to the completion and maintaining of a railway cannot engage in banking. *People v. River Raisin and Lake Erie R. R. Co.*, 12 Mich., 389. 1864.

33. — The issue of paper designed to circulate in the form and similitude of bank bills is an act of banking. *Id.*

34. Baltimore, Catonsville, etc., R. R. Co. The charter of the Baltimore, Catonsville and Ellicott's Mills Passenger R. R. Co. — construed. *Peddicord v. Baltimore, etc., R. R. Co.*, 34 Md., 463. 1871.

35. Baltimore and Ohio R. R. Co. The charter of the Baltimore and Ohio R. R. Co., — construed. *State v. Baltimore and Ohio R. R. Co.*, 6 Gill (Md.), 363. 1847.

36. Constitutional law. A clause in a charter of a railroad corporation enabling it to have land condemned to its use on payment of the valuation found by an inquisition, does not prevent the legislature from passing an act requiring the court to set aside an inquisition found in 1836, confirmed in 1837, but under which the company made no payment or tender, until after the passage of the act in 1841. *Baltimore and Susquehanna R.R. Co. v. Nesbit*, 10 Howard, 395. 1850.

37. — Such an act does not impair the obligation of any complete contract in existence when it was passed. *Id.*

38. — The charter of the Pontiac R. R. Co. is not unconstitutional because no provision is made for notice to owners of lands, of proceedings to assess damages for taking the same. *Swan v. Williams*, 2 Mich., 427. 1852.

39. Camden and Amboy R. R. Co. The franchise of the Camden and Amboy Railroad Company, to perfect an expeditious and complete line of communication between the cities of Philadelphia and New York, and to build across the state a railroad to be part of that line, is exclusive against all but the state and those upon whom the state has conferred it. *Pennsylvania R. R. Co. v. National R. R. Co.*, 8 C. E. Green's Ch. (N. J.), 441. 1873.

40. — Any railroad over the state wherever built, if built for and adapted to be part of a through competing line between said cities is unlawful and liable to be enjoined, unless authorized by legislative enactment. *Id.*

41. — No authority is conferred by any or all of the charters together, of the several New Jersey corporations codefendant with the National R. R. Co. to build a road across the state, to be used for part of a competing line between the cities of Philadelphia and New York, and the attempt by the defendants to build such road is in fraud of the rights of the complainants, and will be enjoined. *Id.*

42. — The charter of the Camden and Amboy R.R.Co.—construed. *Delaware, etc., Canal Co. v. Camden and Atlantic R. R. Co.*, 1 C. E. Green's Ch. (N. J.), 321. 1863.

43. Canal company. The grant of a charter to a canal company, authorizing it to construct its canal along the line of a certain valley, there being no provision in the charter granting a monopoly to such company, will not prevent the granting of a charter to a railway company empowering it to construct a railroad along the same valley. *Tuckahoe Canal Co. v. Tuckahoe and James River R. R. Co.*, 11 Leigh. (Va.), 42. 1840.

44. Central R. R. Co. of Ga. The charters of the Central R. R. Co. and the South Western R. R. Co. — construed. *Central R. R. Co. v. Collins*, 40 Ga., 582. 1869.

45. Central R. R. Co. of N. J. The charters of the Central R. R. Co. of N. J. and the Morris and Essex R. R. Co. — construed. *Morris and Essex R. R. Co. v. Central R. R. Co.*, 2 Vroom (N. J.), 205. 1865.

Commissioners — Conditions.

46. Change of name. The act amending the charter of the Fox River Valley R. R. Co. and changing its name, does not create a new corporation. *Milwaukee and Northern Illinois R. R. Co. v. Field*, 12 Wis., 340. 1860.

47. Commissioners. When an act names a great number of persons, and then enacts that they, "or any three of them, be and are hereby appointed commissioners," it is in the alternative, and the whole number named, or any three of them, are appointed at the election of the individuals named in the act. *Commonwealth v. Westchester R. R. Co.*, 3 Grant's Cases (Penn.), 200. 1855.

48. Compliance with statutes. An attempt to comply with the statute concerning corporations, and a substantial compliance with its provisions, renders a company claiming in good faith to be a corporation a corporation *de jure*. *Oroville and Virginia R. R. Co. v. Plumas Co.*, 37 Cal., 354. 1869.

49. Compensation for services in perfecting organization. Where, after the charter, and before the organization of a corporation services are rendered which are necessary to complete that organization, and, after it has been perfected, the corporation elects to take the benefit of such services, knowing that they were rendered with the understanding that compensation was to be made, it will be held liable to pay for the services upon the ground that it must take the burden with the benefit. *Low v. Connecticut and Passumpsic Rivers R. R. Co.* 45 N. H., 370. 1864.

50.—*Held*, also, that a suit at law will lie to recover such compensation; but that no promise to pay would be implied from the fact that such services were rendered at the request of any number of the grantees less than a majority. *Id.*

51.—*Held*, also, that the sole power of determining by what measures and by what agency such organization shall be effected, rests in the body of the grantees, a majority of whose votes must govern. *Id.*

52. Conditions. It was provided by § 14 of the charter of a railroad company, granted in 1835, that such charter was to become void "if said company shall not expend the sum of fifty thousand dollars upon said railroad, or way, within four years after the passage of this act." Nothing having been

done under such charter, the legislature, in 1846, passed a resolution, by which it was renewed, and which provided, "that if said company should not expend the sum of \$50,000 upon said railroad, as was prescribed in said § 14 of the original charter, within two years from the rising of the general assembly, at which said resolution was passed, or if it should not complete or put in operation a single, double, or treble way, as authorized in said charter, within four years after the rising of said general assembly, then the rights, privileges and powers of said corporation should be null and void." *Held*, that said company was required to expend said sum of \$50,000, and to complete its said road, within the times respectively provided therefor. *Danbury and Norwalk R. R. Co. v. Wilson*, 22 Conn., 435. 1853.

53.—Where the law required that the payment of ten per cent. of the subscriptions should be made in good faith before incorporation, and the incorporators gave their check in payment upon a bank in which they had no funds, it was *held*, that such payment was insufficient, even although it appeared that the bank would have paid the check if presented. (Stat. 1861, p. 607). *People v. Chambers*, 42 Cal., 201. 1871.

54.—Where a charter was granted upon a certain condition, with a reservation of the right to repeal it if the condition was broken, after the breach of the condition the corporation held its franchise as a tenant at will, and the legislature was invested with as full power to repeal the charter as if the reservation had been unconditional. *Erie and Northeast R. R. Co. v. Casey*, 26 Penn. St., 287. 1856.

55.—The fact that the corporation had been compelled by judicial proceedings to comply with the conditions in its charter will not estop the legislature from exercising its right of repeal. *Id.*

56.—A law passed by the legislature will be presumed constitutional until the contrary appear. And where the legislature declares a charter forfeited under its conditions, it will be presumed that the facts authorizing forfeiture have occurred. *Id.*

57.—Where a charter is repealed, the franchises are resumed to the state, and the railroad remains, as it always was, public property. *Id.*

Constitutional Law.

58. — The corporators are not entitled to compensation, for their rights in the road are only franchises and not property, and the resumption of these franchises under the terms upon which they were granted does them no injury, only what they have agreed to submit to. *Ib.*

59. — The law itself declaring a forfeiture makes a *prima facie* case, and it is for the company to show that the breach has not occurred. *Ib.*

60. — In such a case, the lands condemned as a right of way do not revert to their original owners, but remain vested in the state for public use. *Ib.*

61. — If, after the passage of the act declaring the forfeiture, the legislature pass a new act restoring the road to the company, but retaining possession in the state until the acceptance of the new act by the company, and the acceptance is formally made, the original charter is repealed, and the company is estopped to deny the validity of the law to which it has assented. *Ib.*

62. — A contract between the state and a railway company cannot arise by implication, and hence a law regulating the manner of voting at elections and the gauges of the railway, will not be construed as an agreement by the state to relinquish its right to repeal the charter for abuse or misuse. *Ib.*

63. — Abuse or misuse consist of any positive act in violation of the charter, and in derogation of public right, willfully done by the corporation. *Ib.*

64. Constitutional law. The charter of a railroad company is a contract which is protected by clause 1, § 10, art. I, of the constitution of the United States, unless the charter is by its terms repealable. *Alabama and Florida R. R. Co. v. Burkett*, 46 Ala., N. S., 569, 1871; *New Orleans, Jackson and Great Northern R. R. Co. v. Harris*, 27 Miss., 517, 1854; *Smead v. Indianapolis, Pittsburgh and Cleveland R. R. Co.*, 11 Ind., 104, 1858.

65. — But the legislature may alter such a charter with the assent of all the corporators; and that assent may be manifested in at least three ways—by asking the legislature to make the amendment; by expressly accepting an amendment enacted without request; and by acting upon and acquiescing in an amendment enacted without request. *Smead v. In-*

dianapolis, Pittsburgh and Cleveland R. R. Co., 11 Ind., 104. 1858.

66. — The legislature has authority, under the constitution, to create a railroad corporation by special act, whenever in its judgment, a special act is necessary, notwithstanding the constitutional provision. *Mosier v. Hilton*, 15 Barbcur (N. Y.), 657. 1853.

67. — Special acts of incorporation will be valid, notwithstanding the constitutional provision, requiring general laws for such purposes; without any recital by way of preamble, that the object could not be accomplished by general law. *Johnson v. Joliet and Chicago R. R. Co.*, 23 Ill., 202. 1859.

68. — The corporators of the F. W. and S. R. R. Co. having accepted the charter before the constitution of 1851 took effect, it became a valid and binding contract between them and the state, which could not be abrogated or impaired, except for cause. *State ex rel. v. Dawson*, 22 Ind., 272. 1864.

69. — Corporations not municipal can only be created by general laws. Art. 4, § 31, Const. *Oroville and Virginia R. R. Co. v. Plumas Co.*, 37 Cal., 354. 1869.

70. — The Jeffersonville railroad company was incorporated by a special charter, January 20, 1846. By § 33 of the act, the legislature reserved the right to alter the charter. *Held*, that under the power reserved, the legislature might properly apply the general law regulating the liability of railroad companies for stock killed to this company. *Jeffersonville R. R. Co. v. Gabbert*, 25 Ind., 431. 1865.

71. Construction. That which a company is authorized to do by its act of incorporation, it may do; beyond that all its acts are illegal. The power must be given in plain words or by necessary implication. *Commonwealth v. Erie and North East R. R. Co.*, 27 Penn. St., 339. 1856.

72. — The charter of defendant authorized the construction of a road from the borough of Erie, then bounded on the south by Twelfth street. The borough was afterwards enlarged, and the company constructed its road from a point within the enlarged borough sixty rods south of the old boundary. *Held*, that this was not a compliance with the charter. *Ib.*

73. — Laws must be executed in accordance with their sense and meaning at the time of their passage. *Ib.*

Division of Railway Corporation — Double Track.

74. — Where a privilege is given to a railway company, by an act of the legislature, to extend or make certain connections as "hereinafter provided," and there are two provisos appended, they must both be considered together, and the privilege cannot be exercised in a manner inconsistent with either, unless they are repugnant. *Packer v. Sunbury and Erie R. R. Co.*, 19 Penn. St., 1852.

75. — Railroad charters are to be strictly construed against the grantees. *South Carolina R. R. Co. v. Columbia and Augusta R. R. Co.*, 13 Richardson's Eq. (So. Car.), 339. 1867.

76. — This rule applies especially where one grant interferes with another previously made. *Packer v. Sunbury and Erie R. R. Co.*, 19 Penn. St., 211. 1852.

77. — Where the charter leaves a right in doubt, the doubt is resolved against the corporation. *Commonwealth v. Central Passenger R. R. Co.*, 52 Penn. St., 506. 1866.

78. — A company was authorized to hold land and "mine for coal oil and other minerals, cultivate and improve," etc., and also "to construct a railroad or railroads from any other lands to connect with any road or to any navigable stream," etc. If the company had no land, it could build no road, and could only build from its own land to carry off its products. *Warren and Franklin R. R. Co. v. Clarion Land Co.*, 54 Penn. St., 28. 1867.

79. — It could not build a railway independent of its own lands, for the mere accommodation of the public, and for the company's pecuniary profit arising only from general travel. *Ib.*

80. — A proviso to the law was that "the said roads do not exceed twenty miles in length." *Held*, that all the roads together could not exceed twenty miles in length. *Ib.*

81. — The terminus *a quo* must be on the company's land, if the beginning be illegal there is no lawful railroad. *Ib.*

82. — When the road reached a navigable stream or other railroad, it ended. *Ib.*

83. — The charter of the P. W. & B. R. R. Co. authorizes it as soon as it conveniently can, to construct a road, with one or more tracks, and to make and erect such warehouses, etc., and all the works and appendages for the convenience of the said company, for the use of its railroad. This gives the right to construct sidings, turnouts, stations,

engine houses and all works and appendages usual in the convenient operation of the road. *Philadelphia, Wilmington and Baltimore R. Co. v. Williams*, 54 Penn. St., 103. 1867.

84. — The expression "as soon as it conveniently can locate and construct," is not a limitation upon the power to compel the company to exercise its whole authority in the very beginning. *Ib.*

85. — The power to take land includes the power to take a right of way over it. *Ib.*

86. — Grants of exclusive privileges, being in derogation of public rights belonging to the state, or to its citizens generally, must be construed strictly. *Mohawk Bridge Co. v. Utica and Schenectady R. R. Co.*, 6 Paige Ch. (N. Y.), 554. 1837.

87. — A corporation which has been authorized to construct a railroad, and is afterwards authorized by statute to make it in sections of five miles each, provided that it shall not commence the construction of any portion of its road within a certain distance of one of its terminations, until all the stock is subscribed for by responsible persons, and a certain portion thereof actually paid in, is not obliged to have its stock subscribed for, and the specified amount paid in, as a condition precedent to constructing its whole road not in sections. *Boston and Providence R. R. Co. v. Midland R. R. Co.*, 1 Gray (Mass.), 340. 1854.

88. Division of railway corporation. On the division of the route of a railway company into two parts, one part retaining the corporate name with all the subscriptions for the capital stock: *held*, that this was not to be deemed a new corporation, but rather a continuation of the original one with a diminished franchise. *Low v. Connecticut and Passumpsic Rivers R. R. Co.*, 46 N. H., 284. 1865.

89. Domicil of a corporation. Where a corporation derives its charter from the state of Virginia alone, its domicil is in that state exclusively. It cannot reside in Maryland and in Virginia at the same time under the same charter. *Baltimore and Ohio R. R. Co. v. Glenn*, 28 Md., 287. 1867.

90. Double track. The act incorporating the New York and Harlem R. R. Co., passed April 25, 1832 — construed. *Held*, that the permission to build a double track should be construed to mean two tracks upon the same

Extension of Road — Forfeiture.

location, for the purpose of enabling cars to run in opposite directions, and not two essentially different routes through different streets or avenues; especially as the right of granting to other persons or corporations authority to construct parallel railroads on streets or avenues not occupied by the New York and Harlem Railroad Company, was expressly reserved by § 16 of the same act. *People v. New York and Harlem R. R. Co.*, 45 Barbour (N. Y.), 73, 1864; *Same v. Same*, 26 Howard's Pr. (N. Y.), 44, 1863.

91. **Extension of road.** The grant of a right to a railroad company to extend to and unite with any other railroad in this state, gives a general authority to extend to any other road within the prescribed limits. *Belleville and Illinoisstown R. R. Co. v. Gregory*, 15 Ill., 20. 1853.

92. **Ferry.** The charter of the Southern Minn. R. R. Co. — construed. *Held*, that it was not entitled under its charter to run ferry boats within the territory in which McR. had a ferry license. *McRoberts v. Southern Minn. R. R. Co.*, 18 Minn., 108. 1871.

93. **Filing.** Parol evidence is admissible to show the date of the filing of the articles of association of a railroad company organized under the general statute of 1852, in the office of the secretary of state. *Johnson v. Cranfordsville, Frankfort, etc. R. R. Co.*, 11 Ind., 280. 1858.

94. — The filing is no part of such articles. It is a fact separate from and independent of them. It is a fact separate from the indorsement of the fact of filing. The indorsement is not the filing; it can be no more than *prima facie* evidence of the time of the filing. *Ib.*

95. — The filing of a paper, as between the party and the officer, is the delivery of it to the officer, at his office, to be by him kept as a paper on file; and such delivery may be proven by evidence other than the indorsement of the officer. *Ib.*

96. **Forfeiture.** On a bill brought by a corporation against another corporation for interference with its rights, it is entitled to relief against wrongs committed before the issuing of its letters patent, if there was no such tardiness in organizing as forfeited the privileges given by the charter. *Packer v. Sunbury and Erie R. R. Co.*, 19 Penn. St., 211. 1852.

97. — The legislature is not the final judge of whether the act upon which the authority to repeal a charter is based, has accrued. *Commonwealth ex rel. v. Pittsburgh and Connellsville R. R. Co.*, 58 Penn. St., 26. 1868.

98. — The declaration of a forfeiture by an act of the legislature, cannot be sustained on the ground of a taking under the right of eminent domain, unless there is some adequate remedy provided for obtaining compensation. *Ib.*

99. — The sale of a railroad, etc., under the act of April 8, 1861, does not extinguish the corporation, but creates the purchasers a body corporate with all the rights of the corporation whose property they have bought. *Commonwealth v. Central Passenger R. R. Co.*, 52 Penn. St., 506. 1866.

100. — Irregularities in the organization are not necessarily fatal to the being of the corporation; organization is but the creation of an agency by which it can act; it presupposes its existence. *Ib.*

101. — A defect in organization may work a forfeiture of franchises but will not entitle the commonwealth to a judgment that the franchises do not exist. *Ib.*

102. — Under an original grant of corporate rights, the grantee must comply strictly with all the conditions precedent to the taking effect of the grant. *Ib.*

103. — Where the causes of forfeiture are clearly made out, the charter will be pronounced forfeited. *State v. Clinton and Port Hudson R. R. Co.*, 4 Robinson (La.), 445. 1843.

104. — To authorize a suit in the name of the state to declare a forfeiture of a charter, it is not necessary that the legislature should by a statute have authorized and directed the institution of such suit. *State v. Southern Pacific R. R. Co.*, 24 Tex., 80. 1859.

105. — The manner and form of bringing such suit considered. *Ib.*

106. — If an act of incorporation fixes a definite time in which the charter shall expire, when the time fixed for its expiration arrives, the corporation is dissolved. But if its continuance beyond a fixed time is made dependent upon the performance of a given condition, the nonperformance of the condition is a mere ground of forfeiture. This, however, can only be taken advantage of in a proceeding by a *quo warranto*. *La Grange*

Franklin R. R. Co. — Mississippi and Atlantic R. R. Co.

and *Memphis R. R. Co. v. Rainey*, 7 Coldwell (Penn.), 420. 1870.

107. — As long as the state recognizes the existence of a corporation, it may sue and be sued. *Ib.*

108. — constitutional law. An act which repeals the charter of a railroad company and confers its powers upon a different body, with a view to declare a forfeiture or create a dissolution, is unconstitutional. *Bruffett v. Great Western R. R. Co.*, 25 Ill., 353. 1861.

109. — evidence. The only competent evidence to prove a forfeiture of a charter is the judgment of a court directly on the point. *Cleveland and Pittsburgh R. R. Co. v. Speer*, 56 Penn. St., 325. 1867.

110. Franklin R. R. Co. The charter of the Franklin R. R. Co. — construed. *Commissioners of Washington County v. Franklin R. R. Co.*, 34 Md., 159. 1870.

111. Harlem R. R. Co. The time limited for the completion of the Harlem railroad only applied to the road as originally authorized by its charter. *Hamilton v. New York and Harlem R. R. Co.*, 9 Paige Ch. (N. Y.) 171. 1841.

112. Illegal contract. A contract to withdraw opposition to the passage of a railway charter will not be enforced in equity. *Martin v. Second and Third St. R. R. Co.*, 3 Philadelphia Rep. (Penn.), 316. 1858.

113. Infringement of chartered routes. A provision in the charter of a railroad company, that no railroad, other than the one established, shall be authorized to be made from one termination thereof to any place within five miles of the other termination, is not infringed by an act authorizing the construction of a railroad from the first mentioned termination, to a point not within five miles of the other termination, although within the space included by two straight lines drawn from the first termination to points five miles on each side of the other termination. *Boston and Lowell R. R. Co. v. Boston and Maine R. R. Co.*, 5 Cushing (Mass.), 375. 1850.

114. Illinois Central R. R. Co. The Illinois Central R. R. Co. has the right, under its charter, to locate its road in the waters of Lake Michigan. *Illinois Central R. R. Co. v. Rucker*, 14 Ill., 353. 1853.

115. Judicial notice. The act incorporat-

ing the C. and I. R. R. Co., is a private act and will not be judicially noticed by the court unless such act is set out in the pleadings. *Ohio and Indianapolis R. R. Co. v. Ridge*, 5 Blackford (Ind.), 78. 1839.

116. — A supplement to an act incorporating a private company, containing a clause that "it shall be deemed and taken as a public act," will itself receive judicial recognition. *Stephens and Condit Transportation Co. v. Central R. R. Co.*, 4 Vroom (N. J.), 229. 1869.

117. Limitation. An act incorporating a railroad company, with a condition inserted therein that it shall be void if not carried into effect within a time limited, and containing also a proviso, that after twenty years, the commonwealth may, in a certain contingency, purchase the franchise of the road, is not in virtue of either of these provisions, expressly limited as to its duration, within the act of 1830, ch. 81. (R. S., ch. 44, § 23.) *Roxbury v. Boston and Providence R. R. Co.*, 6 Cushing (Mass.), 424. 1850.

118. Macon and Western R. R. Co. Where a railroad company, by its charter, had the exclusive right to transport and carry persons, merchandise, etc., over its road from Atlanta to Macon, it was held, that such charter did not give the company the right to engage in transporting produce through Macon across the Ocmulgee bridge to the depot of another railway company. Such charters are to be strictly construed. *Mayor of Macon v. Macon and Western R. R. Co.*, 7 Ga., 221. 1849.

119. Memphis Branch R. R. Co. The charter of the Memphis Branch R. R. Co. — construed. *Mitchell v. Rome R. R. Co.*, 17 Ga., 575. 1855.

120. Minneapolis and Cedar Valley R. R. Co. The legislature, by an act approved March 10, 1862, entitled "An act to facilitate the construction of the Minneapolis and Cedar Valley Railroad, and to amend and continue certain acts in relation thereto," did not revive the Minneapolis and Cedar Valley R. R. Co., or continue or regrant to it the franchises and property which it had forfeited to the state. *Fitz v. Minnesota Central R. R. Co.*, 11 Minn., 414. 1866.

121. Mississippi and Atlantic R. R. Co. The Mississippi and Atlantic R. R. Co. is a valid and subsisting corporation. *People*

Monopoly.

v. Mississippi and Atlantic R. R. Co., 14 Ill., 440. 1853.

122. **Monopoly.** The legislature, having granted a charter to a railway company between certain *termini*, may afterwards charter another between the same points, unless there is a limitation to the contrary in the first charter. *State v. Noyes*, 47 Me., 189. 1859.

123. — It is provided in a section of the charter of the Michigan Southern R. R. Co., that no railroad or railroads, from the eastern or southern boundary of the state, shall be built or maintained, any portion of which shall approach westwardly of Wayne county, within five miles of the line of said railroad, without the consent of the said company; nor that any railroads shall be authorized, which shall commence within twenty miles of Detroit, and extend to lake Michigan on the southern boundary of the state, the line of which shall, in an average, run within twenty miles of the main line of said Michigan Central Railroad: provided, that said act should not be construed to restrict or prevent the construction of public roads, or canals, or railroads or private ways, under, above or across the road of said company, when deemed expedient; but so as not to unnecessarily obstruct the same. *Held*, that the prohibition contained in the first subdivision of the said section does not apply to a chain or series of railroads, one of which might reach one of the prohibited points, and another of which might reach the other point; but only to an entire road in itself extending to each point. *Michigan Central R. R. Co. v. Michigan Southern R. R. Co.*, 4 Mich., 361. 1856.

124. — The provision of § 12 of the act incorporating the Boston and Lowell R. R. Co., (St. 1830, ch. 4), "that no other railroad than the one hereby granted shall, within thirty years from and after the passage of this act, be authorized to be made, leading from Boston, Charlestown or Cambridge to Lowell," (the legislature also reserving, in this act, the right to regulate the tolls to a certain extent, and to purchase the franchise upon certain terms), constituted a contract by the commonwealth with the Boston and Lowell Co., that no other railroad from Boston, Charlestown or Cambridge to Lowell, should be lawfully made for thirty years; and was within the constitutional power of the legislature to

make, and binding upon their successors. *Boston and Lowell R. R. Co. v. Salem and Lowell R. R. Co.*, 2 Gray (Mass.), 1. 1854.

125. — A railroad company which is unlawfully disturbed in the enjoyment of its franchise by another railroad corporation, may maintain a bill in equity in the supreme court for an injunction of such disturbance as of a nuisance: and is not obliged to apply to the county commissioners for damages under R. S., ch. 39, § 56; nor to this court for leave to file an information in the nature of a *quo warranto*, under St. 1852, ch. 312, § 42. *Ib.*

126. — Such right, however, is subject, like other private property, whenever, in the opinion of the legislature, the public exigencies require it, to be appropriated to public uses, reasonable compensation being made. *Ib.*

127. — Under a stipulation in the charter of a railroad corporation, that the state would not, within thirty years, allow any other railroad to be constructed, within certain limits, the probable effect of which would be to diminish the number of a certain description of passengers on the railroad then chartered. *Held*, 1. That this stipulation was to be construed strictly, as against the corporation. 2. That it was not violated merely by chartering another railroad, which might be exclusively used to transport merchandise. *Richmond, etc., R. R. Co. v. Louisa R. R. Co.*, 13 Howard, 71. 1851.

128. — Where an injunction is asked against a street railway company to prevent the construction of a road, on the ground that the plaintiff had an exclusive right, the injunction will be dissolved if the plaintiff does not show that he has that exclusive right. The fact that the plaintiff has had an exclusive right and afterwards abandoned it, will not confer an exclusive right upon a third party who may obtain permission from the city to build a road through a particular tract of land. *New Orleans City R. R. Co. v. Crescent City R. R. Co.*, 23 La. An., 759. 1871.

129. — An exclusive privilege was granted to the Pontchartrain R. R. Co., of building and operating a railway from New Orleans to Lake Pontchartrain. Subsequently, a company was authorized to build a road from said city to Carrollton, and another company was authorized to build a road from Carrollton to said lake. A combination was made by the

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two latter roads to run through trains from the city to the lake. *Held*, that this was a violation of the privilege of the former company, and an injunction was granted with damages. *Pontchartrain R. R. Co. v. New Orleans and Carrollton R. R. Co.*, 11 La. An., 253. 1856.

130. — The exclusive privilege, vested in the plaintiff, by the act of 1880, to construct a railway, within certain limits, must be construed with reference to the extent of the city of New Orleans, at the time of the passage of the act. *Pontchartrain R. R. Co. v. Lafayette and Pontchartrain R. R. Co.*, 10 La. An., 741. 1855.

131. *Morris and Essex R. R. Co.* The charter of the Morris and Essex R. R. Co. — construed. *Vail v. Morris and Essex R. R. Co.*, 1 Zabriskie (N. J.), 189. 1847.

132. **Municipal corporations.** Where a railroad company by its charter, is authorized to bring its road to a city, and acquire property within it, the right to enter the city is also conferred. *Moses v. Pittsburgh, Fort Wayne and Chicago R. R. Co.*, 21 Ill., 516. 1859.

133. **Name.** The charter of the St. Paul and Pacific R. R. Co. — construed. The corporation had no authority to make a change of its name. *Morris v. St. Paul and Chicago R. R. Co.*, 19 Minn., 528. 1873.

134. **New enterprise.** A stockholder in a corporation, the charter of which by St. 1830, ch. 81, is subject to alteration, at the pleasure of the legislature, cannot maintain a bill in equity to restrain the corporation from engaging in a new enterprise in addition to that contemplated by the charter, but of the same kind, if it is sanctioned by an express legislative grant, and by a vote of a majority of the stockholders. *Durfee v. Old Colony and Fall River R. R. Co.*, 5 Allen (Mass.), 230. 1862.

135. **Neglect of duty.** If a state injure one company by the unlawful grant of a charter to another and rival one, the remedy of the first company is by proper proceedings to restrain the second from getting into operation, and not by neglecting its own duties. *Turnpike Co. v. The State*, 3 Wallace, 210. 1865.

136. — Nor can it plead its lessened revenues, caused by such second corporation, as an excuse for a violation of its charter. *Ib.*

137. *Newark and Bloomfield R. R. Co.*

The charter of the Newark and Bloomfield R. R. Co., and supplement thereto, construed. *Gifford v. New Jersey R. R. Co.*, 2 Stockton's Ch. (N. J.), 171. 1854.

138. *Orange and Newark R. R. Co.* The charter of the Orange and Newark R. R. Co. construed. *McFarland v. Orange and Newark R. R. Co.*, 2 Beasley's Ch. (N. J.), 17, 1860; *Same v. Same*, *ib.*, 561.

139. **Organization.** Where, in the organization of a railroad company, all the requirements of the charter were observed, though not in the order prescribed, the organization was deemed sufficient. *Hakright v. Logansport and Northern Indiana R. R. Co.*, 13 Ind., 404. 1859.

140. — **general statute.** The statute relating to the formation of railroad corporations is substantially complied with if the only defect in the papers necessary to constitute a corporation, is the omission of the words, "in good faith," in that portion of the affidavit attached to the certificate relating to the payment of the ten per cent. *People v. Stockton and Visalia R. R. Co.*, 45 Cal., 306. 1873.

141. — **conditional subscriptions.** An act of assembly appointed commissioners and authorized them to open books and receive subscriptions for the purpose of constructing a railway, and provided that no subscription should be valid unless five dollars was paid on each and every share, at time of the subscription, and provided that when a certain number of shares should have been subscribed, and five dollars paid upon each as aforesaid, and the same should be certified to the governor by the commissioners, under oath, he should thereupon issue letters patent incorporating the subscribers, and those who should thereafter become subscribers to the stock, all of which was done, and the company duly organized. *Held*, that the act imposed no restriction upon the corporation after it was organized, in regard to the payment of the sum of five dollars on each share at time of subscribing. *Philadelphia and West Chester R. R. Co. v. Hickman*, 28 Penn. St., 318. 1857.

142. — That the commissioners were only invested with special authority, but the officers of the company, after its organization, acted under the general corporate powers granted. *Ib.*

Penalty — Powers.

143. — The condition annexed to the subscription, that it should be binding only in the event of a certain amount of stock being subscribed, was a valid one. *Ib.*

144. — The company had the right to accept payment of stock in labor, materials, in damages which the company was liable to pay, or in any other liability of the corporation. *Ib.*

145. Private road. R. having constructed a private railroad to his own mines without authority of law, was enjoined from using it and ordered to remove his rails. He procured the incorporation of himself and six others into a railway company, with a capital of \$100,000. The company was organized before any stock was taken, and R. sold to the company his railroad, mines, etc., for \$100,000, payable in the stock of the company, which had no other assets than the property sold by R. The company relaid the road and operated it. *Held*, that R. was the owner after the organization and sale. That the road was still a private road and not covered by the act of incorporation. *McCandless' Appeal*, 70 Penn. St., 210. 1871.

146. Penalty. The state of Maryland passed a law to subscribe \$100,000 to the stock of the Baltimore and Ohio R. R. Co., providing that, if the road should be located so as not to pass through certain towns, the company should forfeit \$100,000 to the state for the use of Washington county. The company assented to this law as a part of its charter. *Held*, that this was a law inflicting a penalty; that nothing was due to the county by the contract, and that the state could release and had released the penalty by a subsequent law. *State of Maryland v. Baltimore and Ohio R. R. Co.*, 3 Howard, 535. 1844.

147. Pensacola, etc., R. R. Co. The charters and corporate rights of the Pensacola and Ga., and Fla., Atlantic and Gulf Cent. R. R. Companies — examined. *Florida, Atlantic and Gulf Central R. R. Co. v. Pensacola and Georgia R. R. Co.*, 10 Fla., 145. 1862.

148. Philadelphia, etc., R. R. Co. The charter of the Philadelphia, Germantown and Norristown R. R. Co. — construed. *Roberts v. Philadelphia, etc., R. R. Co.*, 5 Penn. Law Jour. Rep., 124. 1851.

149. — The act incorporating the Philadelphia and Wilmington R. R. Co. — con-

strued. *Jarden v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 3 Wharton (Penn.), 502. 1838.

150. Place of existence. A corporation can have no legal existence out of the bounds of the sovereignty which created it; it must dwell in the place of its creation. *Allegheny County v. Cleveland and Pittsburg R. R. Co.*, 51 Penn. St., 228. 1865.

151. Police regulations. Police regulations, established by law for the convenience of passengers cannot affect companies already chartered, but regulations for the safety of passengers may be enacted. *State v. Noyes*, 47 Maine, 189. 1859.

152. Powers — to hold land. The charter of the Pacific Railroad Company gave it power to acquire a strip of land not exceeding one hundred feet wide for a right of way, and to hold sufficient ground for the erection and maintenance of depots, landing places, etc. *Held*, that the corporation had no power to acquire land for purposes of speculation. A corporation can purchase and hold land only for such purposes as are authorized by its charter. *Pacific R. R. Co. v. Seeley*, 45 Mo., 212. 1870.

153. — But although an executory contract to convey such land cannot be enforced on account of being against public policy, yet if the deed were in fact made voluntarily, it will be good to pass title. *Land v. Coffman*, 50 Mo., 243. 1872.

154. — The amount of lands which a corporation may hold cannot be determined in a suit between private parties. That question can only be raised by the state in a direct proceeding against the company. *Ib.*

155. — A railroad company cannot lawfully engage in any distinct branch of business not authorized by its charter, for the purpose of raising funds to accomplish the object for which it was created. *Waldo v. Chicago, St. Paul and Fond du Lac R. R. Co.*, 14 Wis., 575. 1861.

156. — The Chicago, St. Paul and Fond du Lac R. R. Co. had no power under its charter to buy and hold lands situated at a distance from the road, and which it did not need and could not use in constructing or operating its road. *Ib.*

157. — The Ohio R. R. Co. is authorized by its charter to purchase and hold real estate,

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when necessary for the procurement of materials, or for the economical construction of the road. *Overmyer v. Williams*, 15 Ohio, 26. 1846.

158.— In the authority to the P. & R. R. Co. to construct a railroad are included sidings and branches to its wharves. *Black v. Philadelphia and Reading R. R. Co.*, 58 Penn. St., 249. 1868.

159.— generally. In ordinary transactions between the corporation and strangers, the authority of agents, and the existence of contracts, may be implied from circumstances, or where the assent of the board is required by a by-law; but where the charter grants a power, the mode prescribed for its exercise must be strictly pursued. *Pittsburgh and Connellsville R. R. Co. v. Clarke & Thaw.*, 29 Penn. St., 146. 1857.

160. Repeal. Where the charter of a corporation reserves to the legislature an unconditional power of repeal, the legislature may arbitrarily repeal the charter without cause. *Mayor of Baltimore v. Pittsburgh and Connellsville R. R. Co.*, 1 Abbott (U. S. C. C.), 9. 1865.

161.— Suit upon a promissory note. Answer: that the note was given for certain shares of the capital stock of the Fort Wayne and Southern R. R. Co., and that at the time of giving the same the said corporation had no legal existence in this; that said company was authorized by an act of the legislature, in 1849, but did not act upon or accept said charter until November 19, 1852, before which time the new constitution had gone into force, prohibiting the creation of corporations, other than banking, by special act. *Held*, that the organization of the company was a naked assumption, without authority of law, or semblance of right. *Gillespie v. Ft. Wayne and Southern R. R. Co.*, 17 Ind. 243. 1861.

162.— A promise to a body or organization of men, professing to act as a corporation, in an instance, or under circumstances, where by law a corporation of that character could not have a legal existence, does not estop the person making it from showing the facts. *Ib.*

163.— The legislature, in granting a charter to the Penobscot and Kennebec R. R. Co., adjudged that the road was a public necessity; and this decision is conclusive. *State v. Noyes*, 47 Me., 189. 1859.

164.— Whether or not the company has

abused its privileges is a question for the court. *Ib.*

165.— A charter is a contract and will be construed as such. *Ib.*

166.— The privileges granted by the charter may be taken for public use, the same as the property of an individual. *Ib.*

167.— The reserved power to annul the charter, carries with it no power whatever to seize the railroad, or to divest the stockholders, or the owners of the land, of their rights and property, but only takes away the franchise, this being all the legislature gave. *Erie and Northeast R. R. Co. v. Casey*, 1 Grant's Cases (Penn.), 274. 1856.

168.— Under the power of eminent domain, a state may resume grants of lands, franchises or any other private property, whenever the public interest requires it; but in such cases the resumption must always be accompanied with just compensation to the party injured thereby. *Ib.*

169.— The power of the legislature to revoke corporate charters is reserved by the constitution, and need not be contained in the charter. *Delaware R. R. Co. v. Tharp*, 5 Harrington (Del.), 454. 1854.

170.— In 1840, the legislature incorporated the Cross Plains and Red Clay R. R. Co., reserving the right to repeal the charter. In 1847, an act was passed granting the right of way over the same route to others. In 1849, the legislature, by act, recognized the privileges granted by the act of 1840, changed the name to Union Branch Railroad, and repealed the clause in the act of 1840, reserving the right to repeal that act. *Held*, that the act of 1849 could not affect the rights acquired under the act of 1847. *Union Branch R. R. Co. v. East Tennessee and Georgia R. R. Co.*, 14 Ga., 327. 1853.

171. Route designated. When the legislature authorizes the construction of a railroad between two designated points, no intermediate points being named, and there are routes between said points equally feasible, that which is most direct will be deemed to have been contemplated; but where there is a difference in the feasibility of the routes, a reasonable discretion must be allowed in the selection of that to be followed. *Newcastle and Richmond R. R. Co. v. Peru and Indianapolis R. R. Co.*, 3 Ind., 464. 1852.

Checks — Damage.

172. Sale of right of way. The Dayton and Cincinnati R. R. Co. had the right to sell a portion of its right of way on which no work had been done, it having choice of several routes under its charter. *Donner v. Dayton and Cincinnati R. R. Co.*, 1 Cincinnati Superior Ct. Rep., 130. 1871.

173. Savannah, Albany and Gulf R. R. Co. The charter and amendment thereto, of the Savannah, Albany and Gulf R. R. Co., construed with reference to the extension of its road to Tybee Island. *Savannah, Albany and Gulf R. R. Co. v. Shiels*, 33 Ga., 601. 1863.

174. Somerville, etc., R. R. Co. The charter of the Somerville and Easton R. R. Co. — construed. *Doughty v. Somerville and Easton R. R. Co.*, 1 Zabriskie (N. J.), 443. 1848.

175. Street railways. The charter of a street railway company is a contract, and it cannot be impaired by a subsequent charter. *Second and Third Street R. R. Co. v. Green and Coates Street R. R. Co.*, 3 Philadelphia Rep. (Penn.), 430. 1859.

176. Taxation. The charter of the Baltimore and Port Deposit R. R. Corporation, taken in connection with the acts of assembly of Maryland, Delaware and Pennsylvania, which united that and two other companies into one corporation, did not exempt from taxation the property which belonged to the first mentioned corporation. *Philadelphia and Wilmington R. R. Co. v. Maryland*, 10 Howard, 391. 1850.

177. Tide water. Under a charter to a railway company, authorizing the construction of a railway to the place of shipping lumber on a tide water river, the right of location is not limited to the shore, but may be extended to a point at which lumber may be conveniently shipped. *Peavey v. Calais R. R. Co.*, 30 Me., 498. 1849.

178. Transfer. If one corporation in any authorized mode, becomes the proprietor of the property and franchise of another, the former is released from the indebtedness of the latter, not ripened into a prior lien. *Bruffett v. Great Western R. R. Co.*, 25 Ill., 353. 1861.

179. — The sale of the property of a corporation does not disorganize it. *Id.*

180. Transit R. R. Co. The act of the legislature, approved March 10, 1862, entitled

“an act to facilitate the construction of a railroad from Winona westerly by the way of St. Peter,” did not revive the Transit R. R. Co., or continue or regrant to it the property or franchises which it had forfeited to the state. *Huff v. Winona and St. Peter R. R. Co.*, 11 Minn., 180, 1866; *Hilbert v. Same*, ib., 246, 1866.

181. Void charter. A corporation chartered by the laws of Pennsylvania, with a stipulation in the charter that it shall not do business in that state, cannot do business in Kansas. Such charter is void. *Land Grant R. R. Co. v. Commissioners*, 6 Kan., 245. 1870.

182. When a corporation commences to exist. The act to incorporate the Utica and Schenectady R. R. Co. did not create a corporation the instant it became a law; it only constituted such persons as should become stockholders, in the manner prescribed in the act, a body corporate. *Walker v. Devereaux*, 4 Paige Ch. (N. Y.), 229. 1833.

CHATTEL MORTGAGE.

See MORTGAGE OF CHATTELS.

CHECKS.

1. A check drawn upon a bank is only payable in such kind of funds as the drawer has in bank. *Lester v. Georgia R. R. Co.*, 42 Ga., 244. 1871.

2. — Where a check is drawn in payment of a debt, against a bank where there were sufficient funds of the drawer to pay the same, and the holder of the check negligently fails to present the check in a reasonable time, and the bank fails, the holder of the check cannot recover from the drawer. *Syracuse, etc., R. R. Co. v. Collins*, 3 Lansing (N. Y.), 29. 1870.

CHURCHES.

1. Damage. In an action for damages by the trustees of a religious society, against a railroad company, the declaration alleged that the religious society had been disturbed, during worship on the sabbath, in the church edifice, by the noise made by the defendant in

County Bonds—Officers.

the use of its road, by which the property had become very much depreciated in value and rendered unfit for use as a church. *Held*, on demurrer, that although the injuries complained of might amount to a public nuisance, yet that no action could be sustained by the plaintiffs, as owners of the building, for the depreciation in the value thereof, the consequences being too remote. *First Baptist Church v. Utica and Schenectady R. R. Co.*, 6 Barbour (N. Y.), 313, 1848. In case of *First Baptist Church v. Schenectady and Troy R. R. Co.*, 5 Barbour (N. Y.), 79, 1848, the contrary view is held.

2. — If the trustees could not recover for the depreciation of the property, they could not recover at all, for they cannot sue for the disturbance to those worshipping in the church. *Id.*

CITIES.

See INJURIES TO PERSONS ON THE TRACK; MUNICIPAL CORPORATIONS; SUBSCRIPTIONS BY CITIES.

COAL.

See CARRIAGE OF MERCHANDISE.

COLLATERAL SECURITIES.

1. **County bonds.** Actual knowledge of the sale of bonds pledged as collateral, is sufficient to the party who pledged the same, although no notice of such sale has ever been given to him. *Alexandria, Loudon and Hampshire R. R. Co. v. Burke*, 22 Grattan (Va.), 254. 1872.

2. **Sale.** A sale by a creditor of collateral securities, placed in his hands by the principal debtor, in violation of a stipulation for a particular notice of sale contained in the contract under which they were pledged, does not *per se*, discharge a surety *in toto* who is liable for the debt, but by such sale the creditor makes the securities his own to the extent of discharging the surety to an amount equal to their value. *Vose v. Florida R. R. Co.*, 50 N. Y., 369. 1872.

COLLISIONS.

See INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS.

COLORED PERSONS.

See PASSENGERS.

COMMONS.

See EMINENT DOMAIN.

COMPARATIVE NEGLIGENCE.

See INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; NEGLIGENCE.

COMPENSATION.

See DIRECTORS.

1. **Clerk of corporation.** The value of the services of a clerk of a corporation who attends the meeting of the board of directors, waits upon their deliberations, reduces the results of their action to proper form, under the responsibility attaching to his office of clerk, is not to be determined by the value of the mere clerical service of writing or copying so many pages or folios; and when the compensation or salary of such clerk or officer is not fixed by contract or by law, he may recover such sum as he may by competent evidence prove his services to be worth. *Missouri River R. R. Co. v. Richards*, 8 Kan., 101. 1871.

2. — A person who has personal knowledge of the services rendered, and has a knowledge of the value of the services, and what was usually paid for such services in the east, is competent to testify what the services were worth, although he may not have known of any established price for such services in the vicinity where rendered. *Id.*

3. **Officers.** When the by-laws of a corporation provide that the officers shall receive such compensation for their services as the board of directors shall fix and allow, and the board has not fixed any compensation, a secretary who has rendered services is entitled to recover therefor, unless there was an under-

Miscellaneous.

standing that he was to render the services without compensation. *Ib.*

COMPETING LINES.

1. Where two railroad companies have the authority to build and run a railroad between the same termini, neither can take exception to any irregularity or unlawfulness in the exercise of such franchise by the other, unless it can show a particular injury to itself and from such course. *Erie R. R. Co. v. Delaware, Lackawanna, etc., R. R. Co.*, 6 C. E. Green's Ch. (N. J.), 283. 1871.

CONDEMNATION OF LANDS.

See EMINENT DOMAIN.

CONDITIONAL SALE.

1. Railway iron. Although iron rails are so fastened upon a railroad as to be part of the realty in the absence of any agreement to the contrary, yet if the vendor delivered and the company received them under an agreement that they should be laid down on a specified part of the road and remain the vendor's property until paid for, and they have not been paid for, they continue to be personal property as between the vendor and the company, and subsequent incumbrancers and grantees, with notice; but not as between the vendor and prior mortgagees. *Hunt v. Bay State Iron Co.*, 97 Mass., 279. 1867.

CONDUCTOR.

See APPEALS; INJURIES TO EMPLOYEES.

1. Duties and liabilities. An agent of the Concord R. R. Co., whose duty it was to sell tickets issued by that road, for his own profit, purchased joint tickets issued by other roads under a contract with the Concord R. R. Co., entitling the holder to a passage on the Concord Railroad, and sold these tickets to passengers who would have otherwise bought the tickets issued by the Concord Railroad,

and entrusted to the agent for sale. The Concord R. R. Co. derived a larger profit from its own tickets than from the joint tickets issued by other roads. The agent bought and sold the joint tickets with the knowledge and consent of the superintendent of the Concord R. R. Co., but the corporation and its directors had no actual knowledge of it. *Held*, that the Concord R. R. Co. could recover of the agent, in assumpsit for money had and received, the profits made by him in thus buying and selling the joint tickets. *Concord R. R. Co. v. Clough*, 49 N. H., 257. 1870.

2. — The rules of the C. R. R. Co. required its conductors to collect ten cents more than the regular fare from passengers making payment on the trains. One of the conductors, in certain instances, only collected the regular fare, and in order to conceal the irregularity, took the money and bought tickets and punched them in the usual way, to show that they had been used. This was done with the knowledge and consent of the superintendent, but with the understanding that it should be kept concealed from the company, and it was so concealed. *Held*, that this did not constitute a payment of these fares to the company, and that the company could recover the same from the conductor in assumpsit. *Ib.*

CONFEDERATE MONEY.

1. Contract. Where it appeared that the plaintiff, on the 1st of January, 1865, hired his slaves to the defendant upon the express understanding that he was to take Confederate money in advance, or whenever he should apply for it, and the defendant was always ready to pay the confederate money, but the plaintiff never applied for it, it was *held*, that he was not entitled to recover the value of the hire of the slaves. *Erwin v. Western North Carolina R. R. Co.*, 65 N. C., 79. 1871.

2. — A contract is not void because the consideration was confederate money, where the contract had nothing to do with carrying on the war against the general government. *Georgia R. R. Co. v. Eddleman*, 38 Ga., 465. 1868.

3. Payment. The fact that at the time of the payment of a debt in Confederate money,

War of 1861 — Abandonment — Carriage of Goods.

the plaintiff objected, but the defendant told him he "must take it," but used no force, and the further fact that at the time the Confederate army was in Holly Springs, where the payment was made, and a military order had been issued requiring the arrest of persons who refused to accept such money, do not constitute duress, and a payment made under these circumstances is valid. *Davis v. Mississippi Central R. R. Co.*, 46 Miss., 552. 1872.

4. Statute.— The ordinance of 1865, in relation to contracts for confederate money — construed. *Bowdre v. Macon and Brunswick R. R. Co.*, 40 Ga., 143. 1869.

5. — The act of the General Assembly of 1866-67, entitled "an act relating to debts contracted during the war," and allowing either party to show on the trial, the consideration of the contract, and the jury in making up their verdict to take the same into consideration, is not unconstitutional. *King v. Washington and Wilmington R. R. Co.*, 66 N. C., 277. 1872.

6. — A bond of a railroad company, for the payment of money, executed in 1862, comes within the provision of the ordinance of the convention of 1865, and is presumed to be solvable in money of the value of Confederate currency, subject to the evidence of a different intent by the parties. *Alexander v. Atlantic, Tennessee and Ohio R. R. Co.*, 67 N. C., 198. 1872.

CONFESSION.

1. — A confession is an admission of a cause of action to the extent of its terms only. *Hackett v. B., C. and M. R. R. Co.*, 35 N. H., 390. 1857.

CONFISCATION.

1. War of 1861. In the war of the rebellion, the United States had belligerent, as well as sovereign rights. They had the right to confiscate the property of public enemies. *Miller v. United States*, 11 Wallace, 268. 1870.

2. — The right of confiscation exists as well in a civil as in a foreign war. *Ib.*

3. — Congress may specify what property of enemies shall be confiscated. *Ib.*

4. — In a judicial proceeding to confiscate stocks in a railroad company under the acts of congress of Aug. 6, 1861, and July 17, 1862, the person whose property has been seized, may sue out a writ of error, though not a claimant in the court below. *Ib.*

5. — Such seizure may be made by giving notice of seizure to the president or vice president of the company; and a seizure thus made, under a warrant and monition is sufficient to give the district court jurisdiction. *Ib.*

6. — In a seizure upon land, a trial by jury is not necessary when there are no issues of fact to be tried. *Ib.*

7. Revenue cases. In admiralty and revenue cases when a default has been duly entered to a monition founded on an information, averring all the facts necessary to a condemnation, it has substantially the effect of a default to a summons in a court of common law. *Ib.*

CONNECTING LINES.

See AGENCY; BAGGAGE; CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; GAUGE; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; STREET RAILWAYS.

1. Abandonment. Where, by virtue of their respective charters, a connection is made between two railroads, the company procuring the connection is not bound to continue to avail itself permanently of such connection, but may construct additional lines of its own, superseding the necessity of such connection, and it will not be liable for damages for discontinuing the use of the line of the other company. *Boston and Lowell R. R. Co. v. Boston and Maine R. R. Co.*, 5 Cushing (Mass.), 375. 1850.

2. Carriage of goods. A railway company which acts as the forwarding agent of the owner of goods in giving directions by way-bills or otherwise to the successive lines of transportation over which they are to be carried, beyond the termination of its own route, is responsible as such forwarding agent only for the want of reasonable diligence and care. *Northern R. R. Co. v. Fitchburg R. R. Co.*, 6 Allen (Mass.), 254. 1863.

Connection defined — Contract.

3. **Connection defined.** "Railroad connection," without qualifying terms, means either such a union of tracks as to admit the passage of cars from one road to another, or such intersection of roads as to admit the convenient interchange of freight and passengers at the points of intersection. *Philadelphia and Erie R. R. Co. v. Catawissa R. R. Co.*, 53 Penn. St., 20. 1866.

4. — The Atlantic and Great Western R. R. Co. was *connected* with the Catawissa R. R. Co. by the intervening of the Philadelphia and Erie R. R. Co., notwithstanding the diversity of gauge prevented the running of common cars. *Ib.*

5. **Contract.** In a contract between companies owning connecting lines of railroad for the continuous transportation of passengers and freight over both lines, it is lawful to agree upon a division of the fares by which one company allows part of the fares earned on its line to the other company. *Sussex R. R. Co. v. Morris and Essex R. R. Co.*, 4 C. E. Green's Ch. (N. J.), 13. 1868.

6. — A railway company may bind itself by special contract to transport persons beyond the line of its road. *Perkins v. Portland, Saco and Portsmouth R. R. Co.*, 47 Me., 573. 1859.

7. — A company may be thus bound, although it has no actual arrangement with connecting lines. *Ib.*

8. — Although the agent making such contract had no authority from the company to make it, yet if he had for several years, before and after the case in suit, practiced making similar contracts, the company will be estopped from denying his authority. *Ib.*

9. — In such a case, the measure of damages for goods lost, is their value at the place of destination, less the cost of transportation, if unpaid. *Ib.*

10. — It being provided in the charter, that a railroad corporation might "make any lawful contract with any other railroad corporation in relation to the business of such road," it was *held*, that the object of this permission was to enable such company to contract for the common use of so much of another road already constructed as lay within the limits of the road so chartered. *Naugatuck R. R. Co. v. Waterbury Button Co.*, 24 Conn., 468. 1856.

11. — If railroads make a connection under a contract, its continuance may be enforced, in certain cases, by proceedings in equity. *Androscooggin and Kennebec R. R. Co. v. Androscooggin R. R. Co.*, 52 Me., 417. 1864.

12. — But equity will not interfere where such connection is terminated by the parties. *Ib.*

13. — Several railroad companies entered into a contract by which one of them was to build a connecting road and the others to contribute a specified proportion of the expense — the company building the road to control it and to pay over net earnings of the road to a trustee to be agreed on, who should distribute the fund monthly among the contributing companies until their contributions were reimbursed, after which the road was to be owned by all the companies in the proportion of their contribution to the expense of building it. A few weeks later, and before the road was built, another contract was entered into by the same companies, by which it was agreed that two express through trains should run over their respective roads daily for the term of five years. The connecting road was built, and the share of each company toward the expense paid, except a part of that due from the N. company, which was afterwards collected by suit, but soon after, by reason of the failure of the N. company, the arrangement for through trains and a through route was abandoned, and the new road went to decay. Some years after, the company that built the connecting road repaired it and used it in connection with its own road. Upon a petition in chancery against this company, brought by a purchaser of the rights of the insolvent N. company for an account of the net earnings of the connecting road and the appointment of a trustee to receive them, that the share due to the N. company might be applied to the reimbursement of its share of the expense of the construction of the road, it was *held*, that the second contract was not to be regarded as superseding the first; that the duties of the respondent company under the first contract to apply the net earnings of the road to the reimbursement of the expense of its construction were not affected by the insolvency of the N. company and the defeat of the plan for through trains; and that a trustee should be appointed to receive the net

Cars — Commissioners: Award.

earnings of the road from the respondents. *Bartlette v. Norwich and Worcester R. R. Co.*, 33 Conn., 560. 1866.

14. Cars. The owner of a car which was placed upon a railway in pursuance of a license or clearance obtained from the company by another in his own name, which other furnished the loading and paid the tolls, may recover damages in an action against the company for injuries sustained by the car while thus used, in consequence of the insufficiency and bad condition of the road. *Cumberland Valley R. R. Co. v. Hughes*, 11 Penn. St., 141. 1849.

15. — A railroad company which, for a reasonable compensation, receives into its exclusive custody and control and draws over its railroad the cars of another and connecting railroad company, with their passengers and freight, is, in the absence of any special contract to the contrary, liable as a common carrier for any injury to the cars so received, while the same are in transit over its road. *Vermont and Massachusetts R. R. Co. v. Fitchburg R. R. Co.*, 14 Allen (Mass.), 462. 1867.

16. Commissioners. The legislature has the power to authorize the appointment of commissioners to determine judicially the rights and obligations of connecting roads. A statute which does not go beyond this is remedial only, and binding on existing corporations. *Portland and Oxford Central R. R. Co. v. Grand Trunk R. R. Co.*, 46 Maine, 69. 1858.

17. — The St. of 1869, ch. 408, § 5, vesting in railroad commissioners the powers and duties of commissioners appointed by this court under the Gen. Sts., ch. 63, § 117, takes away the jurisdiction of this court, and of commissioners appointed by it, over proceedings pending before these commissioners at the time of its passage. *New London Northern R. R. Co. v. Boston and Albany R. R. Co.*, 102 Mass., 386. 1869.

18. — award. An award of commissioners under St. 1845, ch. 191, is not invalidated by declaring that one railroad company, in case of the cars of another not arriving within ten minutes after time at the junction of the two roads, shall provide and "be allowed for an independent train, to be taken as soon as it conveniently can be;" and that frequent unreasonable want of punctuality in the

arrival of such cars at the junction shall be compensated for in damages. *Lexington and West Cambridge R. R. Co. v. Fitchburg R. R. Co.*, 14 Gray (Mass.), 266. 1859.

19. — Where, under a special act of the legislature, it was made the duty of the railroad commissioners to appraise the land of a railroad, in order to form a just connection with another railroad, and the award of said commissioners was uncertain and ambiguous, the court will give it such a construction as to reserve to the commissioners a full and fair legal exercise of the duties enjoined upon them, and only such, as was properly within their jurisdiction. *Eastern R. R. Co. v. Concord R. R. Co.*, 47 N. H., 108. 1866.

20. — Under the laws of this state, the award of the commissioners is not deemed final and conclusive upon the parties, but is open to future examination and revision. Upon the complaint of an aggrieved party to such connection, the court will appoint a committee to review the same, and will sustain the proceedings of said committee when they conform to the law. *Id.*

21. — It is no objection to an award of commissioners under St. 1845, ch. 191, that it declares that each corporation shall indemnify the other against all loss happening through its own or its servants' fraud and gross negligence or want of skill. *Lexington and West Cambridge R. R. Co. v. Fitchburg R. R. Co.*, 14 Gray (Mass.), 266. 1859.

22. — It is no objection to an award of commissioners under Sts. 1845, ch. 191, and 1857, ch. 291, establishing the compensation to be paid by each of two railroad companies to the other for drawing passengers and freight over its railroad, that the award gives to either corporation different amounts for carrying passengers and freight from the same station upon its road to the junction, where they are to be carried to different stations upon the other road. *Boston and Worcester R. R. Co. v. Western R. R. Co.*, 14 Gray (Mass.), 253. 1859.

23. — An award of commissioners appointed on petition, under the St. of 1864, ch. 229, § 29, to revise a previous award of commissioners determining the compensation to be paid by one street railway corporation for entering and using the tracks of another, takes effect only when returned to and approved by the court, until which time the for-

Crossing Railroads — Statute.

mer award remains in force. *Metropolitan R. R. Co. v. Broadway R. R. Co.*, 99 Mass., 238. 1868.

24. — An award under Sts. 1845, ch. 191, and 1857, ch. 291, of commissioners appointed to determine the terms upon which connecting railroad companies shall transport each other's passengers and freight, and perform the business of each other, must be returned into court. *Boston and Worcester R. R. Co. v. Western R. R. Co.*, 14 Gray (Mass.), 253. 1859.

25. — It is no objection to an award of commissioners appointed under St. 1845, ch. 191, to determine the rate of compensation to be paid by one company for the drawing of its cars, passengers and merchandise over the road of another, that it assumes the number of passengers each month holding different kinds of tickets to be in proportion to the number of the ordinary independent and connected trains; or that it makes the compensation to depend upon the number of passengers and amount of merchandise, and upon the classes of tickets held by the passengers. *Lexington and West Cambridge R. R. Co. v. Fitzburg R. R. Co.*, 14 Gray (Mass.), 266. 1859.

26. **Crossing railroads.** The P. & K. and the S. & K. railroads, being crossing and not connecting lines, have no duties imposed on them other than fall upon railroads situated in the vicinity of each other without crossing. *State v. Noyes*, 47 Me., 189. 1859.

27. **Future connections.** A passenger railroad company, to whom, by its act of incorporation, was granted the right "to connect with any passenger railway now constructed, or hereafter to be constructed, so as to give it a complete route from F. to E.," cannot, under that right, connect with another railway which was not made, nor the right of making granted at the time the claimant's act of incorporation was passed. The alleged right, at the time of its creation, had nothing to which it could attach, or on which it could rest, and was therefore no right at all. *North Branch Passenger R. R. Co. v. City Passenger R. R. Co.*, 38 Penn. St., 361. 1860.

28. **Gauge.** An act of assembly authorizing a company to construct a railroad "to connect with any railroad constructed or to be constructed at any point on the northern boundary of Erie or Warren county," granted

powers to terminate the road at any point in the boundary named which the company might select, and did not limit the terminus to another railroad. *Commonwealth v. Crosscut R. R. Co.*, 53 Penn. St., 62. 1866.

29. — By a proviso, it was directed "that the gauge of said road shall not exceed four feet ten inches," etc. *Held*, that "said road" referred to the road of the company incorporated, not to the road constructed or to be constructed. *Id.*

30. — Where two railway companies have the right to elect as to their forming a connection, and such right of election has not been exercised, the legislature may authorize a change of gauge in one of the roads, and relieve the company from any obligation to connect. *Androscoggin and Kennebec R. R. Co. v. Androscoggin R. R. Co.*, 52 Me., 417. 1864.

31. **Rates.** The terminal freight stations of two railroads in an inland city were connected by a track a mile long, part of which belonged to the first road and the rest to the second. The first road gave notice that its rate for transportation of coal from a seaport to the city would be \$1.75, and from the seaport to stations on the second road \$1.25, per ton. *Held*, that the lesser rate did not apply to coal which was ordered to be transported from the seaport to the city and delivered there at the terminal freight station of the second road, without being transferred for further transportation or delivery so as to give rise to successive charges or an apportionment of the gross freight charges between the two roads. *Wellington v. Norwich and Worcester R. R. Co.*, 107 Mass., 582. 1871.

32. **Right of connection.** The sale of the B. R. R. Co., to the plaintiff, carried with it the right to connect with the A. and St. L. R. Co. Such right is not lost by the power in the charter of plaintiff to build its road across the latter company's road, until the road is actually constructed across and operated. *Portland and Oxford Central R. R. Co. v. Grand Trunk R. R. Co.*, 46 Me., 69. 1858.

33. **Statute.** The last paragraph of § 9, act of 1847, with reference to the liability of connecting railroads, does not apply to intermediate roads, but only to the road which first receives the goods. *Root v. Great Western R. R. Co.*, 45 N. Y., 524, 1871; see *Maghee v. Camden and Amboy R. R. Co.*, *ib.*, 514, 1871;

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also *King v. Macon and Western R. R. Co.*, 62 Barbour (N. Y.), 160, 1872.

34. — Where a railroad company agrees to carry property beyond the terminus of its own road, and receives the goods under such an agreement, it is liable as a common carrier, for the default of the road running in connection with it, on the route to the place of delivery. The statute of 1847 is a mere legislative authorization of such agreements. *Ib.*

35. — But where the company merely receives goods marked for a place beyond the termination of its own route, in the absence of proof of an undertaking, express or implied, to carry the goods to their final destination, the company is bound only for the due delivery of the goods to the next carrier. *Ib.*

36. — In a proceeding, under ch. 93, acts of 1854, relating to connecting railroads, peaceable possession is sufficient evidence of title in the petitioners to entitle them to the relief afforded by the statute. *Portland and Oxford Central R. R. Co. v. Grand Trunk R. R. Co.*, 46 Maine, 69. 1858.

37. — Such suit is not analogous to a suit at common law, and where a company has leased its road to another company, both companies may be made respondents. *Ib.*

38. — The statute (ch. 270 of 1847), making a company which owns a railroad connecting with one or more other roads, and receives freight to be transported to a place on the line of a road thus connected, liable as a common carrier for the delivery thereof, applies as well where one of the connecting roads is wholly beyond this state as where all are within it. *Burtis v. Buffalo and State Line R. R. Co.*, 24 N. Y., 269. 1862.

39. — Commissioners appointed under St., 1845, ch. 191, "to determine the amount of compensation to be paid" by one company entering upon the road of another, for drawing its cars, passengers and merchandise, may fix the times at which such trains shall be drawn, if not agreed upon by the parties; and may award to the first corporation the right to run a certain number of independent, special trains over the other's road, and fix the times at which they shall be run, provided such times are not within fifteen minutes of the time of any regular passenger train thereon. *Lexington and West Cambridge R. R.*

Co. v. Fitchburg R. R. Co., 14 Gray (Mass.), 266. 1859.

40. Way-bill. A way-bill of iron rails, to be transported over several successive lines of transportation by railroad, made out by the agents of the first line in this form: "Way-bill of merchandise transported by the F. R. R. from C. to B. Nov. 27, 1852. (Consignees), Ogdensburg R. R. (Description of articles), rails, part lot," is sufficient to show to the intermediate carriers that the rails are to be carried and delivered to the Ogdensburg Railroad at B., and to exonerate the first carrier from liability, although the rails are detained and used by one of the intermediate railroad companies, which at the same time is receiving other similar rails over the same route for its own use. *Northern R. R. Co. v. Fitchburg R. R. Co.*, 6 Allen (Mass.), 254. 1863.

CONSOLIDATION.

See TAXATION.

1. Bonds. Where B., having become entitled to have certain bonds converted into others at the time of the consolidation of certain railway companies, failed to do so, and having afterwards acquiesced and participated in the arrangement by which such conversion subsequently became impossible, it was held, that he was bound by his election, and precluded from impeaching the arrangement which at the time it was made was satisfactory to him. *Tagart v. Northern Central R. R. Co.*, 29 Md., 557. 1868.

2. Contract. The statute of Indiana, passed Feb. 23, 1853, authorizing the consolidation of two railway companies, causes a dissolution of the old companies upon the completion of the consolidation. Hence, where the declaration averred that the defendant had agreed that the stock of a particular railway company should, at a certain time, and place, be worth a certain price; and the plea averred that the stock of the railway company had been merged and consolidated *with the consent of the party suing*, such plea was held good, although it did not aver that the consolidation was made without the consent of defendants. *Clearwater v. Meredith et al.*, 1 Wallace, 25. 1863.

Effect of Consolidation — Estoppel — Record.

3. Effect of consolidation. Where a consolidation of corporations is made, the new company stands instead of the old companies and subject to their liabilities. *Miller v. Lancaster*, 5 Coldwell (Tenn.), 514, 1868; *Columbus, etc. R. R. Co. v. Powell*, 40 Ind., 37, 1872.

4. — Where several railroad companies were, by virtue of the act of union, "merged in and constituted one body corporate," under the name of one of them, and all were continued in existence, it was treated as a consolidation. *Powell v. North Missouri R. R. Co.*, 42 Mo., 63. 1867.

5. — An amalgamation implies such a consolidation as to reduce the companies to a common interest. But where, by the very terms of the statute and the deed, the first corporation was extinguished, and the second only continued to exist, the case is not one of mere consolidation or amalgamation. *Ib.*

6. — Although, by the old common law, the dissolution of a corporation extinguished its debts, yet courts of equity, in such case, will consider the property and effects as a trust fund for the payment of creditors and for the shareholders, into whosoever hands they may come. *Ib.*

7. — A railroad company formed by the consolidation of two companies succeeds to all the rights of each of the corporations of which it is composed, and may compromise and settle a claim against one of them, and sustain an action to enforce the settlement. *Paine v. Lake Erie and Louisville R. R. Co.*, 31 Ind., 283. 1869.

8. — Where two or more railroad companies are consolidated, as far as creditors of one of the original companies are concerned, the consolidated company is successor of the old company, but in respect to the properties of the other companies, it is a new and independent company, and such creditors have no claim against it upon the original contracts but only by virtue of its assumptions of the obligations of the old companies. *Prouty v. Lake Shore and Michigan Southern R. R. Co.*, 52 N. Y., 363. 1873.

9. Estoppel. Although a corporation cannot relieve itself from responsibility to those to whom it may be indebted, by becoming merged in a new corporation, it may by the act of merger, become so situated, as to be

estopped from claiming that it remains undissolved. *Carey v. Cincinnati and Chicago R. R. Co.*, 5 Iowa, 357. 1857.

10. Judgment against consolidated companies. The appellant recovered a judgment against the appellee. The appellee consisted of the Madison and Indianapolis, and the Peru and Indianapolis Railroad companies consolidated. After the rendition of the judgment, and before its collection, the union of said companies dissolved by judicial decision, and the companies respectively resumed their former separate existence. The appellant then moved the court for execution on his judgment, and served notice of his motion on each of said companies. *Held*, that said notice was properly served, and the appellant was entitled to execution, and that the proceedings touching the union of said companies, in no way affected their liability on said judgment. *Ketcham v. Madison, Indianapolis and Peru R. R. Co.*, 20 Ind., 260. 1863.

11. Mortgage. The consolidation of the stock of a railroad company, created by the laws of Wisconsin, with that of one created by the laws of Illinois, does not constitute the corporations thus consolidating, one corporation of both states, or of either, but the corporation of each state continues a corporation of the state of its creation. *Racine and Mississippi R. R. Co. v. Farmers' Loan and Trust Co.*, 49 Ill., 331. 1868.

12. — And where the name of the Illinois corporation is made the same as that of the Wisconsin corporation, and a mortgage is made in the corporate name by the officers of the company, as consolidated, upon the line in Illinois, such mortgage is the sole mortgage of the Illinois corporation, and is legal and valid. *Ib.*

13. — And in a suit to foreclose such mortgage, the question as to the validity of such consolidation contract cannot be raised by the mortgagor. *Ib.*

14. Record. Filing, in the office of the secretary of the commonwealth, the certificate of consolidation of certain railroad companies, under the act of March 24, 1865, constituted the one company thus created a legal corporation in Pennsylvania. *Commonwealth ex rel. v. Atlantic and Great Western R. R. Co.*, 53 Penn. St., 9. 1866.

15. — In a *quo warranto* against such com-

Special Cases — Pleading.

pany, *nul tiel record* is well replied to a plea that the defendant became a corporation by contract of consolidation under said act. *Ib.*

16. — It being proven that the certificate was deposited with the secretary of the commonwealth in his office, the presumption is that he filed the same of record, and that it remains of record there. *Ib.*

17. — Under a rejoinder that there is such a record, with proof thereof, upon inspection of the record and proof, judgment will be entered for the defendant. *Ib.*

18. — A mandamus will issue, if necessary, to the secretary to add the date of filing and any other necessary act in the premises. *Ib.*

19. Special cases. The act of March 17, 1870, authorizing the consolidation of the United Railway and Canal Companies of New Jersey — construed. *Black v. Delaware, etc., Canal Co.*, 7 C. E. Green's Ch. (N. J.), 130, 1871; *Pennsylvania R. R. Co. v. New York and Long Branch R. R. Co.*, 8 ib., 157, 1872.

20. — The rights and duties of a new corporation organized through the consolidation of three separate corporations, determined under the law authorizing such consolidation. *Shaw v. Norfolk County R. R. Co.*, 16 Gray (Mass.), 407. 1860.

21. — The New York and Boston R. R. Co., a corporation chartered by the legislature of Connecticut, became consolidated, under the same name, with a railroad corporation of the state of Rhode Island, the charter of the latter corporation specially authorizing such union, and that of the former authorizing the company "to connect and make joint stock or common interest with any other railroad company." The charter of the Connecticut corporation was subject to amendment by the legislature, which afterwards passed a resolution ratifying and confirming the consolidation. By the articles of union, the property of the original corporations was transferred to and vested in the new corporation, which was to pay the debts of the old corporations. B. was an original subscriber to the stock of the Connecticut corporation. A creditor of that corporation, whose claim accrued after the consolidation, factorized B. as the debtor of the Connecticut corporation. Upon a *scire facias* afterwards brought by him against B., it was held,

I. That while it was very questionable

whether the charter of the Connecticut corporation would have authorized such a consolidation, yet that the transaction was validated by the ratifying act of the legislature, which was to be considered as an amendment of the charter as much as if it had been expressly so declared.

II. That the consolidation being thus effected by direct legislation, under the reserved power of amending the charter, it was not necessary that the assent of all the stockholders should be obtained, nor that there should be any action of the stockholders or directors on the subject.

III. That the consolidated company thus established was a legal and valid corporation.

IV. That the new corporation, being legally established, and having capacity to receive an assignment of the property of the original corporations, and such assignment having been made on valuable consideration, the indebtedness of B. had been legally transferred to and become vested in the new corporation, and he was therefore no longer indebted to the original corporation. *Bishop v. Brainerd*, 28 Conn., 289. 1859.

22. Power to consolidate. Corporations can only consolidate with the consent of the legislature, and when a consolidation is thus effected, it amounts to a surrender of the old charters, and the formation of a new corporation out of such portions of the old as enter into the new. *State ex rel. v. Bailey*, 16 Ind., 46. 1861.

23. — Those stockholders of the old company who do not enter the new, are entitled to withdraw their shares, and may enjoin till they are secured. *Ib.*

24. Pleading. Where two railroad corporations have been consolidated, the consolidated company must, for the purpose of answering for the liabilities of the old corporations, be deemed to be merely the same as each of its constituents, and liable for their debts, which may be enforced against the new corporation, in the same way as if no change had been made. *Indianapolis, Cincinnati and Lafayette R. R. Co. v. Jones*, 29 Ind., 465. 1868.

25. — In a suit against the consolidated company, where the tort sued for was committed by one of the old corporations, the fact should be so averred, to avoid a variance in

Aid to Ocean Steamship Lines — Commerce.

the proof, but on appeal, such a variance will not be available. *Ib.*

26. **Suits pending.** Where two railway companies were consolidated under a new name, under authority of the legislature, a party to a suit pending at the time against one of the old companies cannot take a judgment against the new company, without taking any steps to bring the new company into court. *Selma, Rome and Dalton R. R. Co. v. Harbin*, 40 Ga., 706. 1870.

27. — An act of union or consolidation of a defendant corporation with three other corporations under a law, which continued all its liabilities, was not such a dissolution of the corporation as abated an action commenced before the consolidation was effected. *Baltimore and Susquehanna R. R. Co. v. Musselman*, 2 Grant's Cases (Penn.), 348. 1856.

CONSTABLE.

1. **Bond.** A person elected to the office of constable may discharge its duties without having executed a bond to the town if it has not been required of him, or if its execution is delayed with the consent of the selectmen. *Langdon v. Rutland and Washington R. R. Co.*, 29 Vt., 212. 1857.

2. **Service.** The service of a writ by a constable, before he has given bail, is valid, if made before any other request for bail has been made of him by the selectmen than the inquiry "when he was going to give bail," and before any refusal on his part to give bail, or any interference on the part of the town with the discharge of his official duties. *Bank of Middlebury v. Rutland and Washington R. R. Co.*, 30 Vt., 159. 1858.

CONSTITUTIONAL LAW.

See BONDS; CHARTER; CARRIAGE OF MERCHANDISE; EMINENT DOMAIN; HIGHWAY; INJURIES TO DOMESTIC ANIMALS; SUBSCRIPTIONS BY CITIES; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY INDIVIDUALS; SUBSCRIPTIONS BY STATES; STOCK; TAXATION.

1. **Aid to ocean steamship lines.** The city

of Philadelphia has no power to invest its stocks, money or credit directly or indirectly in aid of a steamship line between that city and foreign ports, without special authority by legislative enactment. *Pennsylvania R. Co. v. Philadelphia*, 47 Penr. St., 189. 1864.

2. — The appropriation of a part of the dividends due the city on railway stock held by it, for the purpose of aiding in the establishment of an ocean steamship company, is in violation of the constitutional amendment of 1857, and void. *Ib.*

3. **Amendments by implication.** A statute which purports to add a new section to a prior statute may, by implication, amend other sections of the original act, without violating Art. 4, § 25 of the constitution, requiring the sections amended to be reenacted and published at length. *Swartwout v. Michigan Air Line R. R. Co.*, 24 Mich., 389. 1872.

4. **Bridges.** A railway viaduct, constructed in such a manner, as near as may be, to render it impossible for a man or beast to cross except in railway cars is not a "bridge" within the meaning of the act of 1790 of the New Jersey Legislature. Hence, the act of the Assembly of that state passed in 1860, authorizing the construction of a railway, and the necessary viaduct does not impair the obligation of the contract made by the act of 1790. *Bridge Proprietors v. Hoboken Co.*, 1 Wallace, 116. 1863.

5. **Camden and Amboy R. R. Co.** The several legislative acts giving to the Camden and Amboy R. R. Co. the exclusive franchise to carry passengers and goods between the cities of New York and Philadelphia, in part by means of a railroad across the state, examined, and held to be constitutional and valid, as a contract between the state and the company. *Raritan. etc. R. R. Co. v. Camden and Amboy R. R. Co.*, 3 C. E. Green's Ch. (N. J.), 546. 1867.

See CHARTER, 39, 40.

6. **Commerce.** The power to regulate commerce crossing the states is vested in congress, but the judicial power cannot act until congress shall prescribe the rule in regard to commerce. *United States v. Rock Island R. R. Bridge Co.*, 6 McLean, 517. 1855.

7. **Construction.** When there is a doubt, a law will not be held unconstitutional. *State*

Contract — Injunction.

v. North Louisiana and Texas R. R. Co., 25 La. An., 65. 1873.

8. — A law will not be declared unconstitutional unless it is incapable of reconciliation with the constitution. *Stockton and Visalia R. R. Co. v. Stockton*, 41 Cal., 147. 1871.

9. — Nothing but a clear usurpation of a power prohibited will justify pronouncing an act of the legislature void. *Pennsylvania R. R. Co. v. Riblet*, 66 Penn. St., 164. 1870.

10. The effect, not the purpose of an act, determines its validity. *Ib.*

11. — When a statute may receive a construction which will make it consistent with the constitution, that construction should be adopted in preference to one which would render it invalid. *Iowa Homestead Co. v. Webster County*, 21 Iowa, 221, 1866; *Dubuque and Pacific R. R. Co. v. Same*, *ib.*, 235; *Bigelow v. West Wisconsin R. R. Co.*, 27 Wis., 478. 1871.

12. — Thus where a charter provides that the company shall pay the value of land taken, this is construed to mean that the commissioners shall award just compensation. Art. 1, § 13, constitution. *Bigelow v. West Wisconsin R. R. Co.*, 27 Wis., 478. 1871.

13. — Just compensation includes the value of the land taken and the diminution of the value of that from which it is reserved. *Ib.*

14. — The uniform construction given to a provision of the constitution by the legislature, with the silent acquiescence of the people, including the legal profession and the judiciary, and the injurious results that would ensue from a contrary interpretation, are proper elements to be considered in forming a legal judgment on the subject. *Moers v. Reading*, 21 Penn. St., 188. 1853.

15. — An unconstitutional provision embraced in an act will vitiate the whole act, if it enter so entirely into the scope and design of the law that it would be impossible to maintain it without the obnoxious provision. *Reed v. Omnibus R. R. Co.*, 33 Cal., 212. 1867.

16. **Contract.** A contract, valid at the time, having been entered into between parties, no decision of the courts of the state, subsequently made, can impair its obligation. *Chicago v. Sheldon*, 9 Wallace, 50. 1869.

17. — A law cannot be held unconstitutional as "impairing the obligation of a contract," if the law was in force when the con-

tract was made. *Railroad Co. v. McClure*, 10 Wallace, 511. 1870.

18. **Employees.** The number of citizens affected by a law does not control its validity under the constitutional requirement that all laws shall be general in their operation, and that special immunities shall not be granted to any class of citizens. If the law operates upon every person within the relations or circumstances provided for, it is sufficient as to uniformity. A law, therefore, holding railway companies liable for "any neglect of agents, or by any mismanagement of the engineer or other employes," is constitutional. *McAunich v. Mississippi and Missouri R. R. Co.*, 20 Iowa, 338. 1866.

19. **Federal courts.** Where a state, by law, creates a contract, and enacts a subsequent statute impairing the same, and the state courts have declared said subsequent act valid, the supreme court may, under § 25 of judiciary act, review and reverse such decision. *Bridge Proprietors v. Hoboken Co.*, 1 Wallace, 116. 1863.

20. — The supreme court will follow the decisions of the state courts on questions arising under the constitutions of the several states. *Amey v. Allegheny City*, 24 Howard, 364. 1860.

21. **Forfeiture.** An action was brought by the creditors of a company against the commissioners appointed for the liquidation of its affairs, for the purpose of having its property sold for the payment of their claims. The state claimed to hold the property under an act of the legislature declaring the property forfeited. No notice was given to the state or its officials of the proceeding, but the court declared the act of the legislature unconstitutional. *Held*, that the judgment must be reversed and remanded for new trial, and that the state be notified of the action. *Perry v. Com'rs Clinton and Port Hudson R. R. Co.*, 11 Robinson (La.), 404. 1845.

22. — The attorney general having appeared for the state, and the question of forfeiture having, by agreement, been presented on a rehearing, the court *held*, that a forfeiture could not be declared by an act of the legislature without judicial investigation. *Ib.*, 412.

23. **Injunction.** Upon a bill in equity, praying for an injunction and relief, an act of the legislature will not be held unconstitu-

Mortgages—Stockholder's Liability.

tional upon a mere preliminary hearing for an injunction. *Deering v. York and Cumberland R. R. Co.*, 31 Me., 172. 1850.

24. — An application was made for an injunction restraining a railway company from building its road on the plaintiff's land, on the ground that the charter is unconstitutional. *Held*, that the injunction must be denied until the general merits of the bill have been examined. *Ib.*

25. **Mortgages.** The act of April 11, 1862, giving the supreme court the powers of a court of chancery in corporation mortgages, does not violate the constitution of the United States, as to a mortgage dated before its passage, in which the remedy provided for the payment of interest is permissive, not exclusive. The act of 1862 is merely remedial. *McElvath v. Pittsburgh and Steubenville R. R. Co.*, 55 Penn. St., 189. 1867.

26. **Organization of companies—repeal of law.** A special act passed prior to the adoption of the constitution of 1851, authorized commissioners therein named to open books, receive subscriptions to capital stock, and thereupon to organize a corporation under it. No steps were taken by the commissioners toward such subscription and organization until after the constitution took effect, but such subscriptions were made and organization effected, within the period limited by said special act for that purpose. *Held*, that the special act was not abrogated or repealed by the second section of article 13, of the constitution of 1851, nor by the act to "create and regulate railroad companies," passed May 1, 1852. *State ex rel. v. Roosa*, 11 Ohio St., 16. 1860.

27. **Pleadings.** On appeal to the supreme court, upon a question of the constitutionality of a law, it is not necessary that the party appealing should specify the clause of the constitution upon which he relies. It is sufficient if the pleadings make a case coming within its provisions. *Bridge Proprietors v. Hoboken Co.*, 1 Wallace, 116. 1863.

28. **Police regulations.** The legislature may require additional precautions of railway companies to prevent injury to individuals. Such requirements are in the nature of police regulations and do not conflict with the constitution. *Louisville and Nashville R. R. Co. v. Burke*, 6 Coldwell (Tenn.), 45. 1868.

29. **Public and private laws.** The term "general law" in § 21, article 7, of the state constitution, (which provides that no such law shall be in force until it is published), includes all public laws which are such in their nature, but not such as are by their nature private, but by a provision therein, are declared to be public. *Burhop v. Milwaukee*, 21 Wis., 257. 1866.

30. — The Milwaukee and Superior R. R. Co. is a private corporation, and the act creating it would seem, therefore, to be a private law. *Ib.*

31. **Quorum.** The word "house" in section 2, article 12, of the constitution of 1835, means the members present doing business, there being a quorum, and not a majority of all the members elected; and an act of incorporation passed by two-thirds of the members present, there being a quorum, is constitutional. *Southworth v. Palmyra and Jackson R. R. Co.*, 2 Mich., 287. 1851.

32. **Special cases.** The act of March 7, 1861, authorizing the state treasurer to cancel \$3,500,000 of the bonds of the Sunbury and Erie R. R. Co., and directing the satisfaction of the mortgage for \$7,000,000, is not in violation of § 4, article 2, of the state constitution, relating to the sinking fund. *Gratz v. Pennsylvania R. R. Co.*, 41 Penn. St., 447. 1861.

33. — The act of February 21, 1867, dividing the state into districts, and providing for sessions of the supreme court in each district, is unconstitutional. *Mobile and Ohio R. R. Co. v. Mattan*, 41 Miss., 692. 1868.

34. — No court has authority to set aside a public law, on the ground that it was passed by the legislature in fraud of the rights of the people. *Sunbury and Erie R. R. Co. v. Cooper*, 33 Penn. St., 278. 1859.

35. — The act of April 21, 1858, authorizing the sale of the state canals, is constitutional; and the judiciary have no power to declare the sale void for inadequacy of price, or for any undue favor to local interests supposed to have influenced it. *Ib.*

36. **Stockholder's liability.** A state law repealing a former statute, which made the stock or stockholders liable to the corporation's debts, is as respects existing creditors, a law impairing the obligation of contracts, and therefore void. *Hawthorne v. Calef*, 2 Wallace, 10, 1864.

Arbitration: Engineer as Arbitrator.

37. Subjects embraced. A law which authorizes the construction of a railroad, with a branch or extension, the purchase of land, and the making of coal beds thereon, and the purchase or lease of a ferry franchise, embraces but one subject. *Belleville and Illinois-town R. R. Co. v. Gregory*, 15 Ill., 20. 1853.

38. Title of act. A title to an act is sufficient under the constitution, if it expresses the objects of the law. *Swartwout v. Michigan Air Line R. R. Co.*, 24 Mich., 389. 1872.

39. — It is no constitutional objection to a statute that its title is vague or unmeaning as to its purpose, if it be sufficiently distinct as to the matter to which it refers. *People v. Lawrence*, 36 Barbour (N. Y.), 177, 1862; see *Litchfield v. McComber*, 42 ib., 238. 1864.

40. — It is the duty of the courts, under the constitution, to determine, whenever the question arises, whether the subject of a statutory provision is properly included in the title of the act of which it is a part. *Indiana Central R. R. Co. v. Potts*, 7 Ind., 681. 1856.

41. — It is necessary, under § 19 of art. 4 of the constitution, that every statute shall have a title; that the title shall designate a single subject for the act; and that such subject shall be reasonably particular and not too general. *Ib.*

42. — As a general rule, the title of an act should not express the end, object or purpose to be accomplished, but rather the means by which such ends, etc., is to be accomplished. *Ib.*

43. — Ch. 273, P. and L. Laws of 1870, entitled "an act to revise and amend the act to incorporate the Sugar River Valley R. R. Co., approved March 29, 1855, and to authorize certain towns therein named to aid in the construction of said railroad," is not open to the constitutional objection that the act embraces more than one subject, or that the subject is not expressed in the title. *Phillips v. Town of Albany*, 28 Wis., 340. 1871.

44. — The title of the act of the legislature incorporating the Rock Island and Alton R. R. Co., is a sufficient compliance with § 23, art. 3 of the constitution. *Supervisors of Schuyler County v. People ex rel.*, 25 Ill., 181. 1860.

45. — A law described in the title as a law in "relation to the duties of railway compa-

nies," contained a section fixing certain penalties. *Held*, that a provision fixing penalties for the violation of duties was within the province of the act, and not within the constitutional prohibition requiring each act to embrace but one subject. *McAunich v. Mississippi and Missouri R. R. Co.*, 20 Ia., 338. 1866.

46. — A local act cannot, under the constitution, embrace but one subject, which must be expressed in the title, and therefore it was *held*, that the act of March 24, 1865, enabling the city of Rochester to subscribe for stock in the Rochester and Genesee Valley R. R. Co., was void. *People ex rel v. Hills*, 35 N. Y., 449, 1866; reversing *Same v. Same*, 46 Barbour (N. Y.), 340, 1866; see also, *Same v. Same*, 1 Lansing (N. Y.), 202. 1869.

47. — The repeal of a statute on a given subject is properly connected with the subject matter of a new statute upon the same subject, and does not violate the constitutional requirement that "every act shall embrace but one subject in the title," although the repeal of the former statute be not mentioned in the title of the new enactment. *Gabbert v. Jeffersonville R. R. Co.*, 11 Ind., 365. 1858.

48. Veto. The validity of an enrolled statute, authenticated in the manner pointed out by law, by the certificate of the presiding officers of the two houses of assembly that it passed over the governor's veto by the constitutional majority, cannot be impeached by the journals showing a departure from the forms prescribed by the constitution in the reconsideration of the bill. *Pacific R. R. Co. v. Governor*, 23 Mo., 353. 1856.

CONSTRUCTION OF RAILWAYS.

See ARBITRATION; CONTRACT; DAMAGES; EMINENT DOMAIN; INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS.

1. Arbitration: Engineer as arbitrator. A contract for the construction of a railway, by the terms of which the company's engineer is to be the arbitrator of all matters connected with the work, will, if fairly made, be enforced. *Phelan v. Albany and Susquehanna R. R. Co.*, 1

Arbitration: Alteration.

Lansing (N. Y.), 258, 1869; *Kidwell v. Baltimore and Ohio R. R. Co.*, 11 Grattan (Va.), 676, 1854; *Alton, Mt. Carmel and New Albany R. R. Co. v. Northcott*, 15 Ill., 49, 1853; *Condon v. South Side R. R. Co.*, 14 Grattan (Va.), 302, 1858; *O'Reilly v. Kerns*, 52 Penn. St., 214, 1866; *Howard v. Allegheny Valley R. R. Co.*, 69 ib., 489, 1871.

2. — If the contractor might have refused to abide by the final estimate of the engineer, yet having submitted his charges for the work done to the engineer, and not having objected to his proceeding to make up the final estimate, the contractor is concluded by the action of the engineer. *Kidwell v. Baltimore and Ohio R. R. Co.*, 11 Grattan (Va.), 676. 1854.

3. — The estimates and decisions of an engineer of a railway company, are conclusive in disputes with contractors, only where such is the positive stipulation in the contract. *Memphis, Clarksville and Louisville R. R. Co. v. Wilcox*, 48 Penn. St., 161. 1864.

4. — The provisions of a contract between a railway company and a contractor, for building a portion of its road, that the "engineer shall be the sole judge of the quality and quantity of all work herein specified, and from his decision there shall be no appeal," and that in case of alterations, "such allowances and deductions shall be made therefor as the engineer may judge fair and equitable to both parties," constitute the engineer sole umpire; and, if the company furnish a suitable engineer, no recovery can be had, for work done under such contract, without, or beyond his estimate, without the most irrefragible proof of mistake in fact or corruption on the part of the engineer, or positive fraud in the opposite party in procuring the under estimate. *Vanderwerker v. Vermont Central R. R. Co.*, 27 Vt., 180, 1854; *Herrick v. Same*, ib., 673.

5. — Such stipulation does not require the estimates to be made or verified by the chief engineer, but has reference as well to the assistant engineer. *Ib.*

6. — A contract providing for monthly estimates imports an accurate measurement and final estimate for each month, and not such a one as is merely approximate or conjectural. *Ib.*

7. — A court of equity has jurisdiction of

a claim to be paid for a larger amount of work done under such a contract than was estimated by the engineer, where the under estimate was occasioned either by fraud or mistake. *Ib.*

8. — The defendant contracted with B. to build its road, and B. sublet a portion of the work to H. Both contracts contained a provision as to the conclusiveness of the engineer's estimates: *held*, that there was no privity of contract between the defendant and H., and that he could not recover against the defendant for work not estimated by the engineer, by reason only of a mistake which defendant had not connived at; and that the indebtedness of the company to B. did not constitute a fund against which the plaintiff had a claim. *Ib.*

9. — Had there been any connivance on the part of the company or its agents, in bringing about the under estimates, a different rule would prevail. *Ib.*

10. — In a contract for the construction of a railroad, it was provided, that the decision of a chief engineer should be final and conclusive, in any dispute that might arise between the parties to the agreement, relative to or touching the same: *held*, that the individual who filled the office of chief engineer when the adjudication was called for, was the proper person to decide disputes between the parties; and that one who had held the office at the time the contract was made, but who had resigned, was not empowered to adjudicate between them. *North Lebanon R. R. Co. v. McGrann*, 33 Penn. St., 580. 1859.

11. — If the company failed to appoint a chief engineer, the parties would be at liberty to resort to the courts of law. *Ib.*

12. — Whether a stipulation in the original agreement to refer all matters of controversy that may arise, connected with the contract, to an engineer of one of the parties, would be binding, is doubted. *Smith v. Boston, Concord and Montreal R. R. Co.*, 36 N. H., 458. 1858.

13. — alterations. The contract provided that alterations directed by the engineer should "be made as directed." Such alterations are within the jurisdiction of the engineer. *O'Reilly v. Kerns*, 52 Penn. St., 214. 1866.

14. — Alterations directed did not abrogate the contract or substitute a new one; they were within the original contract. *Ib.*

Arbitration — Contract.

15. — But work done after the job had been taken off the contractor's hands by the company, was not done under the contract, and payment for it might be recovered in assumpsit. *Ib.*

16. — **authority cannot be delegated.** Where parties agree that a third person shall measure certain work, and that his measurement shall be conclusive, such person cannot delegate his authority to some one else, and adopt the measurement as his own; the parties will not be bound by such measurement. *Wilson v. York and Maryland R. R. Co.*, 11 Gill and Johnson (Md.), 58. 1839.

17. — **certificate of engineer.** The plaintiff agreed to perform certain work and labor in moving the track of a railroad "under the direction" and "to the satisfaction" of L., the city surveyor, whose certificate that the work had been so performed, was to entitle the plaintiff to payment. The plaintiff having completed the greater part of the work, was stopped at a certain point by L. Held, that L. had power, under the contract, to give that direction, and that the plaintiff had a sufficient excuse for nonperformance of the remainder of the labor. And that, therefore, it was unnecessary to procure the certificate of L., that the contract had been entirely performed, as a prerequisite to his recovery. *Devlin v. Second Avenue R. R. Co.*, 44 Barbour (N. Y.), 81. 1865.

18 — **engineer must be suitable.** Where it is agreed that the work shall be done under the supervision of the other party's engineer, there is an implied agreement that a suitable engineer shall be employed. *Smith v. Boston, Concord and Montreal R. R. Co.*, 36 N. H., 458. 1858.

19. — The party who neglects to furnish such engineer is liable to an action, and can take no advantage of his failure. *Ib.*

20. — **estimates.** A contractor for the construction of a bridge on a railroad, having received the monthly estimates based upon a particular construction of his contract without objection, will be held to have acquiesced in that construction, and to be bound by it. *Kidwell v. Baltimore and Ohio R. R. Co.*, 11 Grattan (Va.), 676. 1854.

21. — **fraud.** But the parties are not bound by the fraudulent estimates of such engineer. *Baltimore and Ohio R. R. Co. v. Polly,*

14 ib., 447, 1858; *Same v. Laffertys*, ib., 478, 1858.

22. — **measurement; notice.** Under a contract for the construction of a railroad, by which all measurements are to be made and the amount of labor determined by the company's engineer, whose decision is final, the contractor is entitled to notice and the opportunity to be present; he is not concluded by measurements made *ex parte*. *McMahon v. New York and Erie R. R. Co.*, 20 N. Y., 463. 1859.

23. — A final estimate made by the engineer being a condition precedent to payment, and his employer having refused to have a measurement made, or those already made received by him, the contractor is not bound to call upon the engineer to make such estimate, but may recover upon other evidence of the amount of work. *Ib.*

24. — The defendant having neglected to cause its engineer to make a final measurement and estimate of the work, when requested by the contractor, interest is allowable from the time of such default, though the amount was not liquidated nor capable of being ascertained by calculation merely, or by reference to ordinary market rates. *Ib.*

25. — **mistake.** When, by the terms of the contract between a railroad company and a contractor, the estimates of the engineer are to be binding upon the parties, a court of chancery has power to correct the mistakes of the engineer. *Mansfield and Sandusky R. R. Co. v. Veeder & Co.*, 17 Ohio, 385. 1848.

26. — In construing the contract, the court will use the terms employed by the parties according to their popular signification, if to apply them according to technical or scientific rules, would defeat the manifest intention of the parties. *Ib.*

27. — **stockholder.** A contract for the construction of a railway providing that the engineer of the railway company, should be arbiter of all disputes under the contract, will be disregarded in equity, when it appears that the engineer is a stockholder in the company, which fact was unknown to the plaintiff when the contract was made, and the award of such engineer will be set aside. *Milnor v. Georgia R. R. Co.*, 4 Ga., 385. 1848.

28. — **Contract; abandonment.** Where a contract has been partly performed and has

Contract.

been abandoned by mutual consent, the plaintiff may recover for what has been already done under the special contract. *Baltimore and Ohio R. R. Co. v. Lafferty*, 2 W. Va., 104. 1867.

29. — books of contractor. In an action for services in building a railroad, entries in the contractor's books of prices paid to his workmen, are not evidence against him of the prices he was to receive. If the question was as to the reasonable value of his services, they are admissible, because tending to show the worth of one item of his claim, that is, of the muscular power employed. *Currier v. Boston and Maine R. R. Co.*, 81 N. H., 209. 1855.

30. — construction. Where, during the progress of the work a new agreement was made, releasing the contractor from finishing his contract, and stipulating for what matters compensation should be made, but not providing for any damages for the suspension of work during the existence of the original contract, it was not error, after affirming the point of the defendants, that no such damages could be claimed, to add, that the question was not material because of the supplemental agreement, which provided for no such compensation. *Memphis, Clarksville and Louisville R. R. Co. v. Wilcox*, 48 Penn. St., 161. 1864.

31. — Though the plaintiff had been dismissed, and the work taken off his hands, the company was not released from paying for the work already done, as stipulated in the supplemental agreement, what it was fairly worth; nor could this claim be restricted to what was coming to him under the final estimates of the engineer; nor after the agreement to pay, could the company set off the expense and loss incurred in completing the unfinished work. *Id.*

32. — Where, under a contract to build a railway at a certain price per mile, nothing is said about sidetracks and turnouts, and the contractor has received monthly payments on monthly estimates, and has made no claim to payment for such sidetracks, etc., it would seem that such fact would be a practical construction of the contract against the right of the contractors to claim pay for such work. *Barker v. Troy and Rutland R. R. Co.*, 27 Vt., 766. 1855.

33. — Where a contract is silent as to the time of payment, and the parties have put a

construction upon it by their acts, such construction is binding upon the parties. *Boody v. Rutland and Burlington R. R. Co.*, 3 Blatchford (U. S. C. C.), 25. 1853.

34. — Where a contract for building an embankment was silent as to where the contractor was to get the earth, and the parties themselves gave a construction of it, they will be bound by it. *Chicago and Great Eastern R. R. Co. v. Vosburgh*, 45 Ill., 311. 1867.

35. — The plaintiff having contracted to procure the right of way, and build defendant's road at an agreed price per mile, and not having paid the land owner's damages in all cases; it was *held*, that the defendant, being liable directly to the land owners, might retain the amount of that liability from the sum which by the contract would be due to the plaintiff. *Barker v. Troy and Rutland R. R. Co.*, 27 Vt., 766. 1855.

36. — Where it was stipulated, in a contract for building a railroad, that if the aggregate amount of all material encountered in constructing it was increased by the definite location over the preliminary estimate, an allowance should be made, it was *held*, that an averment that the amount of material encountered was increased, etc., was in effect the same, as the amount of all material, and that the stipulation did not apply to an increase of the aggregate of each kind of material but the aggregate of all kinds must be increased. *Smith v. Boston, Concord and Montreal R. R. Co.*, 36 N. H., 458. 1858.

37. — Where the contract stipulates that one party shall do the work and the other shall find the materials, there is an implied contract that the materials shall be seasonably furnished. *Smith v. Boston, Concord and Montreal R. R. Co.*, 36 N. H., 458. 1858.

38. — defects. Plaintiffs contracted to build certain abutments, and the contract specified that a certain kind of stone might be used. The stone agreed upon was used, and after the completion of the work, a defect was discovered in it, but it did not appear whether the defect was owing to the quality of the stone or to the badness of the workmanship. *Held*, that the plaintiffs were entitled to recover the contract price, unless it was shown that the defect was in the workmanship. *Vanderwerker v. Vermont Central R. R. Co.*, 27 Vt., 130. 1854.

Contractors.

39. — **entire contract.** If a contractor agrees with a railroad company to grade a section of its road, and do all work necessary to make the road ready for the crossties and iron, and to receive a fixed sum for the work, to be paid from time to time, as the work progresses, at the prices fixed and estimates of work done, made by an engineer, the contract is entire, and the provision for payments from time to time as the work progresses does not make it severable. *Cox v. Western Pacific R. R. Co.*, 44 Cal., 18. 1872.

40. — The by-laws of the defendant provided that interest should be allowed on all installments for work until the road was completed and in running order. *Held*, that the defendant could not recover of the plaintiffs, who had contracted to construct and complete the road by a specified time, the interest which accrued upon the installments between that time and the time when the road was actually completed. *Barker v. Troy and Rutland R. R. Co.*, 27 Vt., 766. 1855.

41. — **modification.** A written contract under seal may be so changed and modified by the parties as to reduce the whole to parol. *McGrann v. North Lebanon R. R. Co.*, 29 Penn. St., 82. 1857.

42. — A written contract for the grading and masonry of a railroad between designated termini, is not so altered and modified by a change of route between such termini, as to enable the contractors to recover for the work done upon a *quantum meruit*, irrespective of the prices designated in the agreement. *Ib.*

43. — Where payments were made in such a case upon monthly estimates, upon the prices specified in the contract, and were receipted for as under the contract, the parties were held to have waived the consequences of previous change. *Ib.*

44. — Where there have been considerable changes and modifications, without any intention to abandon or rescind the written agreement, *assumpsit* may be sustained for the work performed, making the sealed agreement the basis of compensation. *Ib.*

45. — A. entered into a contract with defendants to do certain work in excavating for a railway, and, after commencing work, unexpectedly encountered very difficult material, and gave notice to defendants that he could not do the work under the contract, and quit

work, and afterwards, defendants agreed to pay him a reasonable compensation for his labor, it was *held*, that defendants were liable under the new contract. *Hart v. Lauman*, 20 Barbour (N. Y.), 410. 1859.

46. — **profile.** Where a profile of a work was referred to by parties when making a contract for grading a railroad, a profile proved by a witness to be made from the same data and measurements, cannot be admitted unless the absence of the original is first accounted for. *Currier v. Boston and Maine R. R. Co.*, 31 N. H., 209. 1855.

47. — **release.** Where the contract provides that upon receiving the full amount of the final estimate, made out agreeably to the terms of the contract, the contractor shall give a release under seal from all claims or demands growing out of such contract, the giving of such a release is a condition precedent to a recovery if the final estimate is not fraudulent. *Baltimore and Ohio R. R. Co. v. Laffertys*, 14 Grattan (Va.), 478, 1858; *Same v. Polly*, *ib.*, 447.

48. **Contractors.** The Reading R. R. Co. has the right to temporarily use a reasonable amount of land along the line of its road for shops, dwellings, stables, etc., while engaged in building the road, and the contractors have the same right. *Lauderbrun v. Duffy*, 2 Penn. St., 398. 1845.

49. — The custom of railroad companies to allow their contractors the free use of their own roads, cannot be extended so as to bind a company to pay the expenses of its contractors on a road belonging to a distant corporation. *Colcock v. Louisville, Cincinnati, etc., R. R. Co.*, 1 Strobbart's Law (So. Car.), 329. 1841.

50. — **delays.** B. C. & Co., in September, 1850, made a written contract with a railroad company to construct its road according to certain specifications, the work to be completed on or before October 1, 1851, and on failure to complete it within the time limited, to pay all damages sustained by the company. The road was not completed within the time, and the company sustained damage thereby to the amount of \$3,800. In June, 1852, the company made a supplementary contract with B. C. & Co., by which it agreed to accept the road, and to release them from certain unfinished parts of the work, and B. C. & Co. agreed that a certain sum, estimated as the

Embankments—Extra Work.

expense of the unfinished work, should be deducted from the amount which they were to receive under the original contract. *Held*, that this agreement was not, taken by itself, a waiver of the claim of the company for damages for the failure to complete the road within the time limited by the contract. *Cannon v. Wildman*, 28 Conn., 473. 1859.

51. — The original contract provided that if B. C. & Co. did not, in the opinion of the engineer of the company, from time to time, fully comply with and perform all the stipulations of the contract, the engineer might dismiss them from the work, in which case the contract should determine, and all that was due them for work done should be forfeited, or the engineer might make such deductions from the monthly payments as he should deem reasonable for such breaches of the agreement. *Held*, that the remedy thus furnished had reference to defaults occurring from time to time, rather than to a final default to complete the work in time, and that the company, by neglecting to avail itself of that remedy had not waived its claim for damages for failure to complete the road within the time limited. *Ib*.

52. **Embankments.** A conveyance of land to a railroad company, "for the uses and purposes of said railroad, and for no other or different purpose," described two parcels; the description of the second commencing, "together with a piece for materials, of five hundred and thirty feet in length," etc. A map was annexed to the deed and referred to in the description, on which such second parcel was laid down and designated "for materials." *Held*, that these words did not exempt the company from liability to the grantor for damages caused by his negligently digging away a part of such secondly described lot, so as to cause his adjoining land to fall in, and seriously to impair its value. *Ludlow v. Hudson River R. R. Co.*, 6 Lansing (N. Y.), 128. 1872.

53. — The cause of action for damage did not accrue until the caving away of the land took place, from which the injuries resulted. *Ib*.

54. **Excavations.** A railway company should make its excavations, using all reasonable and practical care and skill, so as to save adjoining proprietors from injury. *Rau v.*

Minnesota Valley R. R. Co., 13 Minn., 442. 1868.

55. **Extra work.** B. contracted with defendant to build its road, and plaintiffs subcontracted, in writing, with B. to build particular portions of it. By both contracts, the work was to be done to the satisfaction and acceptance of the company's engineer, and no claim was to be allowed for extra work, unless it was performed under written contracts, or orders signed by the engineer. Plaintiffs, in the execution of their contract with B., made an excavation for a bridge agreeably to the directions of the engineer, and had left it as finished; the engineer found it necessary to have the excavation enlarged and ordered it done. Plaintiffs made the enlargement, but no contract was made between them and defendant with reference to it. *Held*, that there was no ground for implying or presuming a contract, and that plaintiffs could not recover of defendant therefor. *Vanderwerker v. Vermont Central R. R. Co.*, 27 Vt., 125. 1854.

56. — There could be no claim for extra work, as the engineer had not ordered it in writing. *Ib*; *Same v. Same*, *ib*, 130; *Barker v. Troy and Rutland R. R. Co.*, *ib*, 766.

57. — The fact that the company had paid similar claims to others, would not affect its liability, unless such fact was known to plaintiffs, and influenced them to perform the work. *Vanderwerker v. Vermont Central R. R. Co.*, *ib*, 125, 130.

58. — The rule is not varied by the fact that, previous to doing the extra work, the contractors were assured by the local or assistant engineer, who communicated the order from his chief, that they should receive extra compensation therefor,—it appearing that the assistant had no authority to make the promise for the company. *Ib*.

59. — Certain detailed estimates of the cost of the work were annexed to a contract for the construction of a railway. Shortly before the contract was made, many persons, and among them B. C. & Co., were assembled to make proposals to the railroad company for the work. These estimates were exhibited to them by the engineer of the company, who stated that they were made according to his best judgment, but were only approximate estimates; that they were given them that

Forfeiture — Liability.

they might have the benefit of his judgment, and that they could go over the ground and examine for themselves. *B. C. & Co.* went over the ground, and were experienced and and competent to judge for themselves, but did not make a thorough examination. The contract was made fairly, without fraud or mistake, and was an entire contract to do the whole work for the sum of \$290,000. A portion of the work proved to be much more expensive than was estimated, from a large excess of rock excavation above the quantity estimated. *Held*, that *B. C. & Co.* understandingly took the risk of the work, and were not entitled to any allowance beyond the contract price. *Cannon v. Wildman*, 28 Conn., 472. 1859.

60. — By the contract, certain depot buildings were to be erected by the contractors "after such plans and of such dimensions as might be adopted by the engineer." The engineer required certain of them to be built of somewhat larger dimensions than he had stated at the time of the signing of the contract that he should require, and the expense of their erection was thereby increased above the sum named in the estimates. *Held*, that the contractors were not entitled to an allowance beyond the contract price for the increased expense. *Id.*

61. — Where a contract for the excavation and preparation of a road bed provided that the contractor should be paid a certain price per yard for every cubic yard of earth, and extra compensation for rock excavations, it was held that he was not entitled to extra compensation for excavating hardpan. Where extra compensation is claimed in a *quantum meruit*, where there is a written contract, the party claiming the extra compensation must show that the work was more than was required under the contract. *Nesbitt v. Louisville, Cincinnati and Charleston R. R. Co.*, 2 Spears (So. Car.), 697. 1844.

62. — A promise by the president of the company, conceding the company to be bound by it, to compensate a contractor for excavating hardpan, is not binding as a legal contract, where the contractor is bound by his written contract to excavate that substance. *Id.*

63. — Where a builder undertakes to construct a building according to a plan, which

is afterward changed by agreement of the parties, so as to require extra work and materials, and no agreement was made in reference to the price of extra work; it would be inferred that the price agreed in the original contract would govern in determining the compensation. *Chicago and Great Eastern R. R. Co. v. Vosburgh*, 45 Ill., 311. 1867.

64. Forfeiture. An agreement entered into between the contractor for the construction of a railroad and his subcontractor provided, that, in case of the violation of the terms of the contract by the latter, the contractor might declare the contract forfeited, or should have the right to such other measures as the engineer of the road might deem necessary to insure the completion of the work by the time and in the manner stipulated, and to deduct from the current and final estimates such sum or sums as may be necessary to defray the expense of such measure. *Held*, that an express declaration of forfeiture was not necessary to entitle the contractor to take charge of the work in accordance with the direction of the engineer before the completion of the work. *Maloney v. Malcolm*, 31 Mo., 45. 1860.

65. Highways. Where, through the neglect of a railroad corporation in removing barriers placed along the highway for the protection of travelers, and failing to replace them at night, a traveler was injured, it was held, that the town was liable for double damages to the party injured, under the statute of 1786. But the town could only recover single damages against the railway company. *Lowell, Inhabitants of v. Boston and Lowell R. R. Co.*, 23 Pickering (Mass.), 24. 1839.

66. Laborers — injuries to. A railroad company is not liable for injuries sustained by laborers in the employ of a contractor who was working for said company, though it may have furnished implements and materials for the performance of such work. *Central R. R. Co. v. Grant*, 46 Ga., 417. 1872.

67. — liability of railway companies. The appellant sued the appellee for certain work done in the construction of its road; but it was proved on the trial that the work was not done for the company, but for other parties. There was no evidence of any work done for the company, Judgment against the

Payments in Stock.

plaintiff. *Held*, on appeal, that no ground for reversal appears. *Floyd v. Indianapolis and Cincinnati R. R. Co.*, 8 Ind., 469. 1856.

68. — statutes. Justices of the peace have jurisdiction of actions brought by laborers against railway corporations under § 12 of the railroad act. *Grannahan v. Hannibal and St. Joseph R. R. Co.*, 30 Mo., 546. 1860.

69. — Although a contractor under a railroad company may sublet to another, and bind such subcontractor not to give out his contract to another, yet if such subcontractor should violate this agreement and give out the contract to another, a laborer under the latter could maintain an action under § 12 of the general railroad act against the railroad company. *Ib.*

70. — A statute providing that railway companies shall be liable for the wages of day laborers employed by contractors in constructing their roads is not unconstitutional and impairing the obligation of a contract. Comp. St., ch. 26. *Brannin v. Connecticut and Passumpsic Rivers R. R. Co.*, 31 Vt., 214. 1858.

71. — The Hudson River R. R. Co., under its charter, and to the extent therein specified, is directly liable for all sums due to "laborers" upon its work, in all cases of nonpayment by the contractors. *Warner v. Hudson River R. R. Co.*, 5 Howard's Pr. (N. Y.), 454, 1851; but see contra, *Millered v. Lake Ontario, Auburn and New York R. R. Co.*, 9 Howard's Pr. (N. Y.), 238, 1854.

72. — The term "laborers" includes not only those who personally perform labor, but all who do so by their servants and agents; also all superintendents over others engaged in actual labor upon the road. *Ib.*

73. — A railroad company is chargeable, under § 12 of the general railroad act (Laws of 1850, ch. 140), with services rendered to its contractors, when performed on a *quantum meruit*, as well as for a stipulated price. *Chapman v. Black River R. R. Co.*, 4 Lansing (N. Y.), 96. 1871.

74. — The words, "laborer" and "labor," as used in the general railroad act of 1850, which gives a laborer a claim against the company for the indebtedness of a contractor in certain cases, and to a limited amount, are used in their ordinary and usual sense. *Balch v. New York and Oswego R. R. Co.*, 46 N. Y., 521. 1871.

75. — A laborer employing his own teams and an assistant, under an agreement therefor with the contractors, cannot recover against the company for the services of the teams or the assistant, under the statute of 1850. *Atcherson v. Troy and Boston R. R. Co.*, 6 Abbott's Pr., N. S. (N. Y.), 329, 1856; *Same v. Same*, 1 Abbott's Ct. of Ap. Dec. (N. Y.), 13, 1856.

76. — To charge a railroad company with liability for the indebtedness of a contractor to his laborers, under § 12 of the general railroad act (Laws 1850, ch. 140), the indebtedness must arise from services personally performed by the laborers. *Cummings v. New York and Oswego Midland R. R. Co.*, 1 Lansing (N. Y.), 68. 1869.

77. — A notice to a railroad, that a contractor on its road is in arrears to his hands, which substantially complies with the statute (W. S., 302, § 10), so as to prevent any misapprehension, is sufficient. *Cosgrove v. Tebo and Neosho R. R. Co.*, 54 Mo., 495. 1874.

78. — The account of a laborer for work on a railroad under a contractor, signed by the contractor, is not evidence against the railroad company as its admission, unless the authority to make such admission is established. *Ib.*

79. Payments in stock. When a contract is entered into for work at a certain price, with a stipulation that the same is to be paid for in specific articles at a certain rate or price, the debtor has an election to deliver the articles, or pay the specified amount of money, if such right of election is expressed or fairly to be implied. *Cleveland and Pittsburgh R. R. Co. v. Kelley*, 5 Ohio St., 180. 1855.

80. — If such election is not expressed, and the subject matter of the contract or *res gestæ* indicate that no such right of election was contemplated by the parties, then the general rules of law relating to executory sales are applicable, and the contract is a single and imperative promise to deliver the specific articles. *Ib.*

81. — A railroad contractor agreed with the company to construct and equip its entire road for \$1,000,000, of which \$250,000 was to be paid in cash and cash assets, and the balance in the bonds and stock of the company, the price named being more than twice the cash value of the work. The contract pro-

Route — Subcontractors.

vided that payments should be made on monthly estimates, and in such of the said descriptions of payment as the contractor deemed would best subserve his purpose in doing the work; but the contract fixed no time for the completion of the work. It also provided that both the parties should aid in converting said assets, bonds and stock into means for carrying on the work, and that the contractor need not carry it on faster than such means would serve. The contractor performed work under the contract to the nominal amount of \$117,000, which, at his request, was mostly paid him in the cash assets, and then, the charter of the company having expired by its own limitation, the work was suspended by mutual consent, and the road abandoned, its bonds and stock thus becoming worthless. *Held*, that the contractor is bound to account to the company for all actual profits realized from the work. *Four Mile Valley R. Co. v. Bailey*, 18 Ohio St., 208. 1868.

82. — The plaintiffs, for constructing a railway, were to receive in payment a certain portion of defendant's stock. Upon finishing the work, they demanded their pay, but defendant disputed the performance of the contract, and refused to deliver the stock. At that time, the market price of the stock was 33 per cent. of its par value. It being determined that plaintiffs were entitled to recover a sum less than the whole stipulated price, not upon a strict and literal performance of their contract, but on equitable grounds, it was *held*, that, upon similar grounds, the amount of their recovery upon that portion of their contract payable in stock, should be limited to the market value of the stock at the time of their demand. *Barker v. Troy and Rutland R. R. Co.*, 27 Vt., 766. 1855.

83. — A provision that the contractor should subscribe for and take an amount of the capital stock of the railroad corporation equal to one-fourth of the amount received for work under the contract, construed as an independent covenant, and as not requiring the contractor to receive payment in stock. *McMahon v. New York and Erie R. R. Co.*, 20 N. Y., 463. 1859.

84. — Where a contract provided that a railway contractor should be paid for his work in monthly installments, twenty-five per cent. being payable in stock, and he was, by

the wrongful act of the railway company, prevented from completing his work, *held*, that the contract for stock was executory, and that the contractor was entitled to its value, he having no title to the stock. *Myers v. New York and Cumberland R. R. Co.*, 2 Curtis (U. S. C. C.), 23. 1854.

85. — *extra work.* Where it was stipulated that payment should be made for building a railroad, partly in money and partly in stock, the payment for extra work may be recovered in money. *Smith v. Boston, Concord and Montreal R. R. Co.*, 36 N. H., 458. 1858.

86. *Route.* A railroad corporation is not liable to an action by a person through whose land it has located its road within the limits of its charter, because it has elsewhere deviated from those limits. *Newton v. Agricultural Branch R. R. Co.*, 15 Gray (Mass.), 27. 1860.

87. *Subcontractors.* Where a person contracts with a railroad company to grade and construct a division of the road, the company to retain a certain percentage as a security for the completion of the entire work, and the contractor sublets a portion of the division to another, and it is agreed between them that the contractor shall retain a certain percentage as a security for the completion of the subcontract, and the subcontractor completes his portion, and it is received, he may recover the sum agreed upon, including the percentage, of the contractor, although the latter may have failed to entitle himself to his percentage as against the railroad company. *Blair v. Corby*, 29 Mo., 480. 1860.

88. — A subcontractor cannot pass by his immediate employer, and sue the principal or proprietor of the work. *Lake Erie, Wabash and St. Louis R. R. Co. v. Eckler*, 13 Ind., 67. 1859.

89. — Where a complaint charged that a railroad company promised to pay for goods which should be furnished to a subcontractor, an answer that the railroad company was not indebted to the subcontractor was held no defense on demurrer. *Chicago, Cincinnati and Louisville R. R. Co. v. West*, 37 Ind., 211. 1871.

90. — A railroad company is not liable to one employed by a subcontractor for work done in the construction of its road. *Indianapolis, Bloomington and Western R. R. Co. v.*

Horses — Absence of Counsel.

O'Reilly, 38 Ind., 140. 1871; *Marks v. Indianapolis, Bloomington and Western R. R. Co.*, ib., 440.

91. — negligence. The N. and N. Y. R. R. Co., contracted with F. & Co., for grading its railway. With the consent of the company, F. & Co. sublet the contract for excavating rock to S. Before the contract was made with F. & Co., it was understood that the blasting was to be done with nitroglycerine; and a magazine for storing the nitroglycerine was erected on the land of the company under the direction of its engineer. S., without the knowledge or consent of the railway company, stored also the nitroglycerine of a third party in the magazine, where it was kept for sale. One of S.'s employes in taking out some of such nitroglycerine, belonging to said third person, negligently caused it to explode, whereby one C. was killed. *Held*, that the railway company was not liable for the injury, it not being at fault. *Guff v. Newark and New York R. R. Co.*, 6 Vroom. (N. J.), 17 1870; *Same v. Same*, ib., 574. 1871.

92. — The defendant contracted with P. & E. to construct certain sections of its railway; and they subcontracted with C. to erect certain abutments thereon. A servant of C., in drawing stone for such abutments, left one in the highway, by reason of which one P. was injured, and recovered of the plaintiff for the damage sustained by him. In an action by the town to recover of the defendant, the damages to which the plaintiff was subjected, it was *held*, that the defendant had no control over the servant of C., and that no privity existed between them, and that therefore the defendant was not liable. *Pawlet, Town of v. Rutland and Washington R. R. Co.*, 28 Vt., 297. 1856.

93. — A railroad corporation made a contract with certain persons, that the latter should build a certain portion of the railroad. While the contractors were at work upon the road, in pursuance of the contract, some rocks were blasted and a stone was thrown upon the plaintiff, causing him serious injury. *Held*, that the plaintiff might maintain an action against the corporation to recover damages for the injury he had sustained. *Stone v. Cheshire R. R. Co.*, 19 N. H., 427. 1849.

94. — statute. The liability imposed upon railway companies in favor of laborers by §

12 of the general railroad act (laws of 1850, p 215), is not limited to such as are employed by parties holding contracts immediately with the corporation; but it extends also to workmen hired by parties to whom the original contractor had sublet a portion of the work. *Kent v. N. Y. Central R. R. Co.*, 12 N. Y., 628. 1855.

95. — Contractors for constructing a railroad, are the servants of the company, and the tortious acts of the contractors, while about the business of the company, are properly chargeable to it. *Chicago, St. Paul and Fond du Lac R. R. Co. v. McCarthy*, 20 Ill., 385. 1858.

CONSTRUCTION OF STATUTES.

See STATUTES.

CONTAGIOUS DISEASES.

1. Horses. The owner of diseased horses, knowing their disorder to be contagious, is bound to exercise all the care that a prudent man would exercise, or a rightful regard for the interests of others requires, such as placing his diseased horses so remote from a partition between his stable and that of a neighbor, as to render contact with his neighbor's horses impossible. *Mills v. New York and Harlem R. R. Co.*, 2 Robertson (N. Y.), 326. 1864.

CONTEMPT.

See INJUNCTION.

CONTINUANCE.

1. Absence of counsel. The absence of counsel in attendance upon the district court, is not sufficient ground for continuance in the supreme court. *Richards v. Des Moines Valley R. R. Co.*, 18 Ia., 259. 1865.

Abandonment — Arbiters.

2. Amendments. In a suit to recover the amount of an engineer's estimates for work done for a railroad company, the declaration left the amounts blank, and the court allowed the plaintiff to supply the blanks by inserting the amounts. The defendant having applied for a continuance, without showing that he was prejudiced by the amendment, *held*, that the continuance was properly refused. *Rushville and Shelbyville R. R. Co. v. McManus*, 4 Ind., 275. 1853.

3. Suits long pending. The fact that a cause has been pending for four years, is no reason why a continuance should not be granted upon a proper showing. *Hooper v. Memphis Branch R. R. Co.*, 19 Ga., 85. 1855.

4. Surprise. An application for a continuance by the defendant upon the ground that he was taken by surprise by finding certain depositions on file therein, was properly denied after the plaintiff had withdrawn such depositions. *Congar v. Galena and Chicago Union R. R. Co.*, 17 Wis., 477. 1863.

CONTRACTS.

See BAGGAGE; CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; DISCRIMINATION; EQUITY; INJURY TO DOMESTIC ANIMALS; INJURY TO PASSENGERS.

1. Abandonment. A. contracted to construct and deliver to B. sixteen locomotives, to be paid for as delivered; the fifth locomotive delivered was not paid for: *held*, that A. could not, for this reason, abandon the contract and recover for loss of profits on the eleven to be delivered, unless the payment on delivery was expressly made a condition precedent to the completion of the contract. *Palm v. Ohio and Mississippi R. R. Co.*, 18 Ill., 217. 1856.

2. Acceptance. A railroad company ordered from a firm of iron dealers a certain number of railway "frogs" of a specified quality. The firm sent a less number than that ordered, which was received without objection by the company. Upon using the frogs, it was discovered that a portion of them were not of the quality ordered, but the company did not notify the firm of the defect, or offer to return the frogs, but kept the whole

and used them. *Held*, that the company could not claim a deduction for the defective quality of the frogs, but was liable for the price agreed to be paid. *Gurney v. Atlantic and Great Western R. R. Co.*, 2 N. Y. Sup. Ct., 446. 1873.

3. — Where a contract for the delivery of railway iron provided that it should be delivered at different dates, and the iron which was to have been first delivered was not delivered at the time agreed upon, but was accepted without objection to the delay, it was *held*, that this acceptance was a waiver of that portion of the contract which related to the delivery of that part of the iron. *Bailey v. Western Vermont R. R. Co.*, 18 Barbour (N. Y.), 112. 1854.

4. Agency. C., president of a railroad company, and A., agent of the company, borrow money from H., and give their own bond for it. The money is borrowed for the use of the company, which is itself without credit, and it is immediately turned over to the company. A., as agent, receives money of the company, out of which he is expected to pay the debt; but the bond having been given for money in suit, he cannot pay it; and C. and A. became insolvent. *Held*, the money having been loaned to C. and A., individually, with the knowledge that it was for the use of the company, and H., having chosen to take the responsibility of C. and A., cannot afterwards make the company his debtor. *Strider v. Winchester and Potomac R. R. Co.*, 21 Grat-tan (Va.), 440. 1871.

5. Arbiters. If an agreement between two railroad companies provides that what is reasonable and necessary to be done by one of them, at the expense of the other, pursuant to certain contracts between them, and what is a reasonable expense for doing it, shall be determined by the superintendent of the first corporation and another person named; and afterwards, before the time for making the determination, the office of such superintendent is abolished by the corporation, and the duties of superintendent assigned to its president; he is the proper person to join in the determination, and it is for the jury to determine who is in fact discharging the duties of superintendent at the time of the determination. *Connecticut River R. R. Co. v. Williston*, 16 Gray (Mass.), 64. 1860.

Assignment — Construction.

6. Assignment. Where a timber contract with a railroad company was assigned for a valuable consideration, it was *held*, that an increased allowance, made by the company after the assignment, passed to the assignee. *Winslow v. Elliott*, 5 Jones' Law (N. C.), 111. 1857.

7. — M. assigned to K. one-fifth interest in a railroad contract payable in stock and bonds, K. to pay one-fifth of the cash capital (\$150,000), "as may be required by M.," who was authorized to sell stock and bonds, if necessary to prosecute the work, the profits to be divided amongst the parties in proportion to the cash contributed. K. being called on by M. refused to pay more than one-fifteenth, alleging that no more was required than M. had realized from stock and bonds; M. completed the contract. *Held*, that "required" meant "called for," and that K. was only entitled to one-fifteenth of the profits. *McReynolds's Appeal*, 66 Penn. St., 102. 1870.

8. Attachment. The contract between a railroad company and one of the contractors on its line of improvement provides that the contractor shall not receive the amount of the final estimate of his work until he shall release, under seal, all claims or demands upon the company arising out of the contract. The contractor cannot recover the amount of the final estimate until he has executed the release; and his attaching creditor at law has no greater rights against the company in respect to this final estimate than he has. *Baltimore and Ohio R. R. Co. v. McCullough*, 12 Grattan (Va.), 595. 1855.

9. Breach. It is unnecessary for one party to do certain acts before suing for a breach of a contract where the other party declines complying with it. *New Orleans and Nashville R. R. Co. v. Ganath & Co.*, 18 La., (O. S.), 510. 1841.

10. — Where the defendants refuse compliance with their contract for reasons wholly unconnected with the conduct of the plaintiffs, they are liable for the damages. *Id.*

12. — Though there have been repeated violations of a contract by both parties, yet if neither elects to consider it broken, and they proceed under it, neither can be considered as having been in default. *McCord v. West Feliciana R. R. Co.*, 3 La. An., 285. 1848.

11. Canals. A contract between the com-

monwealth and a private person is ordinarily to be construed in the same manner as a like contract between natural persons, notwithstanding the remedy for its breach is not the same. *Commonwealth ex rel. v. Pennsylvania R. R. Co.*, 51 Penn. St., 351. 1865.

13. — The act of May 5, 1841, authorizing the lease of the surplus water of the canals, shows an interest to retain in the commonwealth absolute control of the canals and an unfettered right to deal with them at pleasure; and the lessees could claim no more for the loss of the water than suspension of rent. *Id.*

14. — The act of May 16, 1857, for the sale of the public works, imposed on the purchasers no other duties to the lessees than those resting on the commonwealth at the time of the sale. *Id.*

15. Charter. A corporation is not liable for services voluntarily rendered in procuring its charter, there being no subsequent promise to pay for such services. No previous promise could be implied for the reason that the corporation was not in being at the time. *Hall v. Vermont and Massachusetts R. R. Co.*, 28 Vt., 401. 1856.

16. Construction. A contract is to be construed according to the law in force when it is made. *Hathorn v. Calef*, 53 Maine, 471. 1866.

17. — Courts are bound to give legal effect to all contracts, according to the true intent of all the parties. C. C., 1940. *Latimer et al. v. New Orleans, Jackson and Great Northern R. R. Co.*, 16 La. An., 79. 1861.

18. — The force and effect of a written instrument should be determined by the court. *Leviston v. Junction R. R. Co.*, 7 Ind., 597. 1856.

19. — A contract for borrowing money to aid in the construction of the Northern Railroad — construed. *Knapp v. New York and Harlem R. R. Co.*, 2 Bosworth (N. Y.), 297. 1857.

20. — The contract between the plaintiff and executive committee of the defendant corporation employing plaintiff as superintendent of defendant's railway — construed. *Queen v. Second Avenue R. R. Co.*, 44 Howard's Pr. (N. Y.), 281. 1872; *Same v. Same*, 3 Jones & Spencer (N. Y.), 154. 1872.

21. — A contract for conveyance of right of way and depot grounds — construed. *Chidester v. Springfield and Illinois S. E. R. R. Co.*, 59 Ill., 87. 1871.

Construction.

22. — The terms of a contract for rates of freight construed with reference to the circumstances of this particular case. *Thayer v. Burchard*, 99 Mass., 508. 1868.

23. — The conditions of a contract for the sale of land construed, under the facts of a particular case. *Russell v. Eastern R. R. Co.*, 5 Allen (Mass.), 291, 1862; *Same v. Same*, ib., 296.

24. — The plaintiffs had contracted with defendants to build certain sections of a railroad at agreed prices. Work was suspended for a time by agreement of the parties, and it was agreed if the work should not be resumed within two years, the defendants would pay the plaintiffs \$750; if resumed within that time, the former contract was to apply to a residue part only of the sections; and upon resumption, the plaintiffs were to resume work upon such parts of the sections at the former prices. The defendants resumed the work within two years, but employed another company to do the work. *Held*, that as the work was resumed within two years, the plaintiffs were not entitled to recover the \$750; but that plaintiffs were entitled to do the work when resumed, and to recover damages for not being called upon to do it. *Fowler v. Kennebec and Portland R. R. Co.*, 31 Me., 197. 1850.

25. — Under an ordinance of the city of Detroit, the complainants contracted "to pave their railway track (on a certain street), and two feet and four inches on either side thereof at their own expense, if the city should pave said street contemporaneously with the construction of complainant's railway." The city did so, and having assessed the said complainants for the cost of the excavation, as well as the paving, of said portion of said street, it was *held*, that under said ordinance and contract, the complainants were only liable to pay for their proportion of the paving. *Fort Street and Elmwood R. R. Co. v. Schneider*, 15 Mich., 74. 1866.

26. — S. was employed by the defendant to procure donations, right of way, etc., under a contract embraced in the following resolution and acceptance: "Resolved, That S. shall be allowed two-fifths in value and kind of all donations to be obtained on account of any extension of the C. F. & M. R. R. Co., beyond W., to be in full of his services in procuring

said donations and superintending the getting of the right of way, etc.: *provided*, that he shall be allowed actual cost expenses while in the employ of the company. But there is no understanding that he shall receive compensation for other services, unless the board shall, under the circumstances of any particular case, see proper to make an allowance." The plaintiff accepted, as follows: "I will accept the above on condition that the road shall be completed as far as N. by the 1st day of January, 1868, and to C. within one year thereafter." *Held*, that the agreement was, in effect, an employment of plaintiff, indefinite as to time, that might be revoked or terminated at the pleasure of the company, and that plaintiff could not recover damages for compensation he might have received, if he had been permitted to continue under the contract. *Smith v. Cedar Falls and Minnesota R. R. Co.*, 30 Ia., 244. 1870.

27. — Where the defendant was the owner of a steamboat and one-half of the boat of the plaintiff, and it was agreed to stock the gross earnings of both boats, and to divide the proceeds equally at the end of the season, and the defendant received the entire earnings, *held*, that to entitle the plaintiff to recover in an action on an account annexed for their part of the earnings, they must show that defendant had some of the earnings of both boats, which of right belonged to them. *Kennebec and Portland R. R. Co. v. White et al.*, 38 Me., 63. 1854.

28. Construction — of cars. The plaintiff agreed, for a specified price, to build and deliver certain cars to the defendant, who was to furnish iron boxes necessary to their completion. They were completed, except so far as prevented by the default of the defendant in not furnishing the boxes, when they were destroyed by fire while in the possession of the plaintiff and without his fault. *Held*, that the property in the unfinished cars and materials remaining in the plaintiff, he was not entitled to recover for his labor and materials. *McConihe v. N. Y. and Erie R. R. Co.*, 20 N. Y., 495. 1859.

29. — of railways. A proposition for a contract, to be in writing, and executed by one party and accepted by the other, is binding on the parties, and where such a contract with a railway company was to be engrossed by the engineer of the company and presented

Correspondence — Depot.

to the contractors, and no particular time for completing the same was fixed, it was *held*, that the consent of the engineer to a delay of a month in the execution of the contract was within the authority of such engineer as agent. *Pratt v. Hudson River R. R. Co.*, 21 N. Y., 305. 1860.

30. Correspondence. Where the defendant offered by letter to receive from the plaintiff and transport from New York to Chicago, railroad iron, not to exceed a certain number of tons, during certain specified months, at a specified rate per ton, and the plaintiff answered merely assenting to the proposal, but did not agree on his part to deliver any iron for transportation, it was *held*, that there was no valid contract binding on either party. *Chicago and Great Eastern R. R. Co. v. Dane*, 43 N. Y., 240. 1870.

31. Custom. Before evidence of a particular custom can be permitted to explain a contract, it must be shown that the custom is established, existing at the time and place of the transaction, and known to the parties; it must also be certain, uniform, reasonable and not contrary to law. *Shackelford v. New Orleans, Jackson and Great Northern R. R. Co.*, 37 Miss., 202. 1859.

32. — Customs and usages must be proven by witnesses who have frequent and actual experience of the custom or usage about which they testify. *Ib.*

33. Damages. No action can be maintained for work and labor, unless the work has been actually performed. Where a party has been employed under a contract and wrongfully discharged, his remedy is either by an action for damages for breach of contract, or for the contract price. In the former case, one recovery would be a bar to any further action. In the latter, it must appear that he was ready and willing to perform any further services that might be required under the contract. *Wiseman v. Panama R. R. Co.*, 1 Hilton (N. Y.), 300. 1857.

34. — A. agreed with B. to deliver him a quantity of goods to be paid for in stock of a corporation, and subsequently drew an order upon him to give seventy shares of that stock to C., which B. promised C. orally to pay. *Held*, in an action by C. against B., that he could recover damages upon the promise to the extent of the value of the goods actually

delivered by A. to B., under the contract at the time the promise was made. *Eastern R. R. Co. v. Benedict*, 15 Gray (Mass.), 289. 1860.

35. — In an action for breach of a contract to permit the plaintiff to construct a railroad and to pay him therefor, at certain rates, the profits, meaning thereby the difference between the cost to him of doing the work, and the price to be paid for it, are a proper subject of damages. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Howard*, 13 Howard, 307. 1851.

36. — A contract provided that a part of the payment for constructing a railway should be made in stock of the company. After the work was performed, the stock was demanded and refused. *Held*, that the measure of damage was the marketable value of the stock. *Porter et al. v. Buckfield Branch R. R. Co.*, 32 Me., 539. 1851.

37. Death of party. The death of one of the parties to a contract for the construction of a railway, will cancel the contract unless the other party consent that the work shall be continued by the heirs of the deceased. A refusal to give such consent will not subject the party refusing to damages. He is only bound to pay for the amount of work already done, and the materials furnished proportionably to the price agreed upon. Civil Code, art. 2738. *McCord v. West Feliciana R. R. Co.*, 3 La. An., 285. 1848.

38. Delivery of goods. Under a contract for the delivery of 9,000 tons of railroad iron, the contract is not complied with on the shipment of the iron. *Thompson v. Cincinnati, Wilmington and Zanesville R. R. Co.*, 1 Bond (U. S. C. C.), 152. 1857.

39. Dependent. Bonds mutually entered into at the same time between two parties, each to the other, respecting the same subject matter, will be construed as dependent upon each other, and either party who seeks to enforce the stipulations entered into by the other must be ready to perform his own. *Smith v. Boston and Maine R. R. Co.*, 6 Allen (Mass.), 262. 1863.

40. Depot. Under an agreement between H. and defendant, H. was to convey certain lots to defendant, and defendant agreed to erect a depot thereon, which would have been of advantage to other property of H. *Held*, that the conveyance of the lots was a condi-

Engineer — Executory Contracts.

tion precedent, without which H. could not maintain an action for damages for the failure to erect such depot. *Sayre v. New York and Harlem R. R. Co.*, 3 Duer (N. Y.), 54. 1854.

41. — Where a person agreed in writing to pay to a railway company a certain sum on condition that the company should build a depot and open its road to a point within one mile of the post office of a certain town, it was *held*, that the building of a side track, which was operated as such, and a depot at a point within the distance named, was a substantial compliance with the condition, although the main track of the road was not, nor was the whole of the depot building, within the mile. *Cedar Falls and Minnesota R. R. Co. v. Rich*, 33 Ia., 113. 1871.

42. — An agreement made by a railroad company, with an adjacent land owner, to establish and maintain a permanent turnout track, and stopping place, at a particular point, in the neighborhood of his property, and to stop there with the freight trains and passenger cars of the company, is, in substance, the grant of an easement, which is to be binding upon the property of the railroad company, for the benefit of the owner of such adjacent property, and of all those who shall succeed him, in his estate. And such an agreement, to be valid, must be in writing. *Pilkin v. Long Island R. R. Co.*, 2 Barbour's Ch. (N. Y.), 221. 1847.

43. Engineer. The plaintiff, as a subcontractor under B., contracted to build a section of defendant's road, and the engineers of the company had authority to direct the removal of the earth from one section to another when needed, and by the contract between the company and B., he, B., was bound to move the earth from one section to another, but no engineer had power to bind the company by any contract for grading and removing earth, and if B. was required by the engineers to so move the earth, he could obtain compensation under his contract. The engineers required plaintiff to move earth from one section to another, assuring plaintiff that defendant would pay for the extra work. The work was beneficial to defendant, and plaintiff charged no more than it would have taken to procure the earth elsewhere, but it did not appear that defendant ever consented to have plaintiff do the work on its credit, and the

plaintiff had no general contract with defendant. *Held*, that plaintiff could not recover from the railroad company; that there was nothing in the duties of an engineer authorizing him to bind the company for such work under such circumstances. *Thayer v. Vermont Central R. R. Co.*, 24 Vt., 440. 1852.

44. Evidence. Where a contract was signed by the first party but was not signed by the second party, but was afterwards assigned by second party to a third person, and where it appeared that the parties to the contract had treated it as binding, it was *held* that the contract was admissible in evidence in an action between the assignee and first party. *Western Maryland R. R. Co. v. Orendorff*, 37 Md., 328. 1872.

45. — In an action upon a contract for the delivery of a lot of railroad stringers, it was held that a witness, who only knew of the contract from hearsay, might be permitted to testify that in delivering the stringers, the parties acted on the contract. *Southwestern R. R. Co. v. Rowan*, 43 Ga., 411. 1871.

46. — A contract for the delivery of 40,000 ties sustained under the evidence in a particular case. *Bryan v. Southwestern R. R. Co.*, 41 Ga., 71. 1870.

47. Excursion cars; damages. A contract for six cars for an excursion having been made, and the parties hiring the cars having afterwards requested only four, the railway company was not bound to furnish the smaller number. *Illinois Central R. R. Co. v. Demars*, 44 Ill., 292. 1867.

48. — In an action against a railroad company for a failure to furnish cars, as agreed upon, for an excursion, at a stipulated price, the measure of recovery would be the amount the plaintiff would have received as passage money, if the train had gone as proposed, less the amount agreed to be paid for the use of the cars. *Id.*

49. Executory contracts. The act of May 20, 1861, provides that no contract shall be binding unless it be in writing. *Pixley v. Western Pacific R. R. Co.*, 33 Cal., 183. 1867.

50. — This only applies to executory contracts and not to those where one party has performed his contract. After one party has performed his contract, the other cannot be permitted to escape liability, on the ground that he had no authority to make it. *Id.*

Execution — Operation of Railway by Two Companies.

51. — Such contract is voidable only so long as unexecuted on both sides. *Id.*

52. Execution. When articles of agreement under seal purport to be between the defendants of the first part, and the plaintiff of the second part, the nonexecution of the instrument by the plaintiff will not prevent the defendants from being held liable. *Wetumpka and Coosa R. R. Co. v. Hill*, 7 Ala. N. S., 772. 1845.

53. Express contracts. If there is an express contract, the plaintiff cannot recover upon an implied one. *New Orleans, Jackson and Great Northern R. R. Co. v. Pressley*, 45 Miss., 66. 1871.

54. Franchises. The directors of a railroad company were by its articles of incorporation empowered, with the assent of the majority in interest of its stockholders, to sell and transfer the property and franchises of the company; provided that no such sale should be valid until the debts of the company were paid or arranged. *Held*, that a transfer was not invalid on the grounds that the debts were not paid, when it appeared that the debts were inconsiderable and that the company to whom the franchises, etc., were conveyed was ready and willing to pay whatever debts might exist. *Mahaska County R. R. Co. v. Des Moines Valley R. R. Co.*, 28 Ia., 437. 1870.

55. Illegal in part. Where the contract is for the doing of two or more things which are entirely distinct, and one of them is prohibited by law and the others are legal, such illegality of the one stipulation cannot be set up as a bar to an action for a breach of one of the valid stipulations. *Erie R. R. Co. v. Union Locomotive, etc., Co.*, 6 Vroom (N. J.), 240. 1871.

56. Indemnity. The president and five directors of a railroad company agreed, by a memorandum in writing, each to advance certain specified sums to enable the company to pay the interest on its bonds, and that the president should advance the further sum of \$2,000, "with the assurance from the other five that he should be indemnified at the next meeting." At the next meeting, the president was authorized to pledge and sell bonds to "meet present claims." He sold the bonds, but used the money to pay other and subsequent debts of the company. *Held*, on an ac-

tion against the directors, that he had had sufficient indemnity, and that he should have secured himself. *Miller v. Morrill et al.*, 51 Me., 9. 1863.

57. Legal tender act. The modification of a contract to pay certain dividends on railway stock in coin, construed. *Portland, Saco and Portsmouth R. R. Co. v. Boston and Maine R. R. Co.*, 101 Mass., 269. 1869.

58. Merger of contracts. Where the parties entered into a contract to build a railroad between two points, which contract was entire and indivisible, and afterwards entered into another contract for the same work either in whole or in part at a different price, the latter contract was held to have extinguished the first. The legal presumption of the merger of the former contract into the latter is not to be repelled by the silence of one party. *Howard v. Wilmington and Susquehanna R. R. Co.*, 1 Gill (Md.), 311. 1843.

59. Misrepresentation. Where a contract is made for work to be done at a stipulated price, and it is discovered, before the work is commenced, that a misrepresentation has been made in respect to its value, the party engaging to do the work may repudiate the contract; if he does not do so, but goes on and performs it, he can demand no more than the contract price. *Saratoga and Schenectady R. R. Co. v. Row*, 24 Wendell (N. Y.), 73. 1840.

60. Open account. A demand cannot be regarded as an open account where there is a contract which is the foundation of the claim. *Railroad Co. v. Lindsay*, 4 Wallace, 650. 1866.

61. Operation of railway by two companies. Where one company furnishes the roadbed and the other furnishes the rolling stock and motive power, and it is agreed that the uniform rates are to be fixed annually by agreement, and the latter company is to pay the former two-thirds of the receipts, but "additional charges by way of discrimination for short distances for motive power not to be included in the term receipts." *Held*, that the additional charges contemplated by the exception were only such as should be imposed by the company for short distances, and in addition to the discriminative charges contained in the table of uniform rates. *Blossburg and Corning R. R. Co. v. Tioga R. R. Co.*, 1 Abbott's Ct. of Ap. Dec. (N. Y.), 149, 1864; 1 Keyes, 486.

Organization of New Company — Public Policy.

62. Organization of new company. — Where an agreement was made by the holders of chattel bonds of an insolvent railway company by their attorney, under which a new company was organized on the basis of a division of the stock among those interested in the old company, and among other things it was agreed that "the expenses of carrying out this agreement, printing new bonds, etc., were to be sustained by the new company;" in an action by certain of the bondholders against the new company to recover the amount paid by plaintiffs to the said attorney for his services, *held*, that the words "printing bonds, etc.," did not restrict the agreement to expenses of that character only, but covered all reasonable and necessary expenses in carrying out the arrangement; and that the action could be maintained by the plaintiffs alone without joining the other parties to the written agreement, they being the only persons by whom the expenses were paid. *Catawissa R. R. Co. v. Titus*, 49 Penn. St., 277. 1865.

63. Payable in goods. A contract to pay in anything but money must be specially declared upon. *New Orleans, Jackson and Great Northern R. R. Co. v. Pressley*, 45 Miss., 66. 1871.

64. Payable in property. An agreement by B. to pay A. certain prices for stone "to answer on a note" previously made by A. to B., imposes no obligation on A. to deliver the stone instead of paying the amount of the note in money; and if he elects to deliver stone, he must deliver it at B.'s residence or place of business. *Nashua and Lowell R. R. Co. v. Nutting*, 15 Gray (Mass.), 25. 1860.

65. Performance. Where one party to a contract, in executing it, follows the direction of the other, the latter cannot complain of the manner of the performance. *Kansas Pacific R. R. Co. v. McCoy*, 8 Kans., 538. 1871.

66. — partial. Where a contractor was to receive in payment for his entire work a certain sum of money, and also a certain amount of stock, and he abandoned the work without completing it, the company has a right to pay a *pro rata* amount for the work in stock. *Harris v. Somerset and Kennebec R. R. Co.*, 47 Me., 298. 1859.

67. Preliminary contract. An agreement to enter into a contract is fulfilled when the contract has been entered into by the parties,

pursuant to the terms of the agreement. The original agreement being then *functus officio*, it cannot be made the basis of an action, in connection with the final contract. *Chesbrough v. New York and Erie R. R. Co.*, 26 Barbour (N. Y.), 9. 1857; *Same v. Same*, 13 Howard's Pr. (N. Y.), 557. 1857.

68. Privy. An action lies upon a promise made by the defendant for a valid consideration to a third person for the plaintiff's benefit, although the plaintiff was not privy to the consideration. *Van Shaick v. Third Avenue R. R. Co.*, 38 N. Y., 346, 1868; see *Same v. Same*, 49 Barbour (N. Y.), 409, 1867; *Same v. Same*, 25 Howard's Pr. (N. Y.), 446, 1862; *Same v. Same*, 8 Abbott's Pr. (N. Y.), 380. 1859.

69. Proposals. Where proposals to perform certain work for a railway company were submitted to the board of directors and were by them referred to a committee and superintendent to make a contract with such of the persons making the proposals as they deemed proper, it was *held*, that such act was not an acceptance of any of the proposals. *Soper v. Buffalo and Rochester R. R. Co.*, 19 Barbour (N. Y.), 310. 1855.

70. Public letting. A letting of a contract by a railway company, in pursuance of a notice published in a newspaper inviting proposals for bids, was a "public letting," within the meaning of the contract. *Eppes v. Mississippi, Gainesville and Tuscaloosa R. R. Co.*, 35 Ala., N. S., 33. 1859.

71. Public policy. A contract by the owners of a railroad to be made under an act of incorporation with the owners of a rival railroad, not to continue such road beyond a certain point, is void as contravening public policy. *Hartford and New Haven R. R. Co. v. New York and New Haven R. R. Co.*, 3 Robertson (N. Y.), 411. 1865.

72. — Such a contract does not affect a prior agreement between the owners of such road, who also owned another railroad, and the owners of another road adjoining the latter, to divide the through fares of passengers on such continuous road in a certain proportion; although the former contains a provision to deduct an additional sum monthly from such through fares as a consideration for entering into such new illegal contract; and such through fares must be divided as

Release — Sale of Real Estate.

though such second and illegal contract had never been made. *Ib.*

73. — A contract made by a corporation in violation of the terms of its charter, is *ultra vires*, and void as against public policy. *Union Bridge Co. v. Troy and Lansingburgh R. R. Co.*, 7 Lansing (N. Y.), 240. 1872.

74. — All contracts for a contingent compensation for obtaining legislation, or to use personal, or secret influence on legislators, are void. *Marshall v. Baltimore and Ohio R. R. Co.*, 16 Howard, 314. 1853.

75. — Secrecy as to the character under which the agent acts, tends to deception, and is immoral and fraudulent; and where the agent or solicitor contracts to use such secrecy, or voluntarily does use it, he cannot have the aid of the courts to recover his compensation. *Ib.*

76. — The power to declare contracts void as against public policy, should only be exercised in cases that are free from doubt. *Richmond v. Dubuque and Sioux City R. R. Co.*, 26 Ia., 191. 1868.

77. Ratification. The civil government of the city of New Orleans cannot be permitted to deny the rights derived by the relators in this case from their contract with said city, on the ground that it was under military authority at the time when, after the cessation of that military authority, those rights have been, in part, frequently recognized and ratified by its ordinances. That contract was an entirety. The city had no right to sever its obligations, so as to ratify one part of the contract and reject another. *State ex rel. v. Cockrem*, 25 La. An., 356. 1873.

78. The city having for a number of years received, without objection, the consideration of the contract, should not be heard when disputing the contract itself. *Ib.*

79. Release. Where a contractor is released by a railway company from the completion of the work under the contract, he can sue in assumpsit for the work done. *Baltimore and Ohio R. R. Co. v. Resley*, 7 Md., 297. 1854.

80. Rescission. Where an agreement has been partly performed by one party thereto, the other cannot rescind it without restoring, or offering to restore, the consideration received for such part performance. *Burge v. Cedar Rapids and Minnesota R. R. Co.*, 32 Ia., 101. 1871.

81. — As a general rule, where the failure is only partial, a party cannot rescind, but must pursue his action on the contract for the part not performed. *Ib.*

82. "Rip rap." Where the plaintiff contracted to build "rip rap" wall for the defendant at a certain price per cubic yard, there being no general usage or uniform custom proved, which should control the mode of measurement, it was *held*, that the term used, implied pay by the cubic yard, for the "rip rap," after the stone is fitted and laid into wall. *Wood v. Vermont Central R. R. Co.*, 24 Vt., 608. 1852.

83. Sale of personal property. A contract for wood "now delivered and being hauled and piled, to be eight feet high, and delivered when called for," will be understood as identifying the wood, but not as then delivering it, so as to change the property and possession, without some further act. *Illinois Central R. R. Co. v. Cassell*, 17 Ill., 389. 1855.

84. — Where wood is sold subject to inspection and measurement by a railroad inspector of wood, the purchaser is not bound by the mere guess, or loose estimate by the eye, of such inspector, as to the quantity. *McAndrews v. Santee*, 57 Barbour (N. Y.), 193. 1869.

85. — A written agreement for the sale and purchase of property, purporting in the body of it, to be between the vendor of the one part, and the purchasers, by their agent, of the other part, signed by the vendor, and by the agent in his own name merely, is not executed in the name of the purchasers, and is, therefore, void. *Sherman v. New York Central R. R. Co.*, 22 Barbour (N. Y.), 239. 1856.

86. — In an action for goods sold and delivered, instructions which authorize the jury to return a verdict for the plaintiff even if they find that the goods were not all of the kind contracted for, and that the defendant did not accept them are erroneous. *Brewer v. Housatonic R. R. Co.*, 104, Mass., 593. 1870.

87. Sale of real estate. A written proposition to sell land, at a certain price, if taken within thirty days, is a continuing offer, which may be retracted at any time; but if, not being retracted, it is accepted within the time, such offer and acceptance constitute a valid contract, the specific performance of

Side Track — Stock.

which may be enforced. *Boston and Maine R. R. Co. v. Bartlett*, 3 Cushing (Mass.), 224. 1849.

88. Side track. The D. and P. R. R. Co. used the surface of certain land owned by the plaintiffs, and in payment thereof was to build and perpetually maintain a side track in front of certain lots owned by plaintiffs, and executed a covenant to them to that effect. The defendant succeeded to the rights of the former company and assumed its indebtedness. *Held*, that the defendant was liable for damages for a breach of such covenant, although the breach occurred after the transfer of the road; that such damages were embraced in and formed a part of the indebtedness of the D. and P. Co. *Amsden v. Dubuque and Sioux City R. R. Co.*, 28 Iowa, 542. 1870.

89. — The measure of damage in such case is the difference between the value of the lots with the side track, and their value without it. *Id.*

See CONTRACT, 41, 42.

90. — Two railroad corporations, whose roads were constructed parallel and near to each other, by the side of the plaintiffs' warehouse, agreed to make and maintain a turn out or side track for the accommodation of the plaintiffs from either or both of said companies main tracks to said warehouse, and the plaintiffs claimed that the turn out from the track farthest from said warehouse should cross the track of the other road and a single side track be laid thence to their warehouse, while the defendants claimed that said turn out should be made on the outer sides of said roads respectively. On a bill in chancery for a specific performance of said contract, the committee to whom the cause was referred, found that a single side track laid as the plaintiffs required, would, unless managed and used with proper care and prudence, expose the public travel along said railroad to serious danger from collisions and other causes, but if the same were under the supervision of the railroad companies, and a reasonable degree of prudence and care were exercised in its management and use, the danger arising therefrom would be very slight and scarcely appreciable, but did not find that it was indispensable or necessary that such turn out should be constructed in such

mode, nor that some other mode would not answer as well as that. *Held*:

I. That if the contract required said turn outs to be made as required by the plaintiffs, the court would not specifically enforce it, but leave the plaintiffs to their remedy at law.

II. That a reasonable construction of said contract might require said turn outs to be made as claimed by the defendants, or in some other manner not proposed by either the plaintiffs or the defendants.

III. That there should be further inquiry as to the best mode of doing this. *Windham Cotton Mfg Co. v. Hartford, Providence and Fishkill R. R. Co.*, 23 Conn., 373. 1854.

91. Specialty. Where a contract under seal is altered, either by a written contract not under seal, or by an oral agreement, it becomes merely a simple contract, and the rights of the parties are determined accordingly. *Briggs v. Vermont Central R. R. Co.*, 31 Vt., 211. 1858.

92. Stock. Where plaintiffs contracted with defendant, in writing, to build certain bridges on defendant's road, at a certain sum per foot, to be paid, one-fourth in cash and three-fourths in stock of the road at par value, and the contract was silent as to the time and place of payment, it was *held*, that looking to that alone the plaintiffs could not call for payment until a complete performance of the contract, or at least not oftener than a bridge was fully completed; nor could they then sue and recover for the stock without proof of a demand. *Boody v. Rutland and Burlington R. R. Co.*, 24 Vt., 661. 1853. Cir. Ct. U. S.

93. — The defendant having, after suit commenced, mortgaged its road to third persons, it was *held*, that this did not render it liable for money in lieu of the stock on said contract. *Id.*

94. — Where it appeared that defendant had been in the habit of making monthly payments to its contractors, including plaintiffs, this must be considered as the rule of payment adopted by mutual consent. *Id.*

95. — A. and B. entered into a written contract, that A. should subscribe and pay for ten shares of stock, and B. should pay him the par value thereof, with six per cent. interest on the money paid by B., in three years from the time of the first installment. A. subscribed and paid for the stock. B. received

Street Railway — Tender.

one dividend of eight per cent. interest, paid by the company on the first installment paid by A. Shortly before, and at the expiration of the three years, A. called on B. with his certificate of the stock, with a blank power of attorney thereto attached, for its transfer, but not signed, and offered to transfer it to B., and demanded payment. B. refused to accept and pay for the stock. In an action by A., stating in his petition said contract, his performance, and offers, and present readiness to transfer the stock, and asking judgment against B. for its par value and interest, there was verdict and judgment for plaintiff. *Held*, that it was not necessary for the plaintiff to prove an actual transfer of the stock, or an execution of the power of attorney; that an offer with the ability there and then to perform, was sufficient to entitle him to recover. *Hager v. Reed*, 11 Ohio St., 626. 1860.

96. — Under an agreement for the sale of railroad stock and bonds, under the circumstances of this case, a demand should have been made for the stock and bonds and a sufficient time given for compliance with the demand. *Boutwell v. O'Keefe*, 32 Barbour (N. Y.), 434. 1860.

97. — The measure of damages in a suit for the breach of an executory contract to purchase railroad stock, is the difference between the value of the stock at the agreed price, and its market value at the date of the breach of the contract. *Rand v. White Mountains R. R. Co.*, 40 N. H., 79. 1860.

98. Street railway. A city invited bids for making a street railway. Bids were made by an unincorporated company and accepted, but a contract was not signed. The city then gave permission to have the company incorporated, "the incorporation not to change the conditions of the propositions heretofore made and accepted, * * * but to preserve the remedies of the parties against each other in case of any violation of a contract hereafter to be entered into." *Held*, that there was no perfected contract between the city and the incorporated company. *People's Railroad v. Memphis Railroad*, 10 Wallace, 38. 1869.

99. Supply of water; damages. The measure of damages is the value of the property, to the purchaser, and not the use or profit it was yielding to the former owner. Nor should its value to the purchaser be re-

duced, because it would cost the owner any amount of money to keep or otherwise dispose of it. So *held* in a case where a coal company furnished water from its shaft for the use of a railway. *Chicago and Rock Island R. R. Co. v. Northern Illinois Coal and Iron Co.*, 36 Ill., 60. 1864.

100. Telegram. The defendant telegraphed to the plaintiff that it "wanted ballasting done from B. to M.," for which it would pay a certain price per cubic yard, and plaintiff telegraphed back, accepting the proposition. A written proposition to "do all the train work required by the company for grading of the depot, side track, etc., in the city of M.," at a certain price, was also accepted by the company. *Held*, that the contracts were unambiguous, and were for so much ballasting and grading respectively, as the company should wish to have done; and parol evidence offered by plaintiff, that a specific amount of such ballasting or grading was required at either place to complete the work or render the road serviceable, and that he was prevented by the company from doing such work to his damage, was properly rejected. *Wells v. Milwaukee and St. Paul R. R. Co.*, 30 Wis., 605. 1872.

101. — When and to what extent telegrams between parties are to be treated as written contracts, depends upon the circumstances under which they are sent, and the intent and object for which they are transmitted and received. *Beach v. Raritan and Delaware Bay R. R. Co.*, 37 N. Y., 457. 1868.

102. — Where there has been a previous communication between the parties, in respect to the subject matter of the contract, and the telegram is sent to fix some one of the details of the agreement between them, such telegram is evidence only for the purpose for which it was sent. *Id.*

103. — Where the original propositions or agreement between the parties were oral, they are to be proved by oral evidence, as modified or affected by the telegram. *Id.*

104. Tender. Where a controversy arose between M. and K. as to a contract for the sale and delivery of railway bonds, M. claiming that the sale was of 1,000 bonds, and K. claiming 14,000, and M. tendered the 1,000, but K. declined to receive them, claiming the 14,000, but made no tender of the contract

Blasting.

price until a week afterwards; *held*, that the denial of the contract by M. did not amount to a waiver of the vendee's obligation to tender payment. That the delay of a week in making such tender gave rise to a conclusive presumption that K. had assented to the rescission of the contract. *Mowry v. Kirk*, 19 Ohio St., 375. 1869.

105. Termination of contract. Under a power reserved to a party to declare a contract no longer binding, *held*, this extended only to the work which remained to be done, and did not deprive the contractor of compensation for the work already done. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Howard*, 13 Howard, 307. 1851.

106. Term of years. A railroad company agreed with K. and his associates, in consideration that they would build an iron furnace on the line of its road, to transport ore and metal to and from such furnace at a given rate for the term of ten years, "when by them required so to do." And K. and his associates, in consideration of the promise and agreement of the railroad company, erected a furnace according to the stipulations of the agreement. *Held*, that the promise of the company to carry freight at the rates agreed upon is not void for want of a sufficient consideration, nor for want of mutuality of obligation between the parties; and *held*, further, that the right thus secured under the contract by K. and his associates was transferable by assignment to a subsequent purchaser of the furnace property. *Himrod Furnace Co. v. Cleveland and Mahoning R. R. Co.*, 22 Ohio St., 451. 1872.

107. Time. Where B. contracted with a railroad company, in writing, to build certain bridges on its road, at a certain sum per foot, to be paid, one-fourth in cash, and three-fourths in the stock at par value, and the contract was entirely silent as to the time or place of payment: *held*, that, looking to the contract alone, B. could not call for payment, either of the cash or stock, until a complete performance of the contract on his part, or, at any rate, before, or oftener than a bridge was fully completed. *Boody v. Rutland and Burlington R. R. Co.*, 3 Blatchford (U. S. C. C.), 25. 1853.

108. — Where a railway company became unable to pay the contractor, and a person

interested in the company agreed to give the contractor his individual promissory notes if he would finish the work by a day certain, the contractor cannot recover upon the notes unless he finishes the work within the time stipulated. *Slater v. Emerson*, 19 Howard, 224. 1856.

109. — The contract was an original undertaking for a valid consideration and not within the statute of frauds. *Emerson v. Slater*, 22 Howard, 28. 1859.

110. — It was therefore held competent to show by parol testimony that the time of performance had been, for a valuable consideration, extended. *Ib.*

111. Ultra vires. Where the president of a railway company employed plaintiffs to perform services for the company and afterwards had frequent interviews with them, and the directors were fully apprised of the fact, they were presumed to have ratified the act of the president, although there is no record of any vote ratifying such act. *Pixley v. Western Pacific R. R. Co.*, 33 Cal., 188. 1867.

112. — The same presumptions apply to corporations as to private persons. *Ib.*

113. Unilateral. An agreement of an individual to pay certain sums if a railway company would locate its line to a certain place, is not binding on the individual, unless the company also incurs some obligation. *Utica and Schenectady R. R. Co. v. Brinckerhoff*, 21 Wendell (N. Y.), 139. 1839.

114. Use of railway. In an action by the owner of a railway to recover for the use of it by persons who did not recognize his title, but used it under a *bona fide* claim of right, the plaintiff is entitled to recover only a reasonable and proper compensation therefor, although he had notified defendants in advance that they must pay a specific sum therefor. *Kittredge v. Peaslee*, 3 Allen (Mass.), 235. 1861.

CONTRACTORS.

See CONSTRUCTION OF RAILWAYS; CONTRACTS; EMINENT DOMAIN; WHARVES.

1. Blasting. A railroad company agreed with certain contractors for the construction of a part of its road. Amongst other work

Fires—Agency.

provided for, was that of removing, at a stipulated price, solid rock, which, it was said in the contract, "must be removed by blasting." In removing such rock, without carelessness on the part of the contractors, a large quantity of fragments was thrown against the dwelling of an adjoining proprietor, causing an injury for which he brought an action against the company. *Held*, that the contractors had done only what they were authorized by the company to do; and as the company must be held to have assented to the unlawful act, by which the plaintiffs were injured, it was liable as a joint wrongdoer. *Carman v. Steubenville and Indiana R. R. Co.*, 4 Ohio St., 399. 1854.

2. **Fires.** A railway company engaged a contractor to construct a portion of its road "under the general supervision of the chief engineer of the company," across the timber land of the plaintiff; the sub-contractor and his employes cut a tote road through the plaintiff's premises, outside of the location, and set fires, which, through negligence, spread and burnt the plaintiff's timber. *Held*, that the company was not liable, as it had no control over the persons who occasioned the injury. *Eaton v. European and North American R. R. Co.*, 59 Me., 520. 1871.

3. **Judgment.** A sum due to a sub-contractor for labor performed in the construction of a railroad, becomes the debt of the company when judgment is rendered against the company on its drafts drawn in payment for such labor, upon and accepted by its treasurer, and in determining the rights of such creditors under a decree providing for the payment of all debts for the construction of a certain part of the road, it is immaterial whether the basis of the judgment was a contract between the company and the original contractor, or with the plaintiff. *Ney v. Duquesne and Sioux City R. R. Co.*, 20 Ia., 347. 1866.

4. **Negligence.** A company contracted with a builder to do the work on a building "in a substantial and workmanlike manner," and "in accordance with the plans and specifications and instructions furnished by the company." *Held*, that the word, "instructions" referred to the kind of structure and not to the mode of accomplishing the work. *Hunt v. Pennsylvania R. R. Co.*, 51 Penn. St., 475. 1866.

5. — A rigger, engaged in raising rafters, was killed by the falling of the rafters. *Held*, in an action by his wife against the company for negligence in causing his death, that it was material for the plaintiff to prove that he was employed by the company. *Ib.*

6. — A contractor in such case is the principal of those he employs; the employer of the contractor is not a guarantor of his skill and care. *Ib.*

7. **Personal injuries.** A railway company is not liable for an injury sustained while its road is being built and operated by contractors, who own the cars and engine by which the injury is committed, and of which the company had no control. *Meyer v. Midland Pacific R. R. Co.*, 2 Neb., 320. 1871.

8. **Statute.** An act of the general assembly of Louisiana provided that a company should not be liable for the debts of its contractors, "nor shall said company be liable for any injury to person or property caused by the act or omission of the persons so contracting with it." *Held*, that this was a convenient form of declaring the common law rights of the company, and conferred no exemption upon it. *Railroad Co. v. Hanning*, 15 Wallace, 649. 1872.

9. — A railroad company is not liable under R. S., 1857, ch. 51, § 25 (R. S., § 22), for trespasses and injuries done by contractors and sub-contractors in the vicinity of the road. *Eaton v. European and North American R. R. Co.*, 59 Me., 520. 1871.

10. **Trespass.** If the company's engineer direct the sub-contractors to do an unauthorized act, such as grading outside the true limits of the location, the company is liable therefor. *Ib.*

CONTRIBUTORY NEGLIGENCE.

See INJURIES TO EMPLOYEES; INJURIES TO DOMESTIC ANIMALS; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; NEGLIGENCE.

CONVEYANCE.

See HUSBAND AND WIFE.

1. **Agency.** By ch. 91, § 14, R. S., "all deeds and contracts executed by an author-

Conditions — Covenants.

ized agent for an individual or corporation, either in the name of the principal, by such agent, or in the name of such agent, for the principal, shall be considered the deed or contract of such principal. *Porter v. Androscoggin and Kennebec R. R. Co.*, 37 Me., 349. 1853.

2. — Where a corporation makes a contract through an agent, who puts to it a seal, it becomes by law the deed of the corporation, though it has not their common seal. *Assumpsit* cannot be maintained on such contract. *Ib.*

3. Conditions. The right or possibility of reverter which belongs to a grantor of land on condition subsequent is extinguished by a conveyance thereof by deed to a third person before entry for breach of condition; even though such conveyance be to a son of the grantor, who, upon the grantor's death, becomes his heir. *Rice v. Boston and Worcester R. R. Co.*, 12 Allen (Mass.), 141. 1866.

4. — A conveyance of land to a company for the purpose of constructing a railroad upon it, "provided the same does not interfere with buildings on said land," will be so construed as to prevent the construction of the road so near to the buildings as to endanger their safety or destroy their usefulness. *Rathbone v. Tioga Navigation Co.*, 2 Watts and Sergeant (Penn.), 74. 1841.

5. — Where, by a conveyance to a railroad company, land was granted upon the condition that it should construct its road thereon within a limited time, it was *held*, that the condition was subsequent, and that title to the land vested in the corporation on the execution of the deed. *Nicoll v. New York and Erie R. R. Co.*, 12 N. Y., 121, 1854; *Same v. Same*, 12 Barbour (N. Y.), 460, 1852.

6. — A mere failure to perform such a condition does not divest the title. *Ib.*

7. — A. conveyed lands to the E. and S. R. R. Co., for depot grounds, and "also for the erection of a house for temporary reception (other than a public house), for the accommodation, victualling and lodging of passengers and others," with a proviso that if the grantee should use such building for any other purpose, or if it should use any other building within a mile of said premises for such purposes, or should use said premises for an inn, the estate of the grantee should be forfeited.

Held, that the estate was not forfeited by a transfer of the property to another corporation under legislative sanction; and that the condition was not violated by the occasional selling of refreshments, and occasionally lodging persons in the depot buildings by a person in the employ of the company. *Southard v. Central R. R. Co.*, 2 Dutcher (N. J.), 13. 1856.

8. — Where a power of sale of certain lands was given by will to the executors of the testator, upon certain contingencies, and a conveyance was made by the executors without reference to the power; more than fifty years after the conveyance was made, the question was submitted to a jury as to whether or not the condition had been performed, and the verdict of the jury that it had not, was not disturbed, there being no adverse possession. *South Carolina R. R. Co. v. Toomer*, 9 Richardson's Eq. (So. Car.), 270. 1857.

9. Consideration. The consideration of a deed may always be inquired into. The only effect of the recitals in the deed is to estop the grantor from claiming that there was no consideration. For every other purpose, it may be shown by parol. *Perry v. Central Southern R. R. Co.*, 5 Coldwell (Tenn.), 138. 1867.

10. Construction. A deed of conveyance construed, and the rights of the grantee determined in this particular case. *Long Island R. R. Co. v. Conklin*, 29 N. Y., 572, 1864; *Same v. Same*, 32 Barbour (N. Y.), 381, 1860.

11. — Where the premises in a deed are so described that they cannot be identified, the conveyance is void. *Purinton v. Northern Illinois R. R. Co.*, 46 Ill., 297. 1867.

12. — But where the grantee has gone into possession, and the parties have given a construction to their contract, by the manner in which they have executed it, the objection of uncertainty would be removed. *Ib.*

13. Covenants. A conveyance of land was made to a railway company upon agreement that it should erect and maintain certain improvements, such as fences, etc., thereon. *Held*, that this agreement was a covenant running with the land, and might be enforced against a subsequent grantee of the railway company. *Dorsey v. St. Louis, Alton and Terre Haute R. R. Co.*, 58 Ill., 65. 1871.

14. — If there are dependent covenants in

Delivery — Form.

an agreement, by which one party is to convey land, and the other to make fences, cattle-guards, passes, etc., if the conveyance has not been made, the party cannot recover for the omission to build the fences, cattle guards, etc. *Mecum v. Peoria and Oquawka R. R. Co.*, 21 Ill., 533. 1859.

15. Delivery. The delivery of deeds to the attorney or solicitor of the grantee, may be deemed an absolute delivery to the grantee. *Price v. Pittsburgh, Ft. Wayne and Chicago R. R. Co.*, 34 Ill., 13. 1864.

16. Description. A contract to pay for all land conveyed "lying on both sides of Cold river," at \$100 per acre, does not bind the party to pay for the land of the river, although that passes by the deed. *Daniels v. Cheshire R. R. Co.*, 20 N. H., 85. 1849.

17. — Where a lot is sold and conveyed, and the number or name of the lot is given in the deed, and also the name of the street, the latter description must give way to the former in case of discrepancy. *Nash v. Wilmington and Weldon R. R. Co.*, 67 N. C., 413. 1872.

18. — Where a grant is bounded "by the side of a highway," these words are presumed to exclude the highway, especially if this construction be consistent with the circumstances and subject matter of the grant; though ordinarily a grant bounded by a highway extends to the centre of such highway. *Hughes v. Providence and Worcester R. R. Co.*, 2 R. I., 508. 1853.

19. Estoppel. If a person, having title to an estate, which is offered for sale, and knowing his title, stand by, and encourage the sale, or do not forbid it, and thereby another is induced to purchase the estate, under the supposition that the title is good, the person, so standing by, and being silent, shall be bound by the sale, and neither he, nor his privies, shall be allowed to dispute the purchase. *Junction R. R. Co. v. Harpold*, 19 Ind., 347. 1862.

20. — But this rule does not apply where the purchaser knows of such adverse claim. *Id.*

21. Evidence; stock subscription. Suit by a railroad company upon the covenant contained in a deed executed by the defendant to the company. The complaint alleged that the company had neglected to record the deed, and that the defendant had conveyed to another; that by the laws of Ohio, where the

lands were, the second grantee had a valid title, and had entered into possession, etc. Answer: I. That the deed was executed in payment of a subscription to the stock of the company; that it was agreed by parol, at the time of making the written subscription and deed, and as part of the consideration thereof that the company should not begin work until stock enough had been subscribed to complete the road, and that if the company should fail in this, within a reasonable time, defendant should be allowed to retract his subscription; that the company did fail to procure sufficient stock, and expended and wasted the stock subscribed, etc. II. That the defendant resold the premises by the license of the company. III. That the company promised and agreed to deliver to defendant the certificate of his stock at a place named; that it failed to so deliver the stock, though often demanded; that when it should have been delivered the stock was worth par, but had now become worthless, etc. Held, that the written subscription and the deed constituted an entire contract between the parties, and that their terms could not be varied by proof of any parol agreement or negotiations which preceded or accompanied the making of the written contract. Held, also, that the acceptance of the writings bound the company to the written terms of the contract. *Cincinnati, Union and Ft. Wayne R. R. Co. v. Pearce*, 28 Ind., 503. 1867.

22. Fee simple. A conveyance of land to a grantee and his heirs creates a fee simple title, both at law and in equity. *Mercier v. Missouri River, etc., R. R. Co.*, 54 Mo., 506. 1874.

23. Form. A corporation may execute a deed in these words: "In testimony whereof, said party of the first part have caused these presents to be signed by their president, and their common seal to be hereto affixed. A. B., president," and seal. *Haven v. Adams*, 4 Allen (Mass.), 80. 1862.

24. — No precise technical words are required to make a stipulation in a deed or contract, precedent or subsequent. The precedence of conditions depends upon the order of time in which the intent of the transaction requires their performance. *Parmelee v. Oswego and Syracuse R. R. Co.*, 6 N. Y., 74, 1851; *Same v. Same*, 7 Barbour (N. Y.), 599, 1850.

Incumbrances — Specific Performance.

25. Incumbrances. One who receives a conveyance of lands with covenant against incumbrances, and gives back a mortgage for the purchase price, cannot, in a suit to foreclose his mortgage, set off the amount of prior incumbrances which he has neither paid, nor shows that he has been or is in danger of being damnified by. *Griggs v. Detroit and Milwaukee R. R. Co.*, 10 Mich., 117. 1862.

26. — And he does not show that he was damnified by setting up the foreclosure in chancery of an incumbrance, and the sale of the mortgaged premises, but without alleging that he was a party to the suit or in any way bound thereby. *Ib.*

27. — But he may afterwards pay off the prior mortgages and then file his bill to have the sums so paid set off and deducted from the amount of the decree. The former suit was held not to bar such a proceeding. *Detroit and Milwaukee R. R. Co. v. Griggs*, 12 Mich., 45. 1863.

28. — The purchaser in such case is not confined to his remedy upon the covenants. *Ib.*

29. — right of way. Section 8 of the act chartering Platte County Railroad, notwithstanding the language therein employed, did not contemplate the investiture of a technical fee simple title in that road, of land condemned. Nothing more than an easement passed to the company under that act. And the grantor of land, a portion of which had been vested in that road by virtue of statutory condemnation and decree had, prior to the date of the deed, would not be liable to the grantee on his covenant of seizin for the land so appropriated. *Kellogg v. Malin*, 50 Mo., 496. 1872.

30. — The occupancy of land, under proceedings for condemnation, by a railroad company, constitutes merely an easement thereon, and not an ownership in fee simple. *Ib.*

31. — The occupancy of land by a railroad track is such an incumbrance thereon as would render the grantor liable on his covenant against incumbrances. And his liability is not discharged by the fact that the grantee, at the date of the deed, was aware of the existence of the incumbrance. *Ib.*

32. — If the owner of a tract of land sells it, giving a contract for a deed of general warranty, to be made on final payment, and between the sale and the making of the deed

a portion of the premises is condemned for a railway track, the incumbrance thus created is not one for which damages can be recovered in an action on the covenants in the deed. *Stevenson v. Loehr*, 57 Ill., 509. 1871.

33. — If the damages are paid in special benefits to the land, the vendee is regarded as having received, in that manner, the consideration for the condemned portion. *Ib.*

34. Notice. The president of a corporation executed to certain of its directors a mortgage of land, to which his wife had an equitable claim, by virtue of an unrecorded deed to her. Held, that having acted in the transaction not for the corporation, but solely for himself, his knowledge of his wife's equities is not the knowledge of the company, and cannot affect its rights, unless shown to have been communicated to it. *Winchester v. Baltimore and Susquehanna R. R. Co.*, 4 Md., 231. 1853.

35. Reservation; right of way. Where one conveyed a farm, describing it by metes and bounds, with full covenants of warranty, but the deed contained the following reservations or exceptions: "Reserving to the public the use of the road through said farm; also reserving to the White Mountains Railroad the roadway for said road, as laid out by the railroad commissioners; and also reserving to myself the damages appraised for said railroad way by the commissioners and select men." Held, that the intention of the grantor must have been to convey to the grantee the lands over which the public highway and railroad had been laid out and established, subject only to the easement or right of way of the public in the highway, and of the railroad corporation in the railroad way, as laid out by the railroad commissioners, reserving to himself the unpaid damages awarded by the commissioners and selectmen for the laying out of the railroad way. *Richardson v. Palmer*, 38 N. H., 212. 1859.

36. Specific performance. When a covenantee, in a joint covenant, for the conveyance of real estate, is ready and willing to pay the purchase money at or within the time limited, and the agent of the covenantors to receive it cannot be found, or the heir of one of them, by reason of nonage, cannot execute a proper deed, a formal tender of the money is not necessary; but a petition may be filed

Domicil — Abuse or misuse — General Powers.

for a conveyance, offering to bring the money into court. *Ohio and Mississippi R. R. Co. v. Orary*, 1 Disney (Ohio), 128. 1856.

CORPORATIONS.

[The various matters pertaining to railway corporations will be found distributed throughout this book under other headings. Only such matters are compiled under the present title as could not be appropriately assigned elsewhere.]

1. **Domicil.** A corporation exists only by law, and has no legal existence beyond the bounds of the sovereignty by which it is created. It must dwell in the place of its creation. *Ohio and Mississippi R. R. Co. v. Wheeler*, 1 Black, 286, 1861; *Land Grant R. R. Co. v. Commissioners*, 6 Kan., 245, 1870.

2. — Where a corporation is created by the laws of a state, the legal presumption is, that its members are citizens of the state in which the corporation exists. *Id.*

3. **De facto.** If a corporation *de facto* is in the actual possession of a public highway, under a grant of a franchise to improve and collect tolls on the same, a mere trespasser cannot justify his entry thereon on the ground that it was only a corporation *de facto*, and was not *de jure* entitled to the franchise. *Stockton, etc., Co. v. Stockton and Copperopolis R. R. Co.*, 45 Cal., 680. 1873.

4. **Name.** A corporate name will be protected like a trade mark. *Newby v. Oregon Central R. R. Co.*, 1 Deady (U. S. D. C.), 609. 1869.

5. **Corporate succession.** Under the legislation of Minnesota, the Milwaukee & St. Paul R. R. Co. is the lawful successor of the right of way obtained by its predecessor, the Minn. Cent. R. R. Co. *Secombe v. Milwaukee and St. Paul R. R. Co.*, 2 Dillon (U. S. C. C.), 469. 1873.

CORPORATE POWERS.

See BAGGAGE; CHARTER; CONNECTING LINES; Eminent Domain; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; MUNICIPAL CORPORATIONS; REAL ESTATE; SUBSCRIPTIONS BY CITIES; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY INDIVIDUALS.

1. **Abuse or misuse.** There can be no abuse of corporate authority without a positive act of malfeasance. And to furnish ground for a forfeiture, it must have been willful. Abuse also includes misuse. *Baltimore v. Connelleville, etc., R. R. Co.*, 6 Philadelphia Rep. (Penn.), 190. 1866.

2. **Acts done without authority.** Where a corporation has purchased property for a purpose, which perhaps was not authorized by its charter, but neither the state nor stockholders have objected thereto, and afterwards sold the same property to the defendants, *held*, that if the plaintiff had exceeded its authority in the purchase of such property, that would not, in this case, constitute a defense to an action brought to recover the price of the property and for repairs the plaintiff had made on the property at the request of defendants after the sale. *Rutland and Burlington R. R. Co. v. Proctor*, 29 Vt., 98. 1856.

3. **Change of route.** A corporation, created for the purpose of constructing a railroad between certain termini, will be enjoined, at the instance of a stockholder who has not assented thereto, from using the funds of the corporation, or pledging its credit, for the purpose of extending the road beyond such termini. This rule is not changed by the fact that the extension was authorized by the legislature and approved by a majority of the stockholders. (U. S. Cir. Ct.) *Stevens v. Rutland and Burlington R. R. Co.*, 29 Vt., 545. 1851.

4. **Collateral issues.** The question whether an incorporated company has been regularly organized, so as to give it power to act, cannot be inquired into collaterally. It must be by a direct proceeding. *Wight v. Shelby R. R. Co.*, 16 B. Monroe (Ky.), 4. 1855.

5. **Compromise.** As an incident of the power of the corporation to conduct its business, it has power to compromise disputes and may release a part of a doubtful claim to secure the residuc. *Philadelphia and West Chester R. R. Co. v. Hickman*, 28 Penn. St., 318. 1857.

6. **General powers.** The powers and duties of corporations discussed. *Bissell v. Michigan Southern and Northern Indiana R. R. Co.*, 22 N. Y., 258. 1860.

7. — A corporation possesses only the powers expressly granted in its charter, and such

Real Estate — Steamboats.

as are necessary to carry into effect the powers expressly granted, and such as are necessary to the enjoyment of some specifically granted right, without which the right would fail. 2 Kent's Com., 298; 7 How. Miss., 530; 35 Miss., 630. *Mobile and Ohio R. R. Co. v. Franks*, 41 Miss., 494, 1867; *Camden and Ambr. R. R. Co. v. Remer*, 4 Barbour (N. Y.), 127, 1848.

8. — A railroad corporation is no exception to the rule requiring a strict construction of corporate powers. *City of Baltimore v. Baltimore and Ohio R. R. Co.*, 21 Md., 50. 1863.

9. — Incorporated companies are not partnerships, but are to be treated with reference to the objects of their creation, and to the express powers with which the legislature may have invested them; and to that extent, the general law of partnership is superseded by the charter. *Purton v. New Orleans and Carrollton R. R. Co.*, 3 La. An., 19. 1848.

10. Real estate. A corporation, although created but for a limited period, may acquire title in fee to lands for its use. *Nicoll v. New York and Erie R. R. Co.*, 12 N. Y., 121, 1854; *Same v. Same*, 12 Barbour (N. Y.), 460, 1852.

11. — A deed to a railroad company which is incorporated for a term of fifty years, granting lands to it and its successors, will convey an estate in fee. *Ib.*

12. — A corporation chartered in another state has the right to hold lands in Vermont. *State v. Boston, Concord and Montreal R. R. Co.*, 25 Vt., 433. 1853.

13. — The statutes of Indiana and the decisions of the courts of Indiana considered, and the conclusion reached that, so far as the question depends upon the laws of Indiana, a railway corporation is competent to take lands in that state, in payment of, or security for, debts due it there. *Thompson v. Waters*, 25 Mich., 214. 1872.

14. — The question whether a railroad company, organized under the laws of the state of Indiana, is competent to take the title to lands in the state of Michigan, is one which depends, first, upon the laws of Indiana, and second, upon the laws of Michigan, and the public policy indicated by its legislation. *Ib.*

15. — Depots, car and engine houses, tanks, repairing shops, houses for bridge and switch tenders, coal and wood yards, are necessary appendages to the operations of a railroad and transportation company, and its power to

hold land for these purposes will be implied without an express grant in its charter; but lands for dwellings for employes, for car or locomotive factories, coal mines and matters of that kind, are things of convenience and not of necessity. *The State v. Commissioners of Mansfield*, 3 Zabriskie (N. J.), 510. 1852.

16. Restrictions. The purchase of a lot of cotton by a railway company, chartered in Mississippi, from a person residing in Louisiana, is not affected by the prohibitions of the act of 1855, which provides, that "no corporation shall engage in mercantile or agricultural business, nor in commission, brokerage, stock jobbing, exchange, or banking business of any kind." This provision only refers to buying and selling merchandise as an employment. *Graham and Anderson v. Hendricks*, 22 La. An., 523. 1870.

17. Right of way. A contract between individuals and a railway company to secure the right of way for such company over a line which it is not authorized to build upon, and to procure the necessary legislative authority to construct such line, is not an unlawful contract. *New Haven and Northampton R. R. Co. v. Hayden*, 107 Mass., 525. 1871.

18. Right to convey property and franchise. Whether or not a corporation, with a railway franchise attached to it, has power to convey away the railroad and the franchises attached to it, is a matter between the state and the corporation, with which third persons have nothing to do. *Arthur v. Commercial and R. R. Bank of Vicksburg*, 9 Smedes & Marshall (Miss.), 394. 1848.

19. — A company authorized to build a railroad, and failing to obtain means, contracted with an individual to build a railroad solely for his own use, on a part of the route. Held, that the company had no power to make such contract, and the individual could not build such road. *Stewart and Folts's Appeal*, 56 Penn. St., 413. 1867.

20. — A bill in equity will lie to restrain such person from operating the road, and to remove it; the company is not a necessary party. *Ib.*

21. — A grant of corporate powers cannot be sold or assigned without express authority. *Ib.*

22. — Steamboats. If a railway company be authorized by law to "contract for trans-

Agreement — Demurrer.

portation and delivery of, and to transport and deliver persons and property conveyed over its road beyond its termini," the purchase of a steamboat by the company for the purpose of transporting freight and passengers from the terminus of its road to the line of another, is not *ultra vires*, and a note given by the company in consideration of such purchase is valid. *Shawmut Bank v. Plattsburgh and Montreal R. R. Co.*, 31 Vt., 491. 1859.

23. — Where two separate corporations were created to build railways, they had no right to unite and conduct their business under one management; nor had they the right to establish a steamboat line, to run in connection with railroads. *Pearce v. Madison R. R. Co.*, and *Peru and Indianapolis R. R. Co.*, 21 Howard, 441. 1858.

24. — Notes given for the purchase money of the steamboat cannot be recovered upon. *Ib.*

COSTS.

See APPEAL; EMINENT DOMAIN; MASTER IN CHANCERY.

1. **Agreement.** Where the attorneys of the respective parties agree that the costs of a term or circuit, at which the cause is noticed, shall abide the final event of the action, the agreement should be enforced, without limit to three calendar fees. *Emmons v. New York and Erie R. R. Co.*, 17 Howard's Pr. (N. Y.), 490. 1858.

2. **Appeal.** An order, made at a special term, refusing to dismiss a complaint on the grounds that the plaintiffs had not given security for costs, is not appealable. *Tyrone and Lock Haven R. R. Co. v. Schenck*, 18 Howard's Pr. (N. Y.), 275. 1859.

3. — An appeal from an order of confirmation of the taxation of costs will not be heard in the supreme court. The appeal should be from the judgment. *Minnesota Valley R. R. Co. v. Flynn*, 14 Minn., 552. 1869.

4. — On appeal from an order, the court may allow the successful party the disbursements for printing the papers and points. *Erie R. R. Co. v. Ramsey*, 10 Abbott's Pr., N. S. (N. Y.), 109. 1870.

5. **Arrest of Judgment.** When judgment is arrested for a defect in the declaration, ap-

parent upon the record, and one for which a plea in abatement or a demurrer would have been sustained, that fact may afford a reason why the court in its discretion should disallow or limit costs on arrest of judgment. *Belknap v. Boston and Maine R. R. Co.*, 48 N. H., 388. 1869.

6. **Assessment of damages — right of way.** A land owner is entitled to the costs of an application, under the Gen. Sts., ch. 68, § 22, for a jury to assess damages for the taking of his land by a railroad company, if the jury find in his favor for any amount, though they assess the damages at a less amount than the county commissioners have done. *New Haven and Northampton Co. v. Northampton*, 102 Mass., 116. 1869.

7. — The costs of an application to county commissioners to estimate damages for the taking of land by a railroad corporation, under the Gen. Sts., ch. 68, § 21, are to be taxed by the commissioners, and not by the superior court or this court. *Ib.*

8. — Where, under the charter in this case, the railway company appeals from an assessment of damages, and the amount of the assessment is reduced upon such appeal, the owner of the land must pay the costs of the proceedings on appeal. *Leak v. Selma, Rome and Dalton R. R. Co.*, 47 Ga., 345. 1872.

9. **Assignment.** Where, when the action is pending, a cause of action becomes, by assignment, the property of a person not a party to the suit, the assignee is liable for costs under § 321 of the Code, if he would have been liable if he had brought the action. *Conger v. Hudson River R. R. Co.*, 7 Abbott's Pr. (N. Y.), 255. 1859.

10. **Consolidation of causes.** Where, on consolidation, some of the actions are discontinued, and only the consolidated action remains, the costs in the discontinued actions cannot be included in the consolidated action, even though it embrace the causes of action in those discontinued. *Blake v. Michigan Southern and Northern Indiana R. R. Co.*, 17 Howard's Pr. (N. Y.), 228. 1858.

11. **Demurrer.** Where a decision is made upon demurrer, allowing a plaintiff to amend or plead over, upon payment of costs, the costs are to be construed single costs. *Saratoga and Washington R. R. Co. v. McCoy*, 7 Howard's Pr. (N. Y.), 191. 1852.

Execution—Reference.

12. Execution. If an execution is placed in the hands of a sheriff, and is afterwards settled by the parties, either by payment of the claim or otherwise, so that a sale is rendered unnecessary, the sheriff is entitled to one-half of the amount of percentage allowed in cases of sale. *Sturges v. Lackawanna and Western R. R. Co.*, 3 Dutcher (N. J.), 424. 1859.

13. Extra allowance. It is not necessary that an application for an extra allowance should be made at the trial of the cause. It may be made subsequently; but must be made before the same judge who tried the cause. *Saratoga and Washington R. R. Co. v. McCoy*, 9 Howard's Pr. (N. Y.), 339. 1853.

14. — An order for extra allowance may be appealed from. *People v. New York Central R. R. Co.*, 30 Howard's Pr. (N. Y.), 148, 1865; *People v. New York Central R. R. Co.*, 29 N. Y., 418, 1864.

15. — The facts authorizing an extra allowance under § 309 of the code — considered. *Woods v. Illinois Central R. R. Co.*, 20 Howard's Pr. (N. Y.), 285. 1861.

16. — The value of the property to be directly affected by the result affords the proper basis for computing the percentage of an extra allowance. *People v. Albany and Vermont R. R. Co.*, 16 Abbott's Pr. (N. Y.), 465. 1862.

17. Former suit. Where a town had a remedy against a railroad company for damages paid by the town for a defect in a road built by the company in lieu of an old road taken by it for its track, it was *held*, that the town might also recover of the company the costs and expenses incurred in defending the suit against it for such damages, the company having been notified of the suit and having declined interfering. *Duxbury v. Vermont Central R. R. Co.*, 26 Vt., 751. 1854.

18. Irrelevant testimony. The expense of taking irrelevant testimony should be taxed to the party causing it to be taken. *Teague v. South Carolina R. R. Co.*, 8 Richardson's Law (So. Car.), 154. 1855.

19. More than one defendant. When an action is brought against more than one defendant, and the judgment is rendered against but one of them, the costs of suit, made by bringing in the winning defendant, should be taxed to the plaintiff. *Union Pacific R. R. Co. v. Horney*, 5 Kansas, 340, 1870; See

also *Albany and West Stockbridge R. R. Co. v. Cady*, 6 Hill (N. Y.), 265, 1843.

20. Mortgage. Where a decree has been entered, but the cause is retained in court for further probable action upon the report of the master in chancery, the costs may be taxed at a subsequent term. *Northern Illinois R. R. Co. v. Racine and Mississippi R. R. Co.*, 49 Ill., 356. 1868.

21. New trial. What costs the party obtaining a new trial will be liable for — considered. *McQuade v. New York and Erie R. R. Co.*, 11 Howard's Pr. (N. Y.), 484, 1855; *Same v. Same*, 5 Duer (N. Y.), 613, 1855.

22. — The costs on appeal, when a new trial is granted, are in the discretion of the court. *Kennedy v. Harlem R. R. Co.*, 3 Duer (N. Y.), 659. 1854.

23. Offer of judgment. An offer made by a defendant under § 385 of the code (to take judgment), should be so distinctly and openly made that there should be no doubt or misunderstanding about it. *Post v. New York Central R. R. Co.*, 12 Howard's Pr. (N. Y.), 552. 1856.

24. Reference. A charge for a copy of the pleadings to be used by referees, is not taxable in suits commenced since the act of May 14, 1840. *Barber v. West Stockbridge R. R. Co.*, 4 Hill (N. Y.), 547. 1843.

25. Security for. A suit commenced by a corporation, without first giving security for the costs, as required by § 2398 of the Code, will be dismissed on motion. *Alabama and Tennessee Rivers R. R. Co. v. Harris*, 25 Ala., N. S., 232. 1854.

26. — A rule was had on the plaintiff to furnish security for costs, the security was not given, but the cause was tried and judgment rendered in favor of the plaintiff. *Held*, that it was too late for the defendant to complain of the failure to give security after judgment was rendered. *Grimball v. Mississippi and Alabama R. R. Co.*, 3 Smedes and Marshall (Miss.), 38. 1844.

27. — Upon an appeal from the decision of a single judge to the general term, no security whatever is required. *Ten Broeck v. Hudson River R. R. Co.*, 7 Howard's Pr. (N. Y.), 137. 1852.

28. — A party at whose instance a rule for security for costs is granted, may lose his right to have it made absolute, by want of ac-

Railway Tickets.

tion upon it, or by his own waiver of the right. *Mississippi and Alabama R. R. Co. v. Ballard*, 5 Smedes and Marshall (Miss.), 606. 1846.

29. — And it is error to have the cause dismissed for failure to give security after the party applying for that security has asked that the rule be dismissed. *Ib.*

30. **Settlement.** Where the defendant in an action settles with the plaintiff, by payment, without any agreement as to costs, the defendant is liable for costs, at least to the date of the settlement. *Jeffersonville R. R. Co. v. Weinman*, 39 Ind., 231. 1872.

31. **Sheriff's commission.** The sheriff is not entitled to his commission upon moneys paid by the defendant direct to the plaintiff, although it be paid after a levy is made upon sufficient property to pay the debt. *Wynne v. Mississippi and Tennessee R. R. Co.*, 45 Miss., 569. 1871.

32. **Statute.** In an action brought originally in the court of common pleas, on St. 1840, ch. 85, to recover damages of a railway company for injury done by fire from its engines to the plaintiff's land, the plaintiff, if he recovers less than \$20 damages, is entitled for his costs, under Rev. Sts., ch. 121, § 3, to no more than a quarter part of the damages, unless the title to real estate is concerned. *Blanchard v. Fitchburg R. R. Co.*, 8 Cushing (Mass.), 280. 1851.

33. **Stay of proceedings.** Where, after service of the summons and complaint, the defendant stays the plaintiff's proceedings until the costs of a former proceeding are paid, the defendant cannot move under § 274 of the Code, to dismiss the complaint, where the costs have not been paid and the stay is in force. *Unger v. Forty-Second Street R. R. Co.*, 30 Howard's Pr. (N. Y.), 443, 1866; see *Same v. Same*, 6 Robertson (N. Y.), 545. 1867.

34. — A stay of all proceedings on the part of the plaintiff in a second action, will be ordered until all the costs of the first suit for the same cause are paid, and also the costs of the motion to stay. *Edwards v. Ninth Avenue R. R. Co.*, 22 Howard's Pr. (N. Y.), 444. 1860.

35. **Tender.** A tender of money to the owner of land, for the damages sustained for right of way, need not be brought into court, or pleaded, if not accepted; and on trial, if the owner of the land recovers less than the

amount tendered, he takes his damages without costs. *Winebiddle v. Pennsylvania R. R. Co.*, 2 Grant's Cases (Penn.), §2. 1852.

36. **Witnesses.** The successful party to a suit in the circuit court is not allowed to recover the fees of more than four witnesses, unless the court shall certify that a greater number was really necessary. *Peoria and Bureau Valley R. R. Co. v. Bryant*, 15 Ill., 438. 1854.

37. — Where a witness has been examined out of the district by commission, and he afterwards attends under a subpoena and is examined on the stand, the costs of the commission cannot be taxed. *Greenville and Columbia R. R. Co. v. Choice*, 7 Richardson's Law (So. Car.), 40. 1853.

38. — It is competent for the district court to adopt a rule limiting the right of witnesses, subpoenaed and attending court in several cases at the same time, to fees for mileage and attendance in one case only. *Meffert v. Dubuque, B. and M. R. R. Co.*, 34 Iowa, 430. 1872.

COTTON.

See CARRIAGE OF MERCHANDISE.

COUNTERFEITING.

1. **Railway tickets.** The fraudulent counterfeiting of a railroad ticket is forgery at common law. *Commonwealth v. Ray*, 3 Gray (Mass.), 441. 1855.

2. — In an indictment for forging a railroad ticket, expressed on its face to be "good this day only," a description of the ticket as signifying to the holder that it must be used continuously, and without stopping at intermediate stations, after once entering the cars, is a fatal variance. *Ib.*

COUNTY.

See SUBSCRIPTIONS BY COUNTIES.

COUPONS.

See MORTGAGE; TICKETS.

Adjournment—Duty of Railway Companies.

COURT.

1. Adjournment. A court legally opened for all general purposes continues in session until it adjourns *sine die*, or expires by law, and when an adjournment is made from Saturday till Monday, and from unavoidable cause does not convene until Wednesday, the term not having then expired by law, the court is legally constituted, and its acts are valid and binding. *Union Pacific R. R. Co. v. Hand*, 7 Kans., 380. 1871.

CREDITOR'S BILL.

1. Decree. The decree obtained upon a creditor's bill filed against a corporation, and founded upon the return of an execution unsatisfied, is a decree not only for the benefit of the complainant in such bill, but also for the benefit of all other creditors of the corporation who may come in and establish their debts under such decree. *Morgan v. New York and Albany R. R. Co.*, 10 Paige Ch. (N. Y.), 290. 1843.

2. Lien. Upon the commencement of a creditor's suit, the plaintiffs therein obtain a lien on all the choses in action of the judgment debtor. *Roberts v. Albany and West Stockbridge R. R. Co.*, 25 Barbour (N. Y.), 662. 1857.

3. Stockholders. A bill in chancery in the form of a creditor's bill will lie against the stockholders of an incorporated company to subject unpaid subscriptions of stock. *Henry v. Vermillion and Ashland R. R. Co.*, 17 Ohio, 187. 1848.

4.—The stockholders may be proceeded against in this way, though they omitted to pay at the time of subscription the five per cent. required by the charter. *Ib.*

5.—An agreement attempting to secure any stockholder the privilege of paying up subscriptions in store goods or otherwise, except in money, will be treated as a fraud upon other stockholders, and payment in money enforced. *Ib.*

6. Supplemental proceedings. Proceedings supplemental to the execution established

by the code, are a substitute for an action by creditor's bill, and constitute the only manner of obtaining the relief formerly held under a creditor's bill. *Graham v. La Crosse and Milwaukee R. R. Co.*, 10 Wis., 459. 1860.

CRIMINAL LAW.

See HIGHWAYS; INDICTMENT; INJURIES TO PASSENGERS.

CROPS.

See INJURIES TO CROPS.

CROSSINGS.

See EMINENT DOMAIN; HIGHWAY; INJUNCTION; PRIVATE WAYS AND CROSSINGS; INJURIES TO PERSONS ON THE TRACK.

CULVERTS.

See BRIDGES.

1. Duty of railway companies. The entrances of a culvert in this case were subject to the company's control as part of its roadbed. The right of the corporation to enjoy the use of its roadbed as an easement, carries with it an obligation to use reasonable diligence to keep the culvert unobstructed, so that detriment to the owners of the land might be avoided so far as practicable. *West and Brother v. Louisville, Cincinnati and Lexington R. R. Co.*, 8 Bush (Ky.), 404. 1871.

CUSTOM.

See CARRIAGE OF MERCHANDISE.

Child — Draw-bridge.

DAMAGES.

See BAGGAGE; BOATS; CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; CONTRACTS; EMINENT DOMAIN; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS CROSSING THE TRACK.

[The various cases in which the measure of damages will be found discussed are arranged under other titles through this book. It has been deemed best to subdivide this title as far as convenient and to arrange the cases under the other titles.]

1. **Child.** Both principle and authority concur in maintaining that a jury would have the right, acting upon their own knowledge and without proof, to say that the services of a boy from eleven until twenty-one years of age were valuable to his father, and to estimate their value. *Sheridan v. Brooklyn City R. R. Co.*, 36 N. Y., 39, 1867; *O'Mara v. Hudson River R. R. Co.*, 38 ib., 445, 1868; *Drew v. Sixth Avenue R. R. Co.*, 26 ib., 49, 1862; *McIntyre v. New York Central R. R. Co.*, 37 ib., 287, 1867.

2. **Construction of railways.** In an action against a railway company to recover damages on account of its preventing the performance by the plaintiff of a contract for the construction of the road, the difference between the amount of the principal contract and of subcontracts, entered into by the plaintiff with other persons for the performance of the work, does not constitute the proper measure of damages. *Story v. New York and Harlem R. R. Co.*, 6 N. Y., 85, 1851. Reversing *New York and Harlem R. R. Co. v. Story*, 6 Barbour (N. Y.), 419, 1849, inasmuch as the judgment could not be affirmed in part and reversed in part.

3. **Death.** The question, "What did the deceased usually earn?" is proper, as being an inquiry of importance in forming an estimate of the pecuniary loss sustained by the next of kin. *McIntyre v. New York Central R. R. Co.*, 37 N. Y., 287, 1867; *Same v. Same*, 47 Barbour (N. Y.), 515, 1867; *Same v. Same*, 35 Howard's Pr. (N. Y.), 36, 1867.

4. — **minor.** Under §§ 12 and 13, ch. 135, R. S., the damages for injuries to the person of a minor resulting in his death, are only the actual pecuniary damages resulting to the parents from the injury. *Potter v. Chicago and Northwestern R. R. Co.*, 21 Wis., 872, 1867.

5. — The pecuniary advantage of the life of the deceased after his majority, can only be considered after proof of the indigent or dependent condition of the parents. *Ib.*

6. — A verdict against a railroad company for \$3,775, for negligently causing the death of a girl ten years old, was set aside as excessive, the evidence showing no ground for extraordinary expectations of pecuniary benefit from continuance of life. *Potter v. Chicago and Northwestern R. R. Co.*, 22 Wis., 616, 1868.

7. — A verdict for more than \$2,000 in such case will be set aside. *Ib.*

8. — The court will not in such a case allow a part of the damage to be remitted, and affirm the judgment as to the remainder. *Ib.*

9. — **wife.** In an action brought by a husband for the death of his wife by negligence, the court charged: "That damages should be given as a pecuniary compensation, the jury measuring the plaintiff's loss by a just estimate of the services and companionship of the wife, of which he was deprived by the accident; that is, of their value in a pecuniary sense — nothing is allowable for the suffering of the deceased, nor for the wounded feelings of the plaintiff. Of course, the jury will examine the testimony to aid them in ascertaining the damages. But if damages are to be given at all, there is no reason why they should be nominal merely; they should be a just compensation for the value of the companionship and services lost to him by reason of this unfortunate collision." *Held*, not to be error. *Pennsylvania R. R. Co. v. Goodman*, 62 Penn. St., 329, 1869.

10. **Double damages.** A statute giving double damages is penal and its repeal after a verdict but before judgment will defeat the right of the plaintiff to recover thereunder. *Bay City and East Saginaw R. R. Co. v. Austin*, 21 Mich., 390, 1870.

11. **Draw-bridge.** A child of nine years of age, who, in the daytime, jumps from a sidewalk, lawfully constructed by a railway company on the side of its railway bridge, upon the properly constructed draw, while the same is being lawfully closed, is so wanting in ordinary care and prudence as not to be entitled to maintain an action for the injury resulting therefrom. *Brown v. European and North American R. R. Co.*, 58 Maine, 384, 1870.

Duty of Injured Party — Excessive Damages; not excessive.

12. Duty of injured party. A party is liable for all the damages which are the proximate result of his violation of his contract; but the other party is bound to use due diligence in preventing loss. *Cincinnati and Chicago R. R. Co. v. Rodgers*, 24 Ind., 103. 1865.

13. Excessive damages. A verdict for damages occasioned by an accident on a railroad, of more than double the amount which could, by law, have been awarded if the accident had proved fatal to the plaintiff, presents a proper case for the interference of the court; as where in a case of no peculiar aggravation, or gross negligence on the part of the defendant \$11,000 damages were allowed. *Coltins v. Albany and Schenectady R. R. Co.*, 12 Barbour (N. Y.), 492. 1852; see *Same v. Same*, 5 Howard's Pr. (N. Y.), 435. 1851.

14. — Where a party sustained actual damages in the loss of time and injury to his team to the amount of about \$600, and lost the toes off of his left foot, by a collision with a train at a crossing, the injury not being the result of the willful act of the railway company, a verdict of \$5,875 was held to be outrageously excessive. *Chicago and Rock Island R. R. Co. v. McKean*, 40 Ill., 218. 1866.

15. — In the absence of any evidence showing willfulness or wantonness, a verdict of \$25,000 for an injury rendering a person a cripple for life, was held excessive. *Chicago and Northwestern R. R. Co. v. Fillmore*, 57 Ill., 265. 1870.

16. — The plaintiff, who was by trade a cooper, and by occupation a teamster, received personal injuries, resulting in the loss of a hand. For these injuries he recovered a verdict for \$8,000. There was very little evidence as to the plaintiff's former or present capacity for labor, and none as to the amount of his ordinary wages or earnings, either before or since the accident; or as to the extent of his bodily suffering; or to show that he was not now in good health. Nor did it appear how long he was laid up and absolutely incapacitated for labor; nor what was the amount of his medical or other expenses; but it did appear he had recovered so far as to be able to walk about. *Held*, that the verdict should be set aside for excessiveness of damages, unless the plaintiff would consent to reduce such damages to the sum of \$6,000. *Murray v. Hudson River R. Co.*, 47 Barbour (N. Y.), 196. 1866.

17. — Where a brakeman, in attempting to descend a ladder while the train was in motion, in obedience to a signal from the engineer, lost his hold by reason of a defect in the ladder, and fell to the ground, the wheels of the cars passing over his legs and crushing them so that amputation became necessary, a verdict of \$18,000 recovered by the brakeman was regarded as so excessive that it should be set aside. *Chicago and Northwestern R. R. Co. v. Jackson*, 55 Ill., 492. 1870.

18. — Where plaintiff's ankle was severely sprained, and he was confined and unable to attend to business for about two weeks, and could only get about on crutches for two or three weeks longer; and at the time of the trial, seven months after the accident, his lameness was hardly observable by persons seeing him on the train discharging his duties as a mail agent; and his surgeon thought he would entirely recover; his salary being \$1,080 per annum and his medical attendance being \$25; *held*, that a verdict of \$2,500 was excessive. *Spicer v. Chicago and Northwestern R. R. Co.*, 29 Wis., 580. 1872.

19. — The supreme court will not grant a new trial upon the ground of excessive damages, unless it appears at first blush that the damages are flagrantly excessive, or that the jury have been influenced by passion, prejudice or partiality. *Kennedy v. North Missouri R. R. Co.*, 36 Mo., 351. 1865.

20. — not excessive. Where the evidence tended to prove a severe, and probably not permanent, injury to the plaintiff's hand and wrist, arising from the defendant's negligence; *held*, that a verdict for \$2,500 ought not to be set aside on the ground that the damages were excessive. *Maloy v. New York Central R. R. Co.*, 58 Barbour (N. Y.), 182. 1870.

21. — Where a passenger was carried four hundred yards beyond his destination, and the conductor refused to back his train, but compelled the passenger to alight, with his baggage in the mud, and the jury found a verdict of \$4,500 damages, the court refused to disturb the verdict. *New Orleans, Jackson and Great Northern R. R. Co. v. Hurst*, 36 Miss., 660. 1859.

22. — A verdict for \$4,500 for an injury to the plaintiff, caused by the negligence of the defendant's servants, resulting in the loss of an arm, will not be deemed excessive. *Mentz v.*

Exemplary Damages — Horses.

Second Avenue R. R. Co., 2 Robertson (N. Y.), 856. 1864.

23. — Where injuries sustained by the plaintiff through the negligence of the defendant — a carrier of passengers — were of an exceedingly painful and permanent nature, some of the effects of which would probably continue during his natural life, and might shorten his existence, and the plaintiff was in his early manhood, and engaged in an extensive and lucrative business as a lawyer, which was impaired by his inability to give it the requisite attention, since his injury, and he was afflicted with bodily derangements that might measurably unfit him for the duties of his profession, *held*, that under these circumstances, the court had no data from which it could say that a verdict for the plaintiff for \$20,000 was excessive. *Walker v. Erie R. R. Co.*, 63 Barbour (N. Y.), 260. 1872.

24. — The plaintiff having been confined to his bed for six weeks, suffering great pain, and unable to attend to business for several months, in consequence of an injury, and left permanently lame, and obliged to pay from \$1,200 to \$1,500 for physician's fees and other expenses, it was *held*, that a verdict for \$12,000 damages was not excessive, when the nature of the injury was considered. *Rockwell v. Third Avenue R. R. Co.*, 64 Barbour (N. Y.), 438. 1873.

25. Exemplary damages; agent. The principal is liable for the acts of his agent to the same extent as if the acts had been done by the principal, and in case of willful or gross negligence of the agent, punitive damages may be allowed. *New Orleans, Jackson and Great Northern R. R. Co. v. Bailey*, 40 Miss., 395. 1866.

26. — Vindictive damages cannot be recovered for the tortious act of emloyés unless it is shown that the company authorized it before, or approved it after it was committed. *Hagan v. Providence and Worcester R. R. Co.*, 8 R. I., 88. 1854.

27. — Railroad companies are responsible in exemplary damages for the negligent and wrongful acts of their agents or employes. *New Orleans, Jackson and Great Northern R. R. Co. v. Bailey*, 40 Miss., 395. 1866.

28. — To warrant a jury in finding exemplary damages, either gross negligence, malice, violence, fraud or oppression must be shown to have mingled in the wrongful act. *Same v.*

Statham, 42 Miss., 607, 1869; *Kennedy v. North Missouri R. R. Co.*, 36 Mo., 851, 1865; *Memphis and Charleston R. R. Co. v. Whitfield*, 44 Miss., 466, 1870; *Chicago and Rock Island R. R. Co. v. McKean*, 40 Ill., 218, 1866.

29. — Exemplary damages may be awarded against a railway company for an injury occurring through the gross negligence or drunkenness of its servants. *Beale v. Railroad Co.*, 1 Dillon (U. S. Cir. Ct.), 568. 1871.

30. — In all actions of tort against common carriers, the jury are authorized to find exemplary damages, when they consider the personal wrong and injury of such a character as, in their judgment, to call for the imposition of such damages. *Southern R. R. Co. v. Kendrick*, 40 Miss., 374. 1866.

31. — pecuniary ability. The pecuniary ability of one defendant should not be considered by the jury in determining the exemplary damages which a codefendant shall have assessed against him. *Toledo, Wabash and Western R. R. Co. v. Smith*, 57 Ill., 517. 1871.

32. — It is not improper in such cases to allow proof of the pecuniary ability of the defendant. *Louisville, Cincinnati and Lexington R. R. Co. v. Mahony's, Adm'rs*, 7 Bush. (Ky.), 235. 1870.

33. — passengers. Such damages may be allowed on account of the conveyance of a passenger to a point four hundred yards beyond his destination, and compelling him to alight there, and it is proper in allowing such damages to consider the pecuniary means of the defendant. *New Orleans, Jackson and Great Northern R. R. Co. v. Hurst*, 36 Miss., 660. 1850.

34. — common carriers. It was held improper to charge the jury that "in all actions against common carriers, the jury, in their discretion, are to weigh all the circumstances of the case, and are to find exemplary damages when they consider the personal wrong of such a character as, in their judgment, to call for the imposition of exemplary damages." *Memphis and Charleston R. R. Co. v. Whitfield*, 44 Miss., 466. 1870.

35. Horses. In an action to recover for injuries to a horse, sustained in consequence of a defect in a highway, the plaintiff is entitled to recover the diminution, occasioned by the injury, in the market value of the horse at the commencement of the action, and, in addi-

Interest — Profits.

tion, such sums as the plaintiff has paid out in reasonable attempts to cure him, with a reasonable compensation for his own services in attempting to cure him, and a reasonable sum as compensation for the loss of the use of the horse while under such treatment; provided, that the whole damages allowed do not exceed the value of the horse. *Gillett v. Western R. R. Co.*, 8 Allen (Mass.), 560. 1864.

36. Insufficient. Damages for a very severe personal injury were only assessed at six cents by the jury. *Held*, that the amount was insufficient, and a new trial was awarded. *Robbins v. Hudson River R. R. Co.*, 7 Bosworth (N. Y.), 1. 1860.

37. Interest. Interest may be considered as an element of damages, in order to arrive at what will be just compensation for the injury sustained, when it would not be proper to allow it *eo nomine*. *Richmond v. Dubuque and Sioux City R. R. Co.*, 33 Iowa, 422. 1871.

38. — And when the jury are instructed, in an action for negligence, to award the damages the plaintiff has sustained, the court may leave it to them to say whether, on such damages, the plaintiff is entitled to interest; but it is erroneous to instruct them as matter of law, that the plaintiff is entitled to interest on the damages. *Black v. Camden and Amboy R. R. Co.*, 45 Barbour (N. Y.), 40. 1865.

39. Labor. The damages for breach of a contract by which plaintiff was to receive a certain price for work is the difference between the contract price and what it would have cost to do the work. *Wallace v. Tumin*, 42 Ga., 462. 1871.

40. — contract. Where one contracts to employ another for a certain time at a specified compensation, and discharges him without cause before the expiration of the time, he is in general bound to pay the full amount of wages for the whole time. *So held*, where the party was employed as superintendent of a railroad for one year at an agreed salary, and discharged without cause. *Costigan v. Mohawk and Hudson R. R. Co.*, 2 Denio (N. Y.), 609. 1846.

41. — In an action for damages on a breach of contract for the employment of the plaintiff at a monthly salary, the plaintiff is entitled to recover for services offered to be performed, which the defendant refused to receive, the amount of wages that he was to

receive by virtue of his contract. *Huntington v. Ogdensburg and Lake Champlain R. R. Co.*, 33 Howard's Pr. (N. Y.), 416. 1867.

42. Occupation of injured party. In an action brought by a traveler on a highway against a railroad company, to recover damages for personal injury occasioned by the engine of defendant, the plaintiff's occupation and means of earning support are not admissible in evidence to increase the damages, if not specially averred in the declaration. *Baldwin v. Western R. R. Co.*, 4 Gray (Mass.), 333. 1855.

43. Personal injury. In an action to recover for personal injuries, evidence of the amount the plaintiff is earning at his trade, at the time of and immediately preceding the accident, is admissible upon the question of damages. *Beisiegel v. New York Central R. R. Co.*, 40 N. Y., 9. 1869.

44. — The plaintiff was a peddler; evidence of the annual amount of his sales and the profit he made, tended to show the amount he might have earned if he had been able to attend to his business, and was admissible. *Hanover R. R. Co. v. Coyle*, 55 Penn. St., 396. 1867.

45. — pain. In an action against a railroad company for damages resulting from a collision caused by a negligence of the defendant's servants, the bodily pain and suffering of the plaintiff, from the injuries, are proper subjects for compensation. *Ransom v. New York and Erie R. R. Co.*, 15 N. Y., 415. 1857.

46. — The damages recoverable for bodily pain and suffering, by a person injured by the negligence of another, are not limited to that incurred before the trial, but extend to such future suffering as the evidence renders it reasonably certain must necessarily result from the injury. *Curtis v. Rochester and Syracuse R. R. Co.*, 18 N. Y., 534, 1859; *Same v. Same*, 20 Barbour (N. Y.), 232, 1855.

47. — For injuries to his person caused by defendant's negligence, plaintiff is entitled to recover not only his actual pecuniary loss (including the value of the time lost, expenses of medical service, etc.), but also for bodily suffering, lameness or other inconvenience, as, from the evidence, appears to be reasonably certain to result therefrom. *Spicer v. Chicago and Northwestern R. R. Co.*, 29 Wis., 580. 1872.

48. Profits. When one contracts to per-

Public Square.

form work for another, at a stipulated price, and is prevented by him from entering upon the performance, the measure of damages is the profits the party would have made. *George v. Cahamba and Marion R. R. Co.*, 8 Ala., N. S., 234. 1845.

49. Statutory limitation. A right to recover damages for negligence having accrued, the amount of the recovery cannot afterwards be limited by act of the legislature. *Kay v. Pennsylvania R. R. Co.*, 65 Penn. St., 209. 1870.

50. Stock subscriptions. Upon a breach of a contract by which defendant agreed to take stock in a railway company which plaintiffs should subscribe for for that purpose and make certain payments upon, the damages are not limited to the difference between the price agreed and the actual value. *Orr v. Bigelow*, 14 N. Y., 556, 1856; *Same v. Same*, 20 Barbour (N. Y.), 21, 1854.

51. Time spent in search of property. In a suit for damages sustained in the loss of certain mules by the neglect of the defendant, and for expenses incurred in the search and recovery of a part of them, it was held, that it was proper first, to show what the expenses were, and afterwards to enquire if they were reasonable. *North Missouri R. R. Co. v. Akers*, 4 Kan., 453. 1868.

52. Torts. In actions for tort, the jury have the exclusive power to determine the amount of damages. *Southern R. R. Co. v. Kendrick*, 40 Miss., 374. 1866.

53. — No precise rule of damages is fixed in case of personal torts, but the amount is left to the unbiased judgment of the jury. *Wheaton v. North Beach and Mission R. R. Co.*, 36 Cal., 590. 1869.

54. — In such case, the verdict will not be set aside as excessive unless the amount is so large as to induce a reasonable person, upon hearing the circumstances, to declare it outrageously excessive, or as to suggest at the first blush, passion, prejudice or corruption on the part of the jury. *Id.*

55. Water — damage by. In an action brought to recover damages for injuries done to the plaintiff's grounds, fruit trees, etc., by water alleged to have been turned upon the plaintiff's land by the defendant, in constructing a railroad, it is proper to charge the jury that the rule of damages in that class of cases is the difference between the value of the

plaintiff's premises before the injury happened, and the value immediately after the injury, taking into account only the damages which have resulted from defendant's acts. *Chase v. New York Central R. R. Co.*, 24 Barbour (N. Y.), 273. 1857.

DEAF PERSONS.

See INJURIES TO PERSONS ON THE TRACK.

DEATH — INJURIES CAUSING.

See CONTRACTORS; DAMAGES; FEDERAL COURTS; HUSBAND AND WIFE; INJURIES TO EMPLOYEES; INJURIES TO PERRONS; INJURIES TO PERSONS ON THE TRACK; INJURIES TO PASSENGERS.

DECREE.

See MORTGAGE.

DEDICATION.

See DEPOT; HIGHWAYS.

1. Public square. The facts upon which a claim of dedication of land by a city for a public square were held insufficient to support such claim — considered. *Pitcher v. New York and Erie R. R. Co.*, 5 Sandford (N. Y.), 587. 1851.

2. — To constitute a dedication, there should be a clear intention to devote the ground claimed to have been dedicated to the use of the public. *Indianapolis and Bellefontaine R. R. Co. v. Indianapolis*, 12 Ind., 620. 1859.

3. — Square 50 in the town of Indianapolis was dedicated to the public as a market space by the action of the commissioners appointed to lay off said town, pursuant to the act of 1871. (Acts of 1821, p. 44, § 4.) By an act of 1837, the south half of said square was exchanged for a part of the north half of square 48, and deeds in fee simple made. The deed

Official Bonds—Dismissal—Statute.

to the town of Indianapolis, though it recites that it was given in consideration of the south half of square 50, does not express the purpose of the grant. *Held*, that by the act of 1837, the part of square 40 was dedicated to the public in lieu of the half of square 50; and that act, being a public one, entered into and formed a part of the deed, and rendered a statement in the deed of the purpose of the grant unnecessary. *Ib.*

4. — Said part of square 48, having been so dedicated, it could not be sold on an execution against the corporation of Indianapolis. *Ib.*

DEED OF TRUST.

See MORTGAGE.

DEFALCATIONS.

See AGENCY.

1. **Official bonds.** The rules and regulations of the company required the president to keep the bonds of the secretary, and required the secretary to give bond in the sum of \$5,000. *Held*, that the president was liable for any loss occasioned by the failure of the secretary to give bond. *Pontchartrain R. R. Co. v. Paulding*, 11 La. (O. S.), 41. 1837.

DEFAULT.

See APPEAL.

1. **Dismissal.** The dismissal of the complaint, at the trial of the action, by a justice of the court, upon the plaintiff's submitting to a default, after he has unsuccessfully applied for a postponement, is not conclusive upon him; and he may apply to another justice of the same court for an order opening the default. *Ramsay v. Erie R. R. Co.*, 9 Abbott's Pr. N. S. (N. Y.), 242. 1870.

2. **Judgment.** A judgment by default is a confession of the plaintiff's cause of action, but not of any fact necessary to be proved on

assessment of damages. Where the amount is not liquidated, it must be ascertained by the court, unless the party not in default demand a jury. Code, §§ 1828, 1830. *Burlington and Missouri River R. R. Co. v. Shaw*, 5 Ia., 463, 1857; *Same v. Marchand*, *ib.*, 468.

3. — The clerk may assess the damages where they are a mere matter of computation. *Ib.*

4. — Where no issue is joined, or judgment by default taken, no judgment can be rendered against the defendant. *New Orleans and Carrollton R. R. Co. v. Patton*, 2 La. An., 352. 1847.

5. **Opening default.** An order to show cause is not to be regarded for any purpose as indicating any opinion of the court on the merits of the application. *Thompson v. Erie R. R. Co.*, 9 Abbott's Pr., N. S. (N. Y.), 233. 1870.

6. — A default should be opened up where it was occasioned by an incorrect publication of the time the suit was commenced, in a sheet containing information of court proceedings on which the business community generally relied. *Watson v. San Francisco and Humboldt Bay R. R. Co.*, 41 Cal., 17. 1871.

7. — Applications to open default are addressed to the discretion of the court, and in case of doubt, the better rule is to decide in favor of the application. *Ib.*

8. — Where judgment is taken by default against a defendant duly served with process, a motion to set aside the default and permit the defendant to plead to the action, must be supported by affidavit in which the nature of the defense is stated. *Toledo, Wabash and Western R. R. Co. v. Gates*, 32 Ind., 238. 1869.

9. **Pleading.** It is not allowable to treat an insufficient answer as a nullity, and render judgment by default, as if no answer was on file. *Burlington and Missouri River R. R. Co. v. Marchand*, 5 Ia., 468. 1857.

10. — A motion for a judgment by default, is not the proper mode of objecting to the sufficiency of an answer. *Ib.*

11. — A motion for a more specific statement is the proper remedy, where the answer fails to respond specifically to the affirmative allegations of the petition. *Ib.*

12. **Statute.** The defendant, by suffering a default, under the R. S., 1852, admitted the truth and sufficiency of the complaint; but since the statute of 1855, the rule is otherwise. *Marion and Logansport R. R. Co. v. Lomax*, 7

Validity—Bill of Lading—Effect.

Ind., 406, 1856; *Same v. Same*, 9 ib., 162, 1857.

13. — The plaintiff cannot, under the Revised Code, take judgment by default in an action *ex delicto*, without evidence. The fact that the suit is brought in assumpsit instead of trespass, does not change the rule. The provisions of the Code only apply to actions *ex contractu*. *Mississippi Central R. R. Co. v. Fort*, 44 Miss., 423. 1870.

14. — It is error to take judgment, by default final, in an action at law, unless it be founded on an instrument of writing, ascertaining the sum due. Hutch., Code, 875. *Arrington v. Mobile and Ohio R. R. Co.*, 30 Miss., 470. 1855.

DEFECTIVE MACHINERY.

See INJURY TO EMPLOYEES; INJURIES TO PASSENGERS.

DELAYS.

See PASSENGERS; CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE.

DELIVERY BOND.

1. **Validity.** An illegal order quashing a forthcoming bond after the return term thereof, being absolutely void, does not affect the validity of the bond. *Bell v. Tombigbee R. R. Co.*, 4 Smedes and Marshall (Miss.), 549. 1845.

DEMAND.

See BONDS OF RAILWAY COMPANIES; DETINUE.

DEMURRAGE.

1. **Bill of lading.** A bill of lading was as follows: "Received of the Penn. Coal Co. on board schooner Goodspeed, of which I am master, 152 tons of coal, to be delivered to the N. & W. R. R. Co., or order, at N., they paying freight for the same at \$1.40 per ton; account J. P. S., Fitchburgh." Held, that under it the railroad company was not a consignee of the coal, and was not liable for damages in the

nature of a demurrage. *Miner v. Norwich and Worcester R. R. Co.*, 32 Conn., 91. 1864.

2. **Lien.** The inconvenience to a railroad company arising from goods being left in its cars for an unreasonable time, is a claim in the nature of demurrage, and no lien exists upon the goods for the same. *Crommelin v. New York and Harlem R. R. Co.*, 1 Abbott's Ct. of Ap. Dec. (N. Y.), 472. 1868.

3. **Orders of consignee.** Where the consignee of a cargo requires it to be taken to a particular place, he ought to be held liable for any delay caused at that place for which the vessel cannot be shown to be directly chargeable. *Philadelphia and Reading R. R. Co. v. Northam*, 2 Benedict (U. S. D. C.), 1. 1867.

DEMURRER.

See PLEADING.

DEMURRER TO EVIDENCE.

1. **Effect.** A demurrer to evidence is an admission of all the facts which the evidence tends to prove, and is analogous to a demurrer upon the facts alleged in the pleading. *Mobile and Ohio R. R. Co. v. McArthur*, 43 Miss., 180. 1870.

2. — When a demurrer to evidence is overruled, final judgment may be rendered in actions *ex contractu* without a writ of enquiry — but in actions *ex delicto* the only safe practice is to have the damage assessed by a jury. *Id.*

3. — In passing upon a demurrer to evidence, the court may indulge all the inferences of a jury from the facts proved, and in such case, the question for a revising court is very much like that presented when considering the general verdict of a jury. *Raiford v. Mississippi Central R. R. Co.*, 43 Miss., 233. 1870.

4. — Before a party can demur to evidence the facts must be ascertained, found and admitted in the record; and the demurrant not only admit every fact found, but every conclusion in favor of the other party which the evidence conduces to prove, or which the jury might have inferred from it in his favor. Without such admission, the other party is not bound to join in demurrer; neither can this

Affidavit — Objections — Agreement to pay for location.

court render any judgment thereon. *Coates v. Galena and Chicago Union R. R. Co.*, 18 Ia., 277. 1865.

5. When demurrer will lie. When the plaintiff's testimony is wholly insufficient to prove the material allegations in his declaration, the defendant should demur to evidence. *New Orleans, Jackson and Great Northern R. R. Co. v. Enoch*, 42 Miss., 603. 1869.

DEPOSITIONS.

1. Affidavit. A party to an action, as well as any other witness, may be compelled to make an affidavit, under subdivision 7 of § 401 of the Code of Procedure. *Fisk v. Chicago, Rock Island and Pacific R. R. Co.*, 3 Abbott's Pr., N. S. (N. Y.), 430, 1868; but see *contra Hodgkin v. Atlantic and Pacific R. R. Co.*, 5 ib., 73. 1868.

2. Exhibits. A paper pinned to a deposition, not referred to in it, and without evidence that it had been attached by the justice, was not an exhibit sufficiently identified to be admissible in evidence. *Susquehanna and Wyoming Valley R. R. Co. v. Quick*, 61 Penn. St., 328. 1869.

3. — A release by a party to a witness of all claims, etc., against the witness under a warranty in a deed, appearing on its face to have been regularly executed and acknowledged before the taking of the deposition, made the witness competent, although not attached to his deposition so as to identify it. *Id.*

4. — Such release was a deed concerning lands, and was entitled to be recorded. *Id.*

5. Federal courts. The law and practice of the state having been adopted in regard to the taking of depositions, a subsequent modification of the law, which was followed for a long time, will be considered as adopted by usage. *Curtis v. Central R. R. Co.*, 6 McLean, 401. 1855.

6. — But the law of the state can make no change in the act of congress as to the circumstances under which depositions may be taken under the act of congress. The person whose deposition is to be taken must reside more than one hundred miles from the place of holding court. *Id.*

7. Form. The sufficiency of the manner of taking certain depositions, determined. *Western and Atlantic R. R. Co. v. Harris*, 46 Ga., 602. 1872.

8. Mistake of officer. If a cross interrogatory annexed to a commission for a deposition is so obscurely written that a date therein referred to is uncertain, the deposition should not be rejected because the deponent and the magistrate mistook the date. *Robinson v. Boston and Worcester R. R. Co.*, 7 Allen (Mass.), 393. 1863.

9. Notice. Where the statute gives five days' notice, with one day added for every thirty miles travel, as the time for taking depositions, and depositions are taken upon a shorter notice, they will be suppressed. *Richardson & Co. v. Burlington and Missouri River R. R. Co.*, 8 Iowa, 260. 1859.

10. Objections. Where objection was made during the trial of a cause, to the reception of the deposition of a witness, which had been taken under a commission, it was properly overruled, because the rules of practice in the circuit court of New York give time and opportunity to move for a suppression of the deposition. *Winans v. New York and Erie R. R. Co.*, 21 Howard, 88. 1858.

DEPOT

See BAGGAGE; CARRIAGE OF MERCHANDISE; EMINENT DOMAIN; INJURIES TO PASSENGERS.

1. Agreement to pay for location. A, by his note, promised to pay to the Terre Haute and Richmond R. R. Co. \$200, in consideration that it would locate its depot in block 94 in Indianapolis, to be paid when the company should commence the construction of the depot. When the note was given, the line of road provided for by the charter of said company extended from Terre Haute through Indianapolis, to Richmond, a distance of 150 miles. The company afterwards procured from the legislature, and accepted, an alteration of its charter, by which its line of road was limited to the distance between Terre Haute and Indianapolis, being thus reduced in length one half, and the other part of the line was placed under a separate corporation de-

Contract — Rules and Regulations.

nominated the Indiana Central R. R. Co., which constructed its road and located its depot in another part of Indianapolis. The first named company constructed a freight depot alone on said block 94. A. was not a stockholder in the company nor a party to the charter. *Held*, that by the alteration of the charter of the Terre Haute and Richmond R. R. Co., and the acceptance thereof by the company, the company became substantially a different corporation, and was unable to perform the condition upon which the note was to become payable. *Held*, also, that the circumstance that the depot located on block 94 was of some advantage to A. was of no importance. *Carlisle v. Terre Haute and Richmond R. R. Co.*, 6 Ind., 816. 1855.

2.—A contract to pay a given sum of money to one who should present a petition or proposition to the directors of a railroad company for the location of the depot on certain land, the money to be paid on location of the depot and completion of the road, is not void as against public policy, unless it appear that sinister, extraneous or corrupting influences were brought to bear on the company to superinduce the location. *Workman v. Campbell*, 46 Mo., 305. 1870.

3.—Labor performed or money spent to secure the location of such depot is a sufficient consideration to support a promise contained in a subscription to pay money for that object. *Ib.*

4. **Contract.** Where by the terms of a contract, granting certain franchises to a railway company, the company was not to build or allow "but one other depot" between certain points, it was *held*, that a station at a coal bank, where trains merely stopped to take or leave cars connected with this trade, was not a depot within the meaning of the contract. *Mahaska County R. R. Co. v. Des Moines Valley R. R. Co.*, 28 Iowa, 437. 1870.

5.—The plaintiff conveyed the right of way through his land to a railway company on condition that it should make the village of Chillicothe a station. The company made the station about one-fourth of a mile from the town plat. *Held*, that this was a substantial compliance with the condition. *Jenkins v. Burlington and Missouri River R. R. Co.*, 29 Iowa, 255. 1870.

6. **Dedication.** Where a husband and wife

executed, acknowledged and put on record a plat of a town, laid out on the lands of the wife, exhibiting thereon a railroad track, and having inscribed upon a lot adjoining such track the words "Depot of Ohio and Penna. R. R.," this did not constitute a dedication of the lot to the railroad company nor to public use. *Todd v. Pittsburgh, Fort Wayne and Chicago R. R. Co.*, 19 Ohio St., 514. 1869.

7.—Nor will the acts of the wife during coverture, tending to show an agreement on her part to donate such lot to the railroad company, on the faith of which the company has acted, estop her from asserting her rights of ownership therein. *Ib.*

8. **Expulsion from depot.** The superintendent of a railroad depot has not a right to order a person to leave the depot, and not come there any more, and to remove him therefrom by force, if he does come, merely because such person, in the judgment of the superintendent, and without proof of the fact, had violated the regulations established by the railroad corporation, or had conducted himself offensively towards the superintendent. *Hall v. Power*, 12 Metcalf (Mass.), 482. 1847.

9.—In the trial of an action for assault and battery brought against the superintendent of a railroad depot, for expelling the plaintiff from the depot, for a supposed violation of one of the regulations established by the railroad company, the defendant cannot give in evidence former violations, by the plaintiff, of other regulations of the company. *Ib.*

10. **Leased lands.** A railroad company leased a lot for making side tracks from its main road to a canal basin and for unloading and piling lumber. The company had the right to use it as most convenient for moving its cars. *Kay v. Pennsylvania R. R. Co.*, 65 Penn. St., 269. 1870.

11. **Rules and regulations.** A superintendent of a railroad depot has authority to exclude therefrom persons who persist in violating the reasonable regulations prescribed for their conduct, and thereby annoy passengers or interrupt the officers and servants of the corporation in the discharge of their duties. *Commonwealth v. Power*, 7 Metcalf (Mass.), 596. 1844.

12.—If an innkeeper who has frequently entered a railroad depot, and annoyed passengers by soliciting them to go to his inn, re-

Demand — Arbitration — Compensation.

ceives notice from the superintendent of the depot that he must do so no more, and he nevertheless continues to enter the depot for the same purpose, and afterwards obtains a ticket for a passage in the cars, with the *bona fide* intention of entering the cars as a passenger, and goes into the depot on his way to the cars, and the superintendent, believing that he had entered the depot to solicit passengers, orders him to go out, and he does not exhibit his ticket, nor give notice of his real intention, but presses forward towards the cars, and the superintendent and his assistants thereupon forcibly remove him from the depot, using no more force than is necessary for that purpose, such removal is justifiable, and not an indictable assault and battery. *Ib.*

13. What constitutes a depot. The place where a carrier is accustomed to receive, deposit and keep ready for transportation or delivery, merchandise, is a depot, within the general signification of the word. *Maghee v. Camden and Amboy R. R. Co.*, 45 N. Y. 514. 1871.

DEPOT GROUNDS.

See EMINENT DOMAIN; INJURIES TO DOMESTIC ANIMALS.

DETINUE.

1. Demand. A demand upon the director of a railroad company, acting as its agent, for the return of property taken by his direction as such agent, is sufficient to authorize the party claiming the property to bring an action against the company for its recovery. *Dunkham v. Troy Union R. R. Co.*, 3 Keyes (N. Y.), 543. 1867.

DIRECTORS.

See ATTORNEYS; INJURY TO EMPLOYEES.

1. Arbitration. The directors of a railroad company have the right to decide, but not to submit to arbitration, the question of the pro-

priety of their former action in declaring a dividend. *Gratz v. Redd*, 4 B. Monroe (Ky.), 178. 1843.

2. Charter. Where the charter required that the directors should be named in the articles of association, it was *held*, a compliance with the requirement to adopt the articles at the time of electing the directors. But, *held*, also, that the requirement was only directory. *Eakright v. Logansport and Northern Indiana R. R. Co.*, 13 Ind., 404. 1859.

3. Compensation. As a general rule, directors are not entitled to compensation for their personal services unless rendered under some express contract. *Hall v. Vermont and Massachusetts R. R. Co.*, 28 Vt., 401, 1856; *American Central R. R. Co. v. Miles*, 52 Ill., 174, 1869.

4. — In an action brought by a director, for services rendered the company, upon a promise by the president to pay him for going to New York on business for the company, it was *held*, that the by-laws of the company, to the effect that directors should receive no compensation for their services, were admissible in evidence. *Barstow v. City R. R. Co.*, 42 Cal., 465. 1871.

5. — By a vote of the directors of a railroad corporation, general services rendered by the directors of the company were to be performed without pay; but for all special services required of them which should call them from home, they were to be allowed \$2.00 per day and expenses. *Held*, that this was a limitation upon their compensation for such services only as could not have been performed by persons who were not directors, and which were not rendered by them in any other than their official capacity. *Henry v. Rutland and Burlington R. R. Co.*, 27 Vt., 435. 1855.

6. — Where a director is empowered to transact any particular business for the company, there is an implied contract that he shall have a reasonable compensation for his services. *Shackelford v. New Orleans, Jackson and Great Northern R. R. Co.*, 37 Miss., 202. 1859.

7. — The services of plaintiff, who was one of the directors of the defendant's company, and a member of the executive committee of that board, were held to be such services as could be performed only by a director, and that the compensation to be allowed for them was therefore regulated by the vote prescrib-

Contract with Company — Election.

ing the pay of the directors. *Hodges v. Rutland and Burlington R. R. Co.*, 29 Vt., 220. 1857.

8. — Where the board of directors have, by resolution, established their compensation, the president of the company cannot bind the company to pay a larger sum to some of them without the concurrence of the other members of the board. *Ib.*

9. — free pass for life. A director of a railroad corporation had rendered special services in procuring subscriptions to the stock of the company and in its organization, which services were rendered on his part in the expectation of compensation. After the company was organized, the stockholders, in view of these services, voted to grant him a free pass over the road for himself and family during his life, which grant was inadequate as a compensation for the services, but was accepted by him as such. Some years after, the stockholders rescinded the vote. *Held*, in an action brought by the company for railroad fares accruing after that time, that if the vote was intended as a contract founded upon the indebtedness of the company for the services rendered as a consideration, and not as a mere gratuity, about which there was room for question, yet that the services rendered created no indebtedness, and could not constitute a consideration for the contract. *Held*, also, that it would have made no difference if the services had been rendered, not only with an expectation of compensation on his part, but upon an express understanding with his associates that he was to be paid by the company after its organization. Aside from the technical difficulty of binding a corporation before its existence, the policy of the law wholly discountenances such arrangements. *New York and New Haven R. R. Co. v. Ketchum*, 27 Conn., 170. 1858.

10. Contract with company. If a director of a railway company enter into a contract for the construction of the road of his corporation, he cannot then, nor subsequently, personally derive any benefit from such contract. *European and North American R. R. Co. v. Poor*, 59 Me., 277. 1871.

11. Contractors — compromise. Persons who are directors of a railroad company cannot acquire such an interest in the profits of a contract for the construction of the road as

to give them a standing in a court of equity to interpose an objection to the consummation of a compromise between the railroad company and its contractor. *Paine v. Lake Erie and Louisville R. R. Co.*, 31 Ind., 283. 1869.

12. Declarations. The declarations of a director of a railway company will not bind the company, when not made within either the scope of his ordinary powers, or some special agency relative to the subject matter. *Soper v. Buffalo and Rochester R. R. Co.*, 19 Barbour (N. Y.), 310. 1855.

13. De facto officers. The doings of a board of directors *de facto*, whose acts have been ratified, cannot be objected to. *Penobscot and Kennebec R. R. Co. v. Dunn*, 39 Me., 587. 1855.

14. Election. The title of directors of a corporation, who are in under color of an election, cannot be inquired into in a suit in equity, instituted to restrain them from exercising their functions of directors, upon the ground of an irregularity in their election. *Hughes v. Parker*, 20 N. H., 58. 1849.

15. — A charter was granted to certain persons, "their associates, successors and assigns." *Held*, that the grantees could legally elect directors without having made any associates, successors or assigns. *Hughes v. Parker*, 19 N. H., 181, 1848; *Same v. Same*, 20 ib., 58, 1849.

16. — The fourth section of a charter provided that the directors should be chosen by the members of the corporation, at their annual meeting, and the tenth section enacted that the annual meeting of the corporation for the choice of directors should be holden at such time and place as might be provided by the by-laws. The grantees met, and, after voting to accept the charter, and after electing directors, adopted a code of by-laws. *Held*, that the election of the directors was valid, although it was before the adoption of the by-laws. *Hughes v. Parker*, 19 N. H., 181. 1848.

17. — The requirement as to the election of directors at the annual meetings of the corporation is directory only. *Ib.*

18. — After the requisite amount of stock has been subscribed to authorize the stockholders to elect directors, it is not indispensable to an election that the notice for it should be given by the persons named in the certifi-

Fraud — Powers.

cate of incorporation. The validity of the acts of the directors cannot be questioned, collaterally, on the grounds of irregularity in giving the notice. *Chamberlain v. Painesville and Hudson R. R. Co.*, 15 Ohio St., 225. 1864.

19. Evidence — Resolutions. The acts, resolutions and proceedings of a corporation, through its directory, are competent evidence against the company, and especially against a director who was present. *Gratz v. Redd*, 4 B. Monroe (Ky.), 178. 1843.

20. Fraud. Directors of corporations are trustees of the corporate funds, and are personally responsible for the fraudulent misapplication of such funds. *Gratz v. Redd*, 4 B. Monroe (Ky.), 178. 1843.

21. — An arrangement made by persons who are directors of a railroad company, with a contractor, by which such persons are to share in the profits of the contract for the construction of the road, can only be confirmed by the stockholders, and not by the directors of whom the guilty persons form a part. *Paine v. Lake Erie and Louisville R. R. Co.*, 31 Ind., 283. 1869.

22. Meetings. The directors are the agents of the corporation, not the corporation itself; although they meet without the limits of the state creating the corporation, yet their proceedings will be valid and binding upon the company. Where a charter granted by the state of Illinois, declared certain persons to be a corporation, and named the directors thereof, such directors could meet and act in the state of Missouri. *Ohio and Mississippi R. R. Co. v. McPherson*, 35 Mo., 13. 1864.

23. — Where, the corporators met without the limits of the state granting the charter, and elected a board of directors, and such board made a call for payment upon the subscription to the stock of the corporation, a subscriber to the stock cannot, when sued for the call thus made, object to the legality of such election. The parties thus elected are directors *de facto*, and the legality of their election cannot be inquired into collaterally, without showing a judgment of ouster against them in a direct proceeding for that purpose, by the government creating the corporation. *Id.*

24. Misapplication of funds. An execution creditor of a corporation, with a return of *nulla bona*, may subject to the satisfaction of his demand, money paid to a director of the

company for dividends illegally declared, and which might be recovered back by the company as paid through mistake. *Gratz v. Redd*, 4 B. Monroe (Ky.), 178. 1843.

25. — And the same rules as to mistakes which apply to individuals, apply also to corporations. *Id.*

26. — The statute of limitations will apply in such cases. *Lexington and Ohio R. R. Co. v. Bridges*, 7 B. Monroe (Ky.), 556. 1847.

27. Misconduct of. Nothing but fraud or misconduct in the directors can create an equity, to allow any other person interested to seek the aid of a court, to reach what they have fraudulently and in his wrong, refused to prosecute without reasonable cause for their refusal. *La Grange v. State Treasurer*, 24 Mich., 468. 1872.

28. — The directors are not required to bring a suit where a suit would be unavailing. *Id.*

29. — Stockholders or creditors cannot sue in behalf of the corporation. *Id.*

30. Personal liability. Where a railroad company, created under the provisions of the general railroad act of 1848, contracted a debt, for cars, in 1853, it was *held*, that the directors of the company could not be made personally liable for the debt, under act of May 13, 1845, on the ground that the same was contracted by their agency or consent, when the company had not available means for its payment. *Rochester v. Barnes*, 26 Barbour (N. Y.), 657. 1858.

31. Powers. The directors of a railroad company may, when authorized by the language of its articles of incorporation, and in the manner therein pointed out, sell and transfer a part of its uncompleted road bed, estate and franchises connected therewith to another company. *Mahaska County R. R. Co. v. Des Moines Valley R. R. Co.*, 28 Ia., 437. 1870.

32. — Although the action of the directors in conveying a road bed, etc., has been irregular, yet where the grantee has made valuable improvements thereon, with the knowledge of the company making the conveyance, the latter company will be estopped from asserting any claim of title, or that the transfer was irregular. *Id.*

33. — It is not necessary that authority from a corporation to its agents to contract in its behalf should be made at a meeting of the

Rates and Facilities.

board, unless that has been their usual practice. If the directors have adopted the practice of giving their separate assent to the execution of contracts in the name of their agents, it is of the same force as if done by a vote at a regular meeting of the board. *Bank of Middlebury v. Rutland and Washington R. R. Co.*, 30 Vt., 159, 1858; see also *Mahaska County R. R. Co. v. Des Moines Valley R. R. Co.*, 28 Ia., 437, 1870.

34. — Where the charter of a corporation contains no special provision upon the subject, less than a majority of the board of directors have no power to transact business. Their acts are absolutely void, and the corporation cannot ratify them. *Price v. Grand Rapids and Indiana R. R. Co.*, 13 Ind., 58, 1859; *Cowley v. Same*, ib., 61; *Hamilton v. Same*, ib., 347.

35. — The law under which the company organized, and orders purporting to have been made by the board of directors, being in evidence, parol evidence may be admitted to show that a majority of the directors was not present when the orders were made. *Ib.*

36. **Proceedings.** A creditor of a corporation may maintain his bill against any member who is a director holding funds of the company, and it is not necessary to bring in all the members of the company before the court. *Gratz v. Redd*, 4 B. Monroe (Ky.), 178. 1843.

37. **Suspension.** No authority is conferred by the statutes (3 R. S., 5 ed., 762, §§ 40-43; 2 ib., 1st ed., 462, § 33, § 36), upon a stockholder of a corporation, to maintain an action for the removal or suspension of a director. *Ramsey v. Erie R. R. Co.*, 38 Howard's Pr. (N.Y.), 193. 1869.

38. **Warrant against.** Where, under a proceeding, given by ch. 17, § 7 of the Rev. Code, the warrant recited an injury by a railroad company, and commands that the body of a director named should be taken; after judgment against the company, and an appeal taken by it, it was held too late to say that the suit was against the director, and not against the corporation. *Aycock v. W. and W. R. R. Co.*, 6 Jones' Law (N. C.), 231. 1858.

New Hampshire for damage caused by an unreasonable discrimination practiced in Maine in violation of the law of that state. *McDuffee v. Portland and Rochester R. R. Co.*, N. H., 430. 1873.

2. — If by reason of bribes or other improper motives, railway employés give preference to one person over another, the company may be held liable for damage thereby sustained. *Galena and Chicago Union R. R. Co. v. Rae*, 18 Ill., 488. 1857.

3. — Charges for freights and passengers must be uniform. *Chicago, Burlington and Quincy R. R. Co. v. Parks*, 18 Ill., 460. 1857.

4. — Transportation by a common carrier is open to the public upon equal and reasonable terms. An exclusive right granted to a common carrier only is inconsistent with the rights of all others. *Avdenried v. Philadelphia and Reading R. R. Co.*, 68 Penn. St., 370. 1871.

5. — A railroad company is not obliged as a common carrier, to transport goods and merchandise for all persons at the same rates. *Fitchburg R. R. Co. v. Gage*, 12 Gray (Mass.), 393. 1859.

6. — An honest effort to aid the public in the prosecution of business, by furnishing such facilities as are best calculated for that purpose, is required of railroad companies; but if they shall in good faith, from a pressing cause, take grain from wagons or boats, while grain remained for shipment in private warehouses, they will not thereby incur liability. *Galena and Chicago Union R. R. Co. v. Rae*, 18 Ill., 488. 1857.

7. — The Pennsylvania R. R. Co. has power under the "Tonnage Commutation Act" of March 7, 1861, to discriminate between the rates charged for "local freight" and those charged for other freight. The constitution of the United States does not prohibit a discrimination between local freight and that which is extra territorial when it commences its transit; the distinction is not personal, and therefore not within the prohibition. *Shipper v. Pennsylvania R. R. Co.*, 47 Penn. St., 338. 1864.

7. — Where a railroad company has fixed its rates for the transportation of grain, from any given station on the line of its road, to Chicago, it will not be permitted to charge one rate for delivery at the warehouse of one per-

DISCRIMINATION.

See RATES.

1. Rates and facilities. An action lies in

Rule of Court — How Effected — Proceedings.

son, and a different rate for delivery at that of another, both houses being upon its line or side tracks. *Vincent v. Chicago and Alton R. R. Co.*, 49 Ill., 33, 1868; see *People ex rel. v. Chicago and Alton R. R. Co.*, 55 ib., 95, 1870.

9. — The defendants, owning a short railway, from New Orleans to Lake Pontchartrain, and one Morgan, owning a line of steamers plying from the lake terminus to Mobile, and the plaintiffs and other parties owning two other steamers in the same trade, an arrangement was made by defendant with Morgan, and temporarily, with the proprietors of the other steamers, respectively, to share *pro rata* the through freight from New Orleans to Mobile. It appeared that this arrangement was unprofitable to the defendant, for the lines of steamers, by competing and lowering the rates of freight, greatly reduced the share coming to the railway. The defendant therefore entered into an agreement with Morgan by which the latter loaned it \$250,000, and the former agreed to prorate with him the through freight from New Orleans to Mobile, and to charge all other steamers the rates paid by the public generally. The plaintiffs immediately laid up their steamer and sued for damages, on the ground that this prorating with Morgan and refusing to further prorate with plaintiffs was an illegal combination with Morgan to confer on him an unlawful monopoly and preference. *Held*, that the acts of defendant were not in contravention of any statute of Louisiana or of any principle of her jurisprudence; that they might agree or refuse to prorate through freight with anybody. *Eclipse Towboat Co. v. Pontchartrain R. R. Co.*, 24 La. An., 1. 1872.

DISMISSAL OF ACTION.

1. Rule of court. A suit was brought to recover certain land which the plaintiff had been induced to subscribe to the stock of a railway company through fraud. The court ordered the plaintiff to permit defendant to inspect the certificates of stock. The plaintiff failed to comply with this order and the court dismissed the action without prejudice. *Held*, that the action was properly dismissed. 2 R. S., § 363, p. 120. *Silvers v. Junction R. R. Co.*, 17 Ind., 142. 1861.

DISSOLUTION.

1. How effected. A corporation may dissolve itself, except so far as its public duties as conservators of a highway may limit this power, and the legislature may release it from this limitation, and allow a transfer of its duties to other hands. *Lauman v. Lebanon Valley R. R. Co.*, 30 Penn. St., 42. 1858.

2. — The dissolution of the corporation is not a corporate act, but an act of the members of the corporation; and its officers in effecting such arrangement act as trustees of the members and not as corporate functionaries. *Ib.*

3. Effect of dissolution. The dissolution of a corporation does not have the effect to dissolve its contracts, and creditors may enforce their claims against any property of the corporation which may not have passed to *bona fide* assignees. *Dudley v. Price's Adm'r*, 10 B. Monroe (Ky.), 84. 1849.

4. — The capital stock of the Lexington and Ohio R. R. Co. is a trust fund in the hands of the company, and liable to the payment of its debts. *Ib.*

5. — But to subject such fund, it must be first shown that the legal remedies have been used ineffectually. *Ib.*

6. — Where a corporation has by its acts ceased to exist, or where it has suffered acts which destroy its existence, it is as fully and entirely dissolved, as if declared so to be by the sentence of a competent court. *Carey v. Cincinnati and Chicago R. R. Co.*, 5 Iowa, 357. 1857.

7. Proceedings after dissolution. In proceedings or actions against defunct corporations, service of process upon the members of its last acting board of directors is sufficient, under the statute, to give the court jurisdiction. *Warner v. Callender*, 20 Ohio St., 190. 1870.

8. — By the statutes of New Hampshire, a suit may be maintained by or against any corporation for three years after the expiration of its corporate powers. *Blake v. Portsmouth and Concord R. R. Co.*, 39 N. H., 435. 1859.

9. — No repeal of the charter of a corporation can take away or impair the remedy of a creditor against it for previously incurred liability, or affect a pending suit against it. *Ib.*

10. Sale. A railroad corporation is not dissolved by the sale of its road. *State v. Rives*, 5 Iredell's Law (N. C.), 297. 1844.

Miscellaneous.

11. — Where a statute provides that a corporation shall be dissolved by a mortgage sale of its franchises and property, an illegal and fraudulent sale does not work a dissolution. *White Mountains R. R. Co. v. White Mountains (N. H.) R. R. Co.*, 50 N. H., 50. 1870.

12. — It is no objection to the maintenance of a bill in equity to compel a corporation to restore property acquired by fraud, that such restoration will cause a dissolution of the corporation. *Ib.*

13. — A corporation may be dissolved by a surrender of its franchises, and if a corporation suffers acts to be done which have the effect of destroying the end and object for which it is created, it is equivalent to a surrender of its rights. *Moore v. Whitcomb*, 48 Mo., 543. 1871.

14. — The seizure and sale of the Cairo and Fulton Railroad under the state lien extinguished the Cairo and Fulton Railroad Company, such seizure and sale destroying the objects for which the corporation was instituted. (Answers to questions, etc., 37 Mo., 135, cited and affirmed.) *Ib.*

DITCHES.

1. **Damages.** If a railroad company, in constructing its road, make a ditch along the side thereof so as to carry off the water from the adjoining land to a railroad channel, it is not bound to keep such ditch open, if the flow of the water is not changed injuriously to the owner of the land by the building of the road. *Louisville, New Albany and Chicago R. R. Co. v. McAfee*, 30 Ind., 291. 1868.

DIVIDENDS.

See *STOCK*.

DIVISION LINES.

1. **Agreement.** Where parties agree, though by parol only, upon a division line between their adjoining lands, and afterwards hold possession conformably to such line, the possession of one is adverse to the claim of

the other and amounts to a disseizin; so that a deed by one, purporting to convey the land thus in possession of the other, passes nothing to the grantee. *Boston and Worcester R. R. Co. v. Sparhawk*, 5 Metcalf (Mass.), 469. 1843.

2. **Mistake.** Where, without fraud or gross negligence, adjoining land owners have acted under a mistake as to the true division line between their premises, neither will be estopped to claim the true line when it is ascertained. *Brewer v. Boston and Worcester R. R. Co.*, 5 Metcalf (Mass.), 478. 1843.

DOGS.

1. **Carried in baggage car.** The owner having a dog on a railroad train, being informed by a brakeman and the baggagemaster that the animal was not allowed in the passenger car, placed him in charge of the baggagemaster, and paid the latter for his transportation. By the regulations which were posted and printed at the various stations, "live animals" were "allowed as baggagemen's perquisites." No special notice of this rule was brought home to the owner. The company was held liable for loss of the dog by the baggageman. *Cantling v. Hannibal and St. Joseph R. R. Co.*, 54 Mo., 385. 1873.

2. **Street railways.** A horse railroad company may be held liable for double the amount of damages sustained in consequence of the bite of a dog kept by its servants or agents. G. S., ch. 88. *Barrett v. Malden and Melrose R. R. Co.*, 3 Allen (Mass.), 101. 1861.

DOMICIL.

1. **Change.** A corporation, created with a special charter, by the legislature of Indiana, in which the corporation is made to consist of certain directors and their successors, with power to construct a railroad in said state, and with authority, in connection therewith, to own and manage certain property in the state of Ohio, cannot, by reason of the latter authority, change its domicile to the latter state. *Aspinwall v. Ohio and Mississippi R. R. Co.*, 20 Ind., 492, 1863; *McCord v. Aspinwall*, ib., 498; *Aspinwall v. Somes*, ib., 498.

Miscellaneous.

2. — Nor could it remove its domicile to the state of Ohio, merely because that state had given it authority to act therein, unless it had been also granted power so to do by the legislature of Indiana. *Ib.*

3. — And where such corporation receives subscriptions to its capital stock in Indiana, payable in such installments, and at such times as the corporation may determine, and then migrates to Ohio, and there establishes its office and performs all its corporate acts, and determines in what installments and at what times said subscriptions shall be paid, and requires them to be paid at its office in Ohio, such subscriptions cannot be collected, because such corporate acts are inoperative and void.

DONATIO CAUSA MORTIS.

1. Stock and bonds. Certificates of stock, and coupon government bonds will pass by delivery *mortis causa*, without any writing. *Walsh v. Sexton*, 55 Barbour (N. Y.), 251. 1869.

DOUBLE TRACK.

See CHARTER.

DRAINAGE.

1. Springs. If, without necessity, the water from springs opened by a railroad company in building its road is collected and conducted by it in an artificial trench to a point from which it is discharged upon land of another, outside of its location, it is liable in tort therefor. *Curtis v. Eastern R. R. Co.*, 98 Mass., 428. 1868.

DRAWBACKS.

1. Agent. A shipper of cattle made a contract with a railroad company, by which he was to have certain drawbacks upon shipments

over its road, it being agreed that the shipper should be allowed the same drawbacks which other companies were paying him. The contract was construed not to relate to shipments made prior to the time it was entered into. *Pittsburgh, Ft Wayne and Chicago R. R. Co. v. Fawcett*, 56 Ill., 518. 1870.

2. — As to such prior shipments, there would be no consideration to support a promise to pay drawbacks. *Ib.*

3. — contract. Where a party acted as the agent of a company for the purpose of procuring cattle shipments only, and according to the routine of business the money for drawbacks would come through him, which the shipper knew when the contract was made; *held*, that the agent was also agent of the shipper for the purpose of receiving the drawbacks. *Ib.*

DRAW BRIDGE.

See DAMAGE.

DRUNKENNESS.

See INJURIES TO EMPLOYEES.

EJECTMENT.

1. Commencement of action. An action of ejectment cannot be commenced against a corporation by declaration, but only by summons. *Brown v. Syracuse and Utica R. R. Co.*, 5 Hill (N. Y.), 554. 1843.

2. Costs. Where a defendant in an ejectment suit disclaims all interest in the premises, judgment should be rendered in favor of the plaintiff, but, ordinarily, defendant will recover his costs. *Kansas Pacific R. R. Co. v. McBratney*, 10 Kans., 415. 1872.

3. Easement. The mere right to an easement over land which another party is entitled to retain in possession, will not be affected by the execution of a writ of possession for the premises, in an action of ejectment. *Camden and Amboy R. R. Co. v. Stewart*, 3 C. E. Green's Ch. (N. J.), 489. 1867.

Cashier—Fraud.

4. Failure to pay damages by railway company. Where a railroad company had lands condemned for right of way, and the damages were assessed, but not paid, and the owner sued and recovered judgment for the damages, but execution was returned, no property found; but the company entered into possession, constructed its road with the consent of the owner, and then leased it to another company, which was occupying and using this right of way when the suit was brought to recover the land; *held*, that the suit could not be maintained without notice to quit. *Chicago, Burlington and Quincy R. R. Co. v. Knox College*, 34 Ill., 195. 1864.

5. Highway. Ejectment is a proper remedy where land owned in fee by an individual, subject to the public easement of a highway, is appropriated by a railroad company for the use of its road. *Lazier v. New York Central R. R. Co.*, 42 Barbour (N. Y.), 466. 1864.

6. Pleading. In an action of ejectment, the defendant, by § 51 of the practice act of 1855 (Nix. Dig., 671), may give in evidence under the statutory plea, which amounts to the general issue, any title which confers a present right of possession. Under that plea, the defendant may avail himself of any defense that could be made under the general issue, by the former proceedings in ejectment. *Stewart v. Camden and Amboy R. R. Co.*, 4 Vroom (N. J.), 115. 1868.

7. Possession. There is no distinction between a trespasser without and one with a title on the record. *Susquehanna and Wyoming Valley R. R. Co. v. Quick*, 68 Penn. St., 189. 1871.

8.—Actual possession may be either by residence or cultivation; it need not be by both. *Id.*

9.—There must be that in the appearance of the premises themselves to show the world that there is still a person in possession. *Id.*

10. Statute. The statute regulating the commencement of the action of ejectment does not apply to corporations. *Baker v. Long Island R. R. Co.*, 1 Howard's Pr. (N. Y.), 214. 1845.

11. Title. A railroad company, owning one undivided moiety of land in fee, and the life estate of A. in the other moiety thereof, being in the exclusive possession, duly located its railroad thereon, and appropriated the whole thereof for the ordinary, necessary and

legitimate purposes of the road, and continued to thus use and possess the same after the termination of said life estate, to the exclusion of the remaindermen, and without the appraisal or payment of land damages under the statute, or otherwise, to the remaindermen. *Held*, that on account of the peculiar and extraordinary character of the subject matter of the case, the remaindermen could not maintain ejectment against said company to recover joint possession of said premises. *Austin v. Rutland R. R. Co.*, 45 Vt., 215. 1872.

ELECTIONS.

See ELECTIONS OF CORPORATE OFFICERS; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY CITIES AND TOWNS.

ELECTIONS OF CORPORATE OFFICERS.

1. Cashier. Where shares are on the transfer books in name of A., cashier, they cannot be voted on by B., cashier, although B. is the successor of A. *Mohawk and Hudson River R. R. Co., In the matter of*, 19 Wendell (N. Y.), 135. 1838.

2. Challenge. Since the amendment, in 1854, to the general railroad law, which provides (§ 5), "that at every election of directors, the books and papers of such company shall be exhibited to the meeting, if a majority of the stockholders present shall require it," a party challenging votes is not entitled to a production of the books, although a prior by-law of the company authorizes him to demand it. *People v. Albany and Susquehanna R. R. Co.*, 1 Lansing (N. Y.), 308. 1860.

3. Fraud. Surprise and fraud upon a part of the electors is ground for avoiding an election, and all acts done by portions of the corporators, which bear the appearance of trick, secrecy or fraud, will be held invalid. *Id.*

4.—All acts done by a portion of the stockholders in a corporation, at an election of officers, which bear the appearance of trick, secrecy or fraud, will be held invalid. *People v. Albany and Susquehanna R. R. Co.*, 55 Barbour (N. Y.), 344, 1869; *Same v. Same*, 38 How-

Miscellaneous.

ard's Pr. (N. Y.), 228, 1869; 7 Abbott's Pr. (N. Y.), 265, 1869.

5. Injunction. An injunction by which inspectors of election in a corporation are commanded to desist from holding any election of directors, or from receiving and counting and canvassing any votes, is entirely void. So as to an injunction forbidding an individual to act as president of a corporation. *Ib.*

6. Opening the polls. It being provided by the by-laws, and stated in the notice of the annual meeting for the election of directors, that the polls would be opened at twelve, and continue open until one o'clock, the fact that the poll was not open until after twelve o'clock, and continued open until after one o'clock, does not invalidate the election. *People v. Albany and Susquehanna R. R. Co.*, 1 Lansing (N. Y.), 308. 1869.

7. — Where the notice of the time of holding an election of directors was for 12 o'clock, *M.*, held, that a meeting called to order, under such notice, and organized about 15 minutes before 12 o'clock, was a surprise and fraud upon many of the stockholders, and as against such of them as did not participate in the meeting, was irregular and void. *People v. Albany and Susquehanna R. R. Co.*, 55 Barbour (N. Y.), 344, 1869; *Same v. Same*, 38 Howard's Pr. (N. Y.), 228, 1869; 7 Abbott's Pr. N. S. (N. Y.), 265, 1869.

8. — It is not improper for the inspectors to keep the polls open as long, within a reasonable discretion, as is necessary to receive the votes of all the stockholders present, ready and offering to vote. *Ib.*

9. President. Where the president of a corporation requests an individual to call to order a meeting of stockholders for electing directors, and to act for him, in his absence, such request is a sufficient authority for such person to act in the place of the president. *Ib.*

10. Proxy. A person who is not a stockholder, is sufficiently authorized to call a meeting of stockholders to order when he holds a proxy, and is requested by the president to call the meeting to order, and act for him, and such call is recognized by the stockholders present. *People v. Albany and Susquehanna R. R. Co.*, 1 Lansing (N. Y.), 308. 1869.

11. Setting aside elections. On an application under 1 Rev. Stat., 603, § 5,—giving

the supreme court power to review elections in private corporations,—notice to the persons who claim to have been elected, and to the corporation is sufficient. It is not necessary that all the stockholders shall have notice of the application. *Schoharie Valley R. R. v. Case*, 12 Abbott's Pr., N. S. (N. Y.), 394. 1872.

12. — The election of directors of an incorporated company will not be set aside on a summary application to the supreme court for that purpose, on the ground that the inspectors were not sworn in the form prescribed by the statute. They are inspectors *de facto*. *Mohawk and Hudson R. R. Co., In matter of*, 19 Wendell (N. Y.), 135. 1838.

13. — No one but a party named as aggrieved, in the notice of application to set aside the election, is entitled to be heard; a notice given by one as attorney for A. B. and others, entitles no one but A. B. to be heard. *Ib.*

14. — Where votes, rejected by inspectors at an election of directors, if received, would have elected a certain ticket, are adjudged to have been erroneously rejected, the only remedy is to set aside the election. *Long Island R. R. Co., In matter of*, 19 Wendell (N. Y.), 37. 1837.

15. Stock held by a state and city. The city of New Orleans and the state, having stock in the N. O., J. & G. N. R. R. Co., have the right to one vote for each share of their stock in any election of directors of the company. The failure to count such votes renders the election void. The state has the right to present to the courts the question of the legality of such an election. *State v. New Orleans, Jackson and Great Northern R. R. Co.*, 20 La. An., 489. 1868.

16. Transfer books. At an election of directors, the right of an individual to vote must be determined by the transfer book of the company; the inspectors cannot look beyond it. *Long Island R. R. Co., In matter of*, 19 Wendell (N. Y.), 37. 1837.

ELEVATED RAILWAY.

See INJUNCTION.

Contract for Monopoly — Lease.

ELEVATORS.

1. **Contract for monopoly.** Where a railroad company set up as a defense, in a proceeding by *mandamus*, to compel it to deliver to the elevator or grain warehouse of the elevator, whatever grain in bulk might be consigned to it upon the line of its road, that it had entered into contracts with the owners of certain other elevators at the same point for exclusive delivery to the latter to the extent of their capacity, it was *held*, such contracts could have no effect as to third parties. *Chicago and Northwestern R. R. Co. v. People ex rel.*, 56 Ill., 365. 1870.

2. — An agreement was made between the D. & S. C. R. R. Co. and an elevator company, stipulating that the elevator company should erect a building suitable "for receiving, storing, delivering and handling all grain that shall be received by the cars of said company, not otherwise consigned." Subsequently, a supplemental contract was made, stipulating that the elevator company "should receive and discharge for the D. & S. C. R. R. Co., all through grain at one cent a bushel," etc., and that the elevator company should have the handling of all through grain at one cent a bushel. The railroad company refused to give the elevator company the handling of the grain in accordance with this contract. *Held*, that the two agreements formed one contract. The contract was not limited to grain shipped in the cars owned by the railroad company, but extended to grain shipped by it in the cars of other companies. That the words "all through grain" did not apply to grain shipped to Dubuque only, but also to grain shipped through Dubuque. *Richmond v. Dubuque and Sioux City R. R. Co.*, 26 Ia., 191. 1868.

3. — The D. & S. C. R. R. Co. and an elevator company at Dubuque entered into an agreement that the elevator company should erect an elevator for "receiving, storing, delivering and handling all grain that shall be received by the cars of said railroad company, not otherwise consigned." In a supplement, it was provided that the elevator company should "receive and discharge all through grain at one cent per bushel," and that the elevator company should have the handling of all through grain at that price. The contract, by its terms, extended for a period of fifteen

years, and, at the option of the railroad company, it was to be extended fifteen years more, but no times of payment were provided therein. In an action against the railroad company, to recover damages for its refusal to give the elevator company the handling of grain according to the contract, it was argued that the contract and the consideration which the plaintiffs were to receive thereunder for handling the grain, was entire and indivisible, and that no recovery could be had against defendant until the expiration of the contract; but the court held otherwise. *Richmond v. Dubuque and Sioux City R. R. Co.*, 33 Ia., 422. 1871.

4. — A judgment in such action would constitute no bar to an action for future breaches of the contract. *Ib.*

5. — The contract was not an unlawful restraint upon the duty of defendant, as a common carrier, in the delivery of the grain shipped to the different consignees thereof. *Ib.*

6. — The fact that defendant was directed by shippers not to pass the grain through plaintiff's elevator is no excuse. *Ib.*

7. — The contract in question is not against public policy. *Ib.*

8. — The contract does not conflict with the act of congress of June 15, 1856, authorizing railroads to "connect with roads of other states, so as to form continuous lines" of transportation from one state to another, and the laws of congress allowing the erection of certain railroad bridges over the Mississippi river. *Ib.*

9. **Delivery of goods for shipment.** Where a railway company had agreed to carry grain at a fixed rate for A. during a given time, and from the freight house of the company to C.'s elevator where A.'s grain was stored from time to time awaiting transportation, to which elevator a railway track extended, it was *held*, that the delivery of A.'s grain at such elevator with notice to the company that it was ready for shipment was equivalent to a delivery to the company at the freight house. *Thayer v. Burchard*, 99 Mass., 508. 1868.

10. **Lease.** The owner of a lot in the city of Chicago, having erected a grain elevator thereon, was permitted, by contract with a railroad company, to connect a side track from his elevator to the company's line, with its

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track. So far as appeared, the contract was purely personal, and in no way attached to the realty. *Held*, a subsequent lessee of the elevator did not succeed to any of the rights of his lessor, in respect to such contract. *People ex rel. v. Chicago and Northwestern R. R. Co.*, 57 Ill., 436. 1870.

11. Mandamus. Mandamus is the proper remedy to compel a railroad company to deliver to a particular elevator whatever grain in bulk may be consigned to it upon the line of its road. *Chicago and Northwestern R. R. Co. v. The People ex rel.*, 56 Ill., 365. 1870.

12. Railway connection. Where a railway was composed of three different divisions, operated under a common name, entering the city of Chicago upon different tracks, and an elevator situated upon one of such tracks could only be approached from the others by a very indirect route, causing much expense and delay to the company, it was *held*, that the elevator was not upon the track of each of the divisions so as to render it obligatory upon the company to deliver grain at such elevator from each of such divisions. *Id.*

13.—In order to compel a railroad company to deliver grain, shipped on its road in bulk, at a particular elevator, to which it may be consigned, it is indispensable that such elevator must be connected by some track with the railroad line of the company, and be, in fact, a portion thereof, or such as would be regarded a portion thereof, for the purposes of such delivery, under the act of 1867. *People ex rel. v. Chicago and Alton R. R. Co.*, 55 Ill., 95. 1870.

14.—Where the city had, by ordinance, granted to the lessor the privilege of laying down a track along one of its streets, in order that he might connect his elevator with the line of a railroad, such grant being made specially to the lessor, the mere leasing of his elevator to a third person would not operate to pass to the lessee any of the rights secured to the lessor under the ordinance. *People ex rel. v. Chicago and Northwestern R. R. Co.*, 57 Ill., 436. 1870.

15. Usage. Where a railroad company sought to evade receiving and delivery of grain in bulk to a particular elevator, to which it was consigned, claiming that it had established a usage that it might itself choose the consignee, it was *held*, the company

could make no such arbitrary discrimination between individuals in its dealings with the public. *Chicago and Northwestern R. R. Co. v. The People ex rel.*, 56 Ill., 365. 1870.

EMBANKMENTS.

See CONSTRUCTION OF RAILWAYS.

1. Double damages. No action lies under St. 1841, ch. 125, to recover double the damages sustained by reason of the neglect of a railroad company to comply with an order of the county commissioners, requiring it to construct and maintain embankments, etc., for the benefit of the owner of land through which its road is laid out, unless the time within which such structures are to be made is prescribed in the order. *Keith v. Cheshire R. R. Co.*, 1 Gray (Mass.), 614. 1854.

EMBEZZLEMENT.

See AGENCY.

1. Arrest. A complaint by a corporation, which shows that the defendant was employed as its officer or agent; that in that fiduciary capacity, he abstracted from the possession of plaintiff, certificates of shares in the stock of plaintiff company, which shares were owned by plaintiff; and that he sold the same and embezzled the proceeds; states a cause of action upon which defendant may be arrested. *Northern R. R. Co. of France v. Carpentier*, 4 Abbott's Pr. (N. Y.), 47. 1856.

2. Confessions—Surety. Confessions of a defaulting agent of a railroad company after his discharge from the service of the company are not admissible in evidence against the surety of such agent in an action on his bond for the faithful performance of his duties as agent. *Pollard v. Louisville, Cincinnati and Lexington R. R. Co.*, 7 Bush (Ky.), 597. 1870.

3.—If one becomes surety on a bond conditioned for the faithful conduct of another as a clerk or collector, it is *held*, that in an action on the bond against the surety, confessions of embezzlement made by the principal after his

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dismissal are not admissible in evidence; though with regard to entries made in the course of his duty, it is otherwise. *Ib.*

4. **Demand.** It is not necessary, in order to constitute embezzlement, that there should be a demand of the money alleged to have been embezzled. *Commonwealth v. Tuckerman*, 10 Gray (Mass.), 173. 1857.

5. **Evidence.** In an indictment for embezzlement by a railroad employè, it is not necessary that the prosecution should prove by direct and positive evidence that the conversion charged is without the consent of a railroad corporation, the alleged master or employer. *State v. Porter*, 26 Mo., 201. 1858.

6. — In an indictment founded on § 37 of the "act to authorize the formation of railroad associations, and to regulate the same" (R. C. 1855, p. 430), it is not necessary to allege a neglect or refusal on the part of the defendant to pay over on demand the moneys, etc., alleged to have been converted. *Ib.*

7. — In the case of an indictment against a ticket agent for embezzling funds belonging to a railroad company, it is competent for the prosecution to show the course of business pursued by the defendant and required by the rules of the company, by introducing in evidence duplicate blank returns used by ticket agents of the company; the prosecution is not bound in such case to resort to the blank returns actually filled up and transmitted by the defendant as ticket agent to the treasurer of the company. *Ib.*

7. — **previous acts.** Upon the trial of an indictment for embezzlement, other previous acts of a similar character, enumerated with the one charged in the indictment in a paper drawn up by the defendant as a statement of all sums taken by him, are admissible in evidence to show the intent with which the act charged was committed. *Commonwealth v. Tuckerman*, 10 Gray (Mass.), 173. 1857.

9. **Treasurer.** The treasurer of a railway company is an "officer, agent, clerk or servant of an incorporated company," within the Revised Statutes, ch. 126, § 29, relating to embezzlements by such persons. *Ib.*

10. — If money of a railway company is received by its treasurer, and by him deposited to his credit as such treasurer, and afterwards drawn out by him either in bills or coin, such bills or coin are the property of the corporation

and, while in the hands of the treasurer, are subjects of embezzlement by him; and if he afterwards, while still treasurer of the corporation, fraudulently converts such money to his own use, without its consent or knowledge, and without claim of right, it is embezzlement; although the guilty intent does not exist at the moment of drawing the money out of the bank, but is formed afterwards; and although at the time of the fraudulent conversion he intends to restore the amount, and has property sufficient to secure its restoration. *Ib.*

EMINENT DOMAIN.

See APPEAL; BRIDGES; CANALS; CONVEYANCE; EJECTMENT; ESTOPPEL; EVIDENCE; HIGHWAY; INJUNCTIONS; LIMITATION; PLEADINGS; RIGHT OF WAY; TRESPASS; WATER COURSES.

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1. *Streets.*2. *Highways.*3. *Parks.*

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General Principles — Proceedings Generally.

- XVIII. CONTRACT.
- XIX. SURVEYS.
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I. GENERAL PRINCIPLES.

1. **Compensation.** Before a railroad company can take land for its roadbed without the consent of the owner, it must make compensation. *Evansville, Henderson and Nashville R. R. Co. v. Grady*, 6 Bush. (Ky.), 144. 1869.

2. — It is requisite that enactments, in order to justify the taking of private property for public use, should designate the means to be pursued for obtaining compensation. *Cushman v. Smith*, 34 Me., 247. 1852.

3. — It would seem that there is no distinction between public and private corporations, as to the right of taking and holding private property without just compensation being previously made. *Ib.*

4. **Constitutional law.** The taking of private property for public use without just compensation, is forbidden by the constitution. The taking referred to includes any right or easement in land. *Ib.*; *Nichols v. Somerset and Kennebec R. R. Co.*, 43 Me., 356. 1857.

5. — But this provision does not dislodge the paramount domain which the sovereignty has over the property rights of the individual. *Ib.*

6. — It does not prevent the legislative power from authorizing, without compensation, acts injurious to the property of the individual, which do not however amount to the taking of any portion of such property. *Ib.*

7. — Nor does it preclude the temporary taking without compensation, where such taking is a proceeding incipient to the acquisition of the title for public use. *Ib.*

8. **Mt. Washington Railroad.** If a road is of a public character, it rests with the discretion of the legislature to determine whether power shall be given to take land for it without the owner's consent. *Mt. Washington R. R. Co., Petition of*, 35 N. H., 134. 1857.

9. — A road to the summit of Mt. Washington and thence to the foot of the mountain on the other side, open to all travelers on payment of a uniform and fixed toll, is of such public character. *Ib.*

10. **Principles discussed.** The general

principles with relation to the taking of private property for railway purposes — discussed. *Mims v. Macon and Western R. R. Co.*, 3 Ga., 333. 1847.

11. — The principles governing the eminent domain, correspond to those controlling the police power, rather than to those applying to the power of taxation, and its exercise has rather regard to the public need than to the public character of its object. *People v. Salem*, 20 Mich., 452. 1870.

12. **Time.** After the time fixed by the charter for building the road has expired, the company has no right to take additional lands for the extension of its road, without the consent of the owner. *Peavey v. Calais R. R. Co.*, 30 Me., 498. 1849.

13. **Statute.** The general railroad laws of New York are to be construed harmoniously, as respects their various provisions, and strictly, as to the rights of the parties. *New York and Boston R. R. Co., In matter of*, 62 Barbour (N. Y.), 85. 1871.

14. — But corporations must conform to the provisions of the statute before they can acquire any title or rights to lands against the consent of the owner. *Ib.*

15. **Strict construction.** The right of condemning lands granted by the state to a railroad company will be strictly construed. *Doughty v. Somerville and Easton R. R. Co.*, 1 Zabriskie (N. J.), 442, 1848; *Zack v. Pennsylvania R. R. Co.*, 25 Penn. St., 394, 1855.

16. — Statutes delegating the right of eminent domain to railroad and other corporations for public use, must be strictly complied with. Yet they are not to be construed so literally, as to defeat the evident purposes of the legislature. *New York and Harlem R. R. Co. v. Kip*, 46 N. Y., 546. 1871.

II. PROCEEDINGS GENERALLY.

1. *Proceedings under charter.*

17. **Action.** No action can be maintained against a railway company for injuries to lands, done in conformity to law, unless the corporation have in some way forfeited its chartered rights, or the charter remedy has been modified by some statute, so as to authorize a suit. *Gowen v. Penobscot R. R. Co.*, 44 Me., 140. 1857.

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18. Camden and Amboy R. R. Co. The charter of the Camden and Amboy R. R. Co. — construed. *Bennet v. Camden and Amboy R. R. Co.*, 2 Green's Law (N. J.), 145, 1833; *Vanwinckle v. Same*, ib., 162, 1833.

19. Charter. The charter of a railroad company contained a provision that where any person through whose land the road might run should refuse to relinquish the same, or when a contract between the parties could not be made, the corporation might give notice to a justice of the peace, etc., of the facts, and the justice should summon the owner, etc., and appoint twelve disinterested men, etc., who, after having taken an oath, etc., should view the land, etc., and after having taken into consideration the advantages as well as disadvantages the road might be to the same, should report whether the person was entitled to damages or not, etc. *Held*, that this provision, being contrary to common right, should be strictly construed. That it was only applicable where the land appropriated was part of a tract with which the road came in contact. That it was inapplicable, except where the company took the initiative in assessing the damages. *Eward v. Lawrenceburgh and Upper Mississippi R. R. Co.*, 7 Ind., 711. 1856.

20. Elizabethtown and Somerville R. R. Co. Proceedings under the charter of the Elizabethtown and Somerville R. R. Co. — examined. *Ross v. Elizabethtown and Somerville R. R. Co.*, 1 Spencer (N. J.), 230, 1843; *Same v. Same*, 1 Green's Ch. (N. J.), 422, 1841.

21. Hannibal and St. Joseph R. R. Co. Under the charter of the Hannibal and St. Joseph R. R. Co. (see acts 1847, p. 156), a writ of error does not lie to the action of the judge of the circuit court upon the report of the viewers appointed to assess damages to individuals over whose land the road is run. The judgment entered upon the report is final. *Hannibal and St. Joseph R. R. Co. v. Morton*, 20 Mo., 70. 1854.

22. Hartford and New Haven R. R. Co. Though under the charter of the Hartford and New Haven R. R. Co. the quantity of land taken for the road must be designated, so that the freeholders may know what to appraise, before the damages can be legally assessed, yet the charter does not require the width of the road to be determined, before the route is

approved by the commissioners, and the freeholders to assess the damages are appointed *Williams v. Hartford and New Haven R. R. Co.*, 13 Conn., 110. 1839.

23. — The appointment of freeholders to assess the damages, in such case, is not the subject of revision by writ of error. *Ib.*

24. — Where the Hartford and New Haven R. R. Co. designated the center line of its road through the plaintiff's land, but the width of the road was not defined by the company, or approved by the commissioners, by any act in writing and recorded, before the damages were assessed by the freeholders appointed for the purpose; it was *held*, that such assessment was of no legal validity, and the company was properly restrained from using the plaintiff's land for its purposes. *Same v. Same*, ib., 397. 1840.

25. Hastings and Dakota R. R. Co. The provisions of the charter of the respondent, in relation to condemnation of real estate — construed. *Peters v. Hastings and Dakota R. R. Co.*, 19 Minn., 260. 1872.

26. Hudson River R. R. Co. Where the land of an individual was, in 1850, regularly taken by the Hudson River R. R. Co., under the special provisions of its charter, granted in 1846, it was *held*, that the title to the land was vested in the company, and that the proceedings to obtain such title were not required to be under the general railroad act of April 2, 1850, that act prescribing a different mode of proceeding from that specified in the charter of the company. *Visscher v. Hudson River R. R. Co.*, 15 Barbour (N. Y.), 37. 1853.

27. — The provisions of the general railroad act are "inconsistent" with the charter of the Hudson River R. R. Co. *Ib.*

28. Minn. and Pacific R. R. Co. The proceedings under the charter of the Minn. and Pacific R. R. Co. — considered. *Wilkin v. St. Paul and Pacific R. R. Co.*, 16 Minn., 271. 1871.

29. N. J. R. R. Co. The New Jersey R. R. Co. may at any time acquire the title to the lands occupied by its road, by the provisions of the charter for that purpose. *Coster v. New Jersey R. R. Co.*, 4 Zabriskie (N. J.), 730. 1853.

30. North Mo. R. R. Co. In a proceeding instituted in behalf of the N. M. R. R. Co. to

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condemn land, three commissioners were, in accordance with the prayer of the petition, appointed to assess damages. *Held*, it not appearing that said company had accepted the provisions of the general railroad law requiring the appointment of five commissioners, etc., that the proceeding was properly conducted under the act of incorporation of the company. *North Missouri R. R. Co. v. Gott*, 25 Mo., 540. 1857.

31. Penn. R. R. Co. Under the acts providing for the condemnation of lands for the Penn. R. R. Co., it must appear from the petition that the land has been surveyed, located and marked; that an effort to agree upon the compensation has been made; and the petition must be verified. *O'Hara v. Pennsylvania R. R. Co.*, 25 Penn. St., 445. 1855.

32. The Port Royal R. R. Co. was chartered in 1857, and its charter was renewed in 1870. The charter of 1857 prescribed the mode by which lands might be condemned to the use of the company, and by a general act, passed in 1868, a different mode of condemning lands to the use of all railroad corporations was prescribed: *held*, that the company must proceed in the mode prescribed by the act of 1868. *McCrea v. Port Royal R. R. Co.*, 3 So. Car., N. S., 381. 1871.

33. Statute. When the provisions of the act to authorize the formation of railroad companies, and to regulate the same (Laws of 1850, ch. 140) as to the mode in which a company may acquire title to land for the purposes of its road, are inconsistent with the provisions of the charter of a company incorporated before its passage, such company may acquire the title in the manner prescribed by its charter. *Clarkson v. Hudson River R. R. Co.*, 12 N. Y., 304. 1855.

34. St. Paul and Pacific R. R. Co. The charter of the St. Paul and Pacific R. R. Co.—construed. *Held*, that the provision for taking and holding lands prior to the proceeding for assessment of damages, without paying or securing compensation is invalid. *Hursh v. St. Paul and Pacific R. R. Co.*, 17 Minn., 439. 1871.

35. Width of a road. Where a charter granted a right of way six rods in width and it was afterwards renewed, it was held that the company could take a right of way six rods in width, although the general statute

authorized but four.' *Eaton v. European and North American R. R. Co.*, 59 Me., 520. 1871.

2. Commencement of Proceedings.

36. By whom commenced. A claimant may delay proceeding for damages till the completion of the road. *Delaware, Lackawanna and Western R. R. Co. v. Burson*, 61 Penn. St., 369. 1869.

37.—Either party may have the damages assessed at any time after the location of the road. *Id.*

38.—It is immaterial which takes the initiative. *Marion and Mississinewa R. R. Co. v. Ward*, 9 Ind., 123. 1857.

39.—Under the laws of Kansas, the owner of lands cannot take steps to have his lands condemned for railroad purposes, and a valuation thereof made. *Kansas Pacific R. R. Co. v. Streeter*, 8 Kan., 133. 1871.

40.—joint interests. The persons vested with the several interests which constitute the entire estate may join in a proceeding under the statute to obtain compensation; or, as they have several interests, may proceed separately. In either mode of proceeding, the compensation for the entire damage must be apportioned according to the injury to their respective interests. *Colcough v. Nashville and Northwestern R. R. Co.*, 2 Head. (Tenn.), 171. 1858.

41. Failure to agree. It is not necessary that the judge by whom the appointment of commissioners is made should be satisfied that the parties were unable to agree for the price of the land previous to the notice of the intended application. It is enough if the judge is satisfied when the appointment is made that the parties are unable to agree as to the price. *Coster v. New Jersey R. R. Co.*, 3 Zabriskie (N. J.), 227. 1852.

42.—A railway corporation cannot procure a condemnation of land, when it can agree with the owner, as to its purchase. *Oregon Cascades R. R. Co. v. Oregon Steam Nav. Co.*, 3 Or., 178, 1869; *Philadelphia, etc., R. R. Co. In matter of*, 7 Philadelphia Rep. (Penn.), 461, 1870; *Contra Costa R. R. Co. v. Moss*, 23 Cal., 324. 1863.

43.—In proceedings to condemn land for the "Osage Valley and Southern Kansas R. R. Co.," under the act of 1857 (Sess. Acts 1857.

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pp. 59, 63), no title to the land will pass unless it appear affirmatively from the record that the owner refused to relinquish his right of way to the company. *Ells v. Pacific R. R. Co.*, 51 Mo., 200. 1873.

44. — In proceedings to condemn lands for railroad purposes, an allegation in the petition that the parties could not agree upon the proper compensation to be paid for the land proposed to be taken, is a sufficient averment of the fact of disagreement to put the adverse party upon his defense upon the merits. *Hannibal and St. Joseph R. R. Co. v. Muder*, 49 Mo., 165. 1871.

45. — **charter.** The eighth section of the charter of the Miss. Central and Tenn. R. R. Co., which does not materially differ from most of the other railroad charters, provides that where the company and owner of the soil required for the road, fail to agree upon the terms of purchase and sale, the court shall appoint commissioners to value the land taken, etc. It is not necessary, under this charter, that the parties should make an effort to agree, and fail, before the court has jurisdiction to appoint commissioners to assess the value of the land. *Bigelow v. Mississippi Central and Tennessee R. R. Co.*, 2 Head (Tenn.), 624. 1859.

46. **Location.** Where a railroad company is about to build a road, and it proceeds to condemn land under its charter for the use of the road, it should define with precision the location and quantity required, so that the owner of the land may know the extent of the claim that is made. *Strang v. Beloit and Madison R. R. Co.*, 16 Wis., 635, 1863; *Vail v. Morris and Essex R. R. Co.*, 1 Zabriskie (N. J.), 189, 1847.

47. — A railroad company, in determining upon its route, acts arbitrarily. No one is entitled to any notice on the subject until the route has been actually designated and the map and profile filed. Then the company is in a condition to notify the property holders, whose lands are to be taken. *Norton v. Wallkill Valley R. R. Co.*, 42 Howard's Pr. (N. Y.), 228. 1871.

48. — Companies organized under the law of 1849, providing for a general system of railroad corporations, cannot proceed to condemn lands until after such companies shall have obtained from the legislature a law ap-

proving of the route and terminations of the roads proposed to be constructed. *Gillmeater v. Mississippi and Atlantic R. R. Co.*, 13 Ill., 1. 1851.

49. — The right of the owners to take proceedings to assess damages is perfected by the location of the road, without any other act of appropriation on the part of the company. *Marion and Mississinewa R. R. Co. v. Ward*, 9 Ind., 123. 1857.

50. — A plan or map, filed by a railroad company, together with the location of its road, and expressly made "a part of the description of said location," may be referred to to explain, but not to modify or control the written location. *Hazen v. Boston and Maine R. R. Co.*, 2 Gray (Mass.), 574. 1854.

51. — The map, profile and notice required by §§ 48 and 49 of ch. 23, G. S., need not be filed prior to the commencement of proceedings for condemning the right of way under art. 9 of said chapter. *Missouri River, Fort Scott and Gulf R. R. Co. v. Shepard*, 9 Kan., 647. 1872.

52. **Notice.** Where an application for an assessment of damages is made, the proceedings will be illegal unless notice is given to the adverse party. *Atlantic and St. Lawrence R. R. Co. v. County Commissioners*, 51 Me., 36, 1863; *Oruger v. Hudson River R. R. Co.*, 12 N. Y., 190, 1854; *Lohman v. St. Paul, Stillwater, etc., R. R. Co.*, 18 Minn., 174, 1872; *Wallkill Valley R. R. Co. v. Norton*, 12 Abbott's Pr., N. S. (N. Y.), 317, 1872.

53. — Notice to the occupant must be served before applying for the appointment of commissioners of appraisal. *New York and Boston R. R. Co., In matter of*, 62 Barbour (N. Y.), 85. 1871.

54. — Where land owners are not notified, they may object to the preliminary proceedings after the report of the viewers is returned. *O'Hara v. Pennsylvania R. R. Co.*, 25 Penn. St., 445. 1855.

55. — Where the appraisers gave notice in writing of the time and place of appraisal, to the party interested, who resided within eighty rods of the place, and received the notice on the day previous to the time appointed, and instead of requesting delay, returned a written answer to the appraisers, protesting against their authority to act, and declaring that he would not appear; it was held, that

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such notice was sufficient in point of time. *Williams v. Hartford and New Haven R. R. Co.*, 13 Conn., 397. 1840.

56. — Where the published notice notifies the land owner that the petitioner will make application to the judge of the circuit court at a certain time and place, and the object sought to be accomplished is precisely and plainly stated, and the land, which is the subject of the proceeding, is described, the notice is sufficient. *Quincy and Palmyra R. R. Co. v. Taylor*, 43 Mo., 35. 1865.

57. — Where the subject of appraisal was described in the notice, as land owned by the plaintiff, and of which the state of Connecticut was mortgagee, when in fact the state was not mortgagee of all, but of a part of the land appraised; but the notice also referred, for further description, to a petition and proceedings thereon, to which the plaintiff was a party, in which the boundaries of all the land to be appraised were defined with precision; it was held, that such notice was sufficient in point of form. *Williams v. Hartford and New Haven R. R. Co.*, 13 Conn., 397. 1840.

58. — The owner of land filed in the office of the clerk of the court of common pleas, in vacation, his application, addressed to the judge of said court, for the appointment of appraisers to assess the damages which he had sustained by the construction of a railroad through his land. The railroad company was not notified of the pendency of the proceedings, until the damages had been assessed. The court, at the next term, ordered that the petitioner should have execution against the company for the damages assessed, etc., and also for costs. Held, that the proceedings were properly instituted under the R. S. 1852. But, held, that the order for execution, etc., both as to damages and costs, was erroneous. *Columbus and Shelby R. R. Co. v. Richardson*, 7 Ind., 543. 1856.

59. — Where a notice of proceedings to condemn the right of way was given to a widow, but not to her children, and the lands belonged to the widow and children, it was proper to restrain, by injunction, the taking of the land. The charter of the railway in question required notice of such proceedings to be given to all parties in interest. *New Orleans, Mobile and Chattanooga R. R. Co. v. Frederic*, 46 Miss., 1. 1871.

60. — The taking of lands for right of way is a proceeding *in rem*, and in proceedings of this character, the seizure of the property gives the court jurisdiction over the persons of those interested, and is considered as notice to them. The charter of the N. O., etc., R. R. Co., makes no provision for notice in such cases. The assembling of the jury on the premises is considered as constructive notice. *New Orleans, Jackson and Great Northern R. R. Co. v. Hemphill*, 35 Miss., 17. 1858.

61. — Where the M. & W. R. R. Co. had procured an appraisement of damages and the defendant appealed therefrom to the circuit court, but before the trial in that court took place the rights of the company became vested in another company, and the latter company was substituted for the former; and the notice of substitution was served by letter sent by mail to S. and P. without anything to show that either of them was the attorney of the company; held, that such notice gave no jurisdiction of the latter company. *Sturtevant v. Milwaukee, Watertown, etc., R. R. Co.*, 11 Wis., 61. 1860.

62. — In the absence of statutory directions, the tribunal to whom application is made for the appointment must judge of the sufficiency of the notice of making such application; and if it appear by the record that the notice was satisfactory to the tribunal, this court will not assume that the notice was invalid or insufficient. *Coster v. New Jersey R. R. Co.* 3 Zabriskie (N. J.), 227. 1852.

63. — Where due service of the petition and notice required by the general railroad act, is made upon the owner of land to be taken for a railroad, the court acquires jurisdiction to make the appointment of commissioners to appraise damages. *New York and Oswego Midland R. R. Co., In matter of*, 40 Howard's Pr. (N. Y.), 335. 1870.

64. — In a proceeding to appropriate land for the use of the L. and O. R. R. Co., the return of the sheriff must show that all the requirements of the law have been complied with. *Harper v. Lexington and Ohio R. R. Co.*, 2 Dana (Ky.), 227. 1834.

65. — It is not indispensable that the notice to the land owner should be by personal service. And a return of the writ, "executed," implies a legal notice to the owner of the land. *Id.*

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66. Time of commencing proceedings. The fact that a railway company has possessed itself of a strip of land through the plantation of the defendants, and has constructed its road through it, does not preclude it from instituting proceedings afterwards to have the land condemned for railway purposes. *Carrollton R. R. Co. v. Avert*, 9 La. (O. S.), 205. 1835.

67. — Under the acts incorporating railroad companies, the damages may be assessed either before or after the land has been taken. *Compton v. Susquehanna R. R. Co.*, 3 Bland's Ch. (Md.), 386. 1831.

68. — The proviso of act of April 14, 1834, relative to the removal of suits brought by and against railway companies to the common pleas of any adjacent county, through which the road does not pass, does not apply to an appeal from the report of viewers appointed to assess the damages occasioned by the location and construction of the road, when it assumes the form of a suit or action against the railroad company. *Pinneo v. Lackawanna and Bloomsburg R. R. Co.*, 43 Penn. St., 361. 1862.

69. Warrant. A warrant, upon a petition to assess damages, made returnable to the county commissioners instead of to the supreme judicial court, is invalid. *Cassidy v. Kennebec and Portland R. R. Co.*, 45 Me., 263. 1858.

70. Waiver. A party having accepted the damages assessed in his favor, cannot plead that the assessment was irregular, after having made no objections for two years, and having had full knowledge of the irregularity at the time that he received the sum assessed as his damages. *Hitchcock v. Danbury and Norwalk R. R. Co.*, 25 Conn., 516. 1857.

3. Jurisdiction.

71. County court. Under the act, ch. 174, § 1, Code of 1860, the case of a railroad company asking the county court to ascertain the compensation to a land owner for the land proposed to be taken for its purposes, which has remained in the court for more than one year without being determined, may be removed to the circuit court. *Virginia and Tennessee R. R. Co. v. Campbell*, 22 Grattan (Va.), 437. 1872.

72. — In such a case, if the circuit court sets aside the report of the commissioners that court should not send the case back to the county court, but should take jurisdiction of the case, and proceed in it with the same powers that are vested in the county court by the statute. *Ib.*

73. — The circuit court and court of common pleas have concurrent jurisdiction in actions for the assessment of damages for lands taken by railroad companies, and where proceedings for such purpose have been commenced in one of said courts, and appraisers appointed thereby, and an award made and returned by them, the other court cannot then deprive it of jurisdiction. *Hughes v. Lake Erie and Pacific R. R. Co.*, 21 Ind., 175. 1863.

74. — The court of common pleas has a supervisory power, to see that the proceedings of the viewers are regular. *Pennsylvania R. R. Co. v. Lutheran Congregation of Pittsburgh*, 53 Penn. St., 445. 1866.

75. — It may set aside the report for gross errors or misconduct in the viewers, or for gross inadequacy or excessive damages. *Ib.*

76. — No appeal is given to the supreme court; the judgment of the lower court is final, except for errors manifest on the record. *Ib.*

77. — The common pleas may permit amendments to the petition for the appointment of viewers. *Ib.*

4. Pleadings, practice and general requirements.

78. Amendment. Where proceedings are commenced under the act of 1852, and the case is appealed to the circuit court, the proceedings cannot, by amendment, be changed to a proceeding under the act of 1845. *Peoria, Pekin and Jacksonville R. R. Co. v. Black*, 58 Ill., 33. 1871.

79. Bond. A bond filed by a railroad company when locating its road is a security for all damages that may occur from the construction also; both are but one injury, and a bond filed for one is therefore security for all. *Wadhams v. Lackawanna and Bloomsburg R. R. Co.*, 42 Penn. St., 303. 1862.

80. — The offer of a bond by a railway company is an assertion by one of the parties that they cannot agree upon the damages;

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and the action of the court approving the bond and ordering it filed, involves an adjudication that everything had been done to entitle the company to have the bond filed. *Ib.*

81. *Certiorari.* Under the act incorporating the Penn. R. R. Co. an assessment of damages may be set aside as excessive by the court, or this court on *certiorari* has the same power. *Pennsylvania R. R. Co. v. Heister*, 8 Penn. St., 445. 1848.

82. — A proceeding to appropriate the right of way over lands alleged to have belonged to an unknown nonresident, which was regular upon its face, will not be set aside or interfered with upon the allegations of a petition in a *certiorari* proceeding that the owner was known and not notified, when such allegations were not supported by the return to the writ nor by any proof contained in the record. *Everett v. Cedar Rapids and Minnesota R. R. Co.*, 28 Ia., 417. 1869.

83. — This court will set aside, the proceeding of such commissioners, if they have adopted and acted upon illegal principles in making their valuation of land, and assessment of damages. To ascertain the fact, affidavits may be taken and read before the court, on a *certiorari*, although the merits of the case may not be inquired into. *New Jersey R. R. Co. v. Suydam*, 2 Harrison (N. J.), 25. 1839.

84. — A *certiorari* lies in all cases unless taken away by express words of a statute; and not only where there is no other remedy, but even where an appeal is given upon the merits. *Ib.*

85. *Change of courts.* Where the proceedings for appraisal were commenced before the first judge of a court of common pleas, whose office was abrogated by a change of the organic law, and a county judge was elected in his place, under the new constitution, it was *held*, that such proceedings might be continued and completed before such county judge. *Polly v. Saratoga and Washington R. R. Co.*, 9 Barbour (N. Y.), 449. 1850.

86. — The judge has the power to continue the proceedings by adjournment from day to day, although such power is not expressly given by the charter of the company. *Ib.*

87. *Disability of owner.* The right of taking land for railway purposes is not affected by the disability of the owner, as where

the owner is a *feme covert*. *East Tennessee and Virginia R. R. Co. v. Love*, 3 Head (Tenn.), 63. 1859.

88. *Dismissal.* Where, under the act of April 30, 1852, "to provide for compensation to owners of private property appropriated to the use of corporations," a railroad corporation regularly instituted proceedings in the proper probate court for the appropriation of a right of way over lands of a party made a defendant in such proceedings, and carried the same forward until a verdict was rendered and confirmed by the probate court fixing the amount to be paid by the corporation for the right of way sought to be appropriated; and the corporation immediately thereupon, having neither paid nor secured to be paid the amount of the verdict, caused notice to be entered on the journals of said court of its abandonment of such intended appropriation, *held*, I. That the probate court had no jurisdiction to proceed, on motion of the landowner, to thereupon render a judgment or order for the payment, by the corporation, of the amount of the verdict. II. In case there had not been entered on the journal of the probate court any such express abandonment, by the corporation, of its proposed appropriation but where the railroad corporation afterward failing either to pay or to secure to be paid the amount of the verdict, actually constructed its road on another line, not touching the lands of the defendant to the proceeding, the like results in law would follow. *State ex rel v. Cincinnati and Indiana R. R. Co.*, 17 Ohio St., 103, 1866; *Hayes v. Same*, *ib.*, 110.

89. — The North Mo., R. R. Co. instituted proceedings under its charter to obtain a condemnation of land upon which its railroad was located. *Held*, that the company might at any time before final judgment in such proceedings, change its route and dismiss the proceeding. *North Missouri R. R. Co. v. Lackland*, 25 Mo., 515. 1857.

90. — When a railroad company, after having commenced proceedings for the condemnation of land, upon which its railroad is located, exercises its right of dismissing the proceedings before the judgment of the court upon the report of the viewers or commissioners is rendered, the company should pay the costs and expenses growing out of the suit. *Same v. Reynal*, *ib.*, 534.

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91. In a proceeding under the act of 30th April, 1852, to ascertain the amount of compensation to be paid to the owner of property sought to be appropriated to the use of a corporation, such corporation is the actor, and may discontinue the proceedings, at any time, at least, before the submission of the matter to the jury. *Dayton and Western R. R. Co. v. Marshall*, 11 Ohio St., 497. 1860.

92. **Exceptions.** Where proceedings of commissioners appointed to assess damages for taking of railroad lands are regular, and there is nothing to show that they erred in the principles upon which their valuation was made, exceptions to the proceedings should be overruled. *Hannibal and St. Joseph R. R. Co. v. Muder*, 49 Mo., 165. 1871.

93. — Where several exceptions were filed by the owner of lands taken by a railroad, to the assessment of damages, each containing some valid objection to the assessment, though all might have been included in one general exception, that the damages assessed were too small, it was held that demurrers to the exceptions were rightly overruled. *White Water Valley R. R. Co. v. McClure*, 29 Ind., 536. 1868.

94. **Forfeiture.** The question of forfeiture cannot be tried in a proceeding to condemn land. *Oregon Cascade R. R. Co. v. Bailey*, 3 Or., 164. 1869.

95. **Judges — interest.** Where two of the judges of the court of common pleas are interested in the event of a proceeding, to appropriate land to the use of a railroad, and that fact appears on the record, and there is no evidence that the landholder waived his objection to the court, the order of such court appointing appraisers and directing a warrant to issue, will be reversed. *Gregory v. Cleveland, Columbus and Cincinnati R. R. Co.*, 4 Ohio St., 675. 1855.

96. **Organization.** In a proceeding for the appropriation of land by a railroad corporation, and the estimating of the compensation to be paid to the owner, it is essential that the company give evidence of a certificate or public record of its organization in accordance with the provisions of the statute. *Atlantic and Ohio R. R. Co. v. Sullivan*, 5 Ohio St., 276. 1855.

97. **Pleadings — amendment.** County commissioners have power to allow an amendment of a petition for the assessment of

damages by the construction of a railroad, after hearing the parties, and before issuing a warrant for a jury. *Grand Junction R. R. Co. v. County Com'rs of Middlesex*, 14 Gray (Mass.), 553. 1860.

98. — Where the petition fails to state that the owner is absent from the state, or the inability of the owner and the company to agree upon the damages, the defect may be obviated by an amended petition, filed before the view is had. *Pennsylvania R. R. Co. v. Porter*, 29 Penn. St., 165. 1857.

99. The land must be so described, either in the petition or the report, that its identity cannot be questioned — and where the proceedings are defective in this respect, they will be reversed. *Ib.*

100. — **increase of damages.** In cases where a hearing is had on a petition for an increase of damages for the location of a railroad or highway before a jury, in order to present the question of law involved, the statute (R. S., ch. 18, § 13), requires a written motion setting out the objection to the verdict, whether of law or fact, and exceptions filed to the ruling of the court in adjudicating thereon. If these requirements be not complied with, the court will decline to consider any objections to the verdict. *Bryant v. Knox and Lincoln R. R. Co.*, 61 Me., 300. 1872.

101. — **map.** The general railroad law, as amended in laws of 1859, p. 559, requires that a petitioner for appraisal of damages should allege that the railway company has made a map and survey thereof, and filed a certificate thereof. The map required must be full and accurate and complete in every respect. *Convers v. Grand Rapids and Indiana R. R. Co.*, 18 Mich., 459. 1869.

102. — **quantity of land.** The company is not bound to take and pay for the land described in the petition, if less is needed for its purposes. *Peoria and Rock Island R. R. Co. v. Bryant*, 57 Ill., 478. 1870.

103. — **second petition.** A petition to the mayor and aldermen of Boston for the assessment of damages was filed by two owners of land over which a railroad had been located, and an order of notice issued thereon. Some years afterwards, a new petition was filed by the administrator of one of the petitioners and the other petitioner, stating that the proceedings upon the first petition had been re-

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strained by a suit in equity, since dismissed, and praying that such proceedings be had in the premises as were prayed for in the first petition. *Held*, that an adjudication by the mayor and aldermen upon the last petition was, in effect, an adjudication upon the first, and authorized the petitioner to apply to the superior court for a jury. *Whitman v. Boston and Maine R. R. Co.*, 16 Gray (Mass.), 530. 1860.

104. — **sufficiency.** The sufficiency of the pleadings in a particular case — determined. *Farrant v. St Paul and Pacific R. R. Co.*, 13 Minn., 311. 1868.

105. — It is not necessary that the petition should show an intention to build the entire road, if a division of fifteen miles has been lawfully designated. *Chicago and Michigan Lake Shore R. R. Co. v. Sanford*, 23 Mich., 418. 1871.

106. — Each parcel sought to be appropriated should be distinctly described, and the reasons why it is necessary to proceed under the statute should be given. *Ib.*

107. — The fact of inability to agree to the damages is jurisdictional, and may be controverted like any other fact. *Ib.*

108. — In a claim for damages, under the R. S. 1833, for injuries to land occasioned by the construction of a public work, the same strictness is not required in the averments as in pleadings in a court of record. *Martinsville and Franklin R. R. Co. v. Bridges*, 6 Ind., 400. 1855.

109. — The written statement of the claim should show, however, whether the injury was occasioned by the passing through and appropriation of the claimant's land, or the taking of timber and other materials for which the statute provides. *Ib.*

110. — In a petition in behalf of the N. M. R. R. Co., for the condemnation of the land on which it was located, it was alleged that the road passed hills and valleys, and that a strip of 150 feet in width was necessary for the construction of the road: *held*, that this allegation was not traversable. *North Missouri R. R. Co. v. Gott*, 25 Mo., 540. 1857.

111. — A petition for a jury to assess damages, signed by the attorney of the company, *it seems*, is sufficient. *Tucker v. Erie and Northeast R. R. Co.*, 27 Penn. St., 281. 1856.

112. — The affidavit of the agent of the

company that he was unable to agree with the land owners, necessarily implies that he has made the attempt. *Ib.*

113. — In a proceeding by a railroad company under the railroad act of 1848, authorizing an appropriation of lands on which to construct a railroad, the company described the land to be appropriated as "fifty feet wide on each side of said railroad, as last surveyed, through subdivision lots Nos. 1, 2, 3 and 4, fractional section No. 1, of township 10 south, of range 7 east, commencing on the north bounds thereof, thence westerly and southerly on and near the boundaries thereof to a point in the west line of said No. 4, near the northwest corner; also, lots Nos. 11, 12, 13, 14 and 15, of the subdivision of river tract No. 87, in said county." The application was filed, February 28, 1851; and notice given, March, 4. View made and report filed, April 21, and possession taken by the company, April 22, 1851. In an action by a subsequent purchaser of the lands of the former owner, with notice, to recover the same from the company; on proof that said road was surveyed and staked out previous to the 1st of April, and found staked out by the viewers; *held*, that said description was sufficiently certain in the appropriation proceedings. *Cleveland and Toledo R. R. Co. v. Prentice*, 13 Ohio St., 373. 1862.

114. — The petition should be verified, and should set out the names of the owners, the fact that they cannot agree upon the compensation, or that the owner is absent or legally incapacitated to contract. (Act Feb. 19, 1849.) *Reitenbaugh v. Chester Valley R. R. Co.*, 21 Penn. St., 100. 1853.

115. — Though the statute does not require the court to have the owners summoned, it would be good practice to have them notified before viewers are appointed. Where the parties are incapacitated to contract, or beyond the reach of process, the court should appoint guardians and should make such decree or order as will be necessary to protect the interests affected. *Ib.*

116. — **trust.** The trustee, and not the *cestui que trust*, is the proper person to petition for a jury to assess damages caused by taking the trust estate for a railway; and if the suit be brought by the *cestui que trust*, the respondents may deny the petitioner's title at the hearing before the jury. *Davis v. Charles*

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River Branch R. R. Co., 11 Cushing (Mass.), 506. 1858.

117. — width of right of way. Where the plaintiff sues to condemn sixty feet in width, he will not be allowed to give evidence of the value of, and ask a verdict for the condemnation of forty-five feet in width. *Oregon Cascade R. R. Co. v. Bailly*, 3 Or., 164. 1869.

118. Practice. Points of practice decided. *New Jersey R. R. Co., Matter of*, 1 Harrison (N. J.), 893. 1838.

119. — Proceedings for the condemnation of lands for the use of railways — discussed. *Walker v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 1. 1840.

120. Record. R. S., ch. 18, § 12, makes it the duty of the person presiding at the view and hearing by the jury, to certify any decision or instruction by him given, when any party shall request it. Where a party does not request that such ruling be certified, he waives all right to the exception, and cannot call the person who presided as a witness to prove the rulings. *Allen v. Androscoggin R. R. Co.*, 60 Me., 494. 1872.

121. Right to open and close. On the hearing before a jury summoned to reassess damages for taking land for a railroad, the party claiming damages has the right to open and close. *Connecticut River R. R. Co. v. Clapp*, 1 Cushing (Mass.), 550. 1848.

122. — In an action to condemn lands to the use of a railroad company, when the issue is formed by a statement in the complaint that the defendant's damages did not exceed the sum of \$200, and a statement in the answer that the land sought to be appropriated is of the value of \$234, and that the additional damages to defendant resulting from such appropriation will amount to \$2,516, the defendant was permitted to open and close the case. *Oregon and California R. R. Co. v. Barlow*, 3 Or., 811. 1871.

123. — Upon a hearing before commissioners of appraisal, appointed pursuant to § 15 of the general railroad act of 1850, the commissioners have the right to decide which party shall open and close the argument. *Albany Northern R. R. Co. v. Lansing*, 16 Barbour (N. Y.), 68. 1852.

5. Report, judgment and subsequent proceedings.

124. Collateral proceedings. The validity of the condemnation of lands for railway purposes cannot be questioned in a collateral proceeding. *Evans v. Hafner*, 29 Mo., 141. 1859.

125. — The decision and award of commissioners appointed to assess damages sustained by a landowner from the location of a railroad, is a judicial act; and, unless appealed from, becomes *res adjudicata*, and cannot be collaterally impeached. *Butman v. Vermont Central R. R. Co.*, 27 Vt., 500. 1854.

126. — And after such award, which is not appealed from or vacated, the landowner cannot bring an action to recover damages which were not appraised and awarded, in consequence of the false representations of the agents of the company in regard to the manner in which the railroad was to be constructed. *Id.*

127. Judgment. All questions relating to the damage done are terminated by the inquest. *Baltimore and Susquehanna R. R. Co. v. Compton*, 2 Gill (Md.), 20. 1844.

128. — conditional. In rendering judgment for damages, such judgment must be unconditional; a judgment cannot be rendered for a certain sum if the railway company shall permit the passage of water at a certain point, and for an additional sum upon the refusal to permit such passage of water. *Winchester and Potomac R. R. Co. v. Washington*, 1 Robinson (Va.), 67. 1842.

129. — form. It is error to render an ordinary judgment against the corporation for the damages, without a decree for the conveyance of the land in question to the corporation upon the payment of the money. *Evansville and Crawfordsville R. R. Co. v. Miller*, 30 Ind., 209. 1868.

130. — Where an action is brought for damages against a railway company for taking land for its roadway, the judgment should identify the land, and, after awarding damages to the plaintiff, should vest the title to the land in the company. *Central R. R. Co. v. Merkel*, 32 Tex., 723. 1870.

131. — execution. When a railroad company has located its road through a person's land, and had the damages assessed by view-

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ers and confirmed by the court, this is a judgment in favor of the owner of the land for the amount, and he is entitled to execution, even although the company has not taken possession and they desire to change the route. *Neal v. Pittsburgh and Connellsville R. R. Co.*, 31 Penn. St., 19. 1854.

132. — An award of viewers, when confirmed by the court, is a judgment upon which an execution may be issued. *Davis v. North Pennsylvania R. R. Co.*, 2 Philadelphia Rep. (Penn.), 146. 1856.

133. — notice. The plaintiff is entitled to notice of the award of the commissioners in order that he may appeal if desired. In such case, where judgment has been rendered upon the award, without notice to the plaintiff, it will be reversed on appeal, and the cause remanded. *New Orleans, Mobile and Chattanooga R. R. Co. v. Bougere*, 23 La. An., 803. 1871.

134. — payment. The proceedings, under the statute for the condemnation of lands, simply fix the price at which, upon payment, the company may take the right of way. The judgment assessing the damages passes no title to the company before payment, and does not bind it to accept the lands and pay the amount assessed. *Gear v. Dubuque and Sioux City R. R. Co.*, 20 Ia., 523. 1866.

135. — A judgment, instead of being entered in the form provided for by the statute, having been entered in the form of an ordinary judgment, will not be construed to have any greater effect for that reason. *Ib.*

136. — sale of road. The plaintiff's land was appropriated by a railway company for its roadway, and a judgment for the amount of damages rendered in the plaintiff's favor on appeal to the circuit court. Before the judgment was paid, the railroad was sold under a mortgage (which covered the company's right of way), to persons who organized a new company pursuant to the statute, and continued to operate the road, using the track as laid across plaintiff's land. *Held*, that the plaintiff had a right of action on the judgment against the new company. *Pfeifer v. Sheboygan and Fond du Lac R. R. Co.*, 18 Wis., 155. 1864.

137. Payment. Where a railway company had seasonably filed a petition in the nature of an appeal, which was dismissed at the October term, 1870, and the plaintiffs applied

for the security for the payment of damages required by R. S., § 6, and no security was given, but, in the following December, the damages awarded and costs were paid. *Held*, that in the absence of evidence to the contrary, this payment would be presumed to be in satisfaction of the damages awarded by the commissioners for the land taken to which the assessment refers. *Eaton v. European and North American R. R. Co.*, 59 Me., 520. 1871.

138. — The payment of the compensation awarded by the commissioners, into court, pending an appeal, was *held* to be sufficient to entitle the Chester R. R. Co., under its charter, to take possession of the land and construct its railway. *Cooper v. Chester R. R. Co.*, 4 C. E. Green's Ch. (N. J.), 199. 1868.

139. — Where a statute provided that in case any railroad company should not, within twelve months after the acceptance of its route by the commissioners, procure and pay for the right of way over all land covered by the location, such acceptance by the commissioners should be void, it was *held*, that such failure to procure and pay for the right of way was not in the nature of a forfeiture, to be taken advantage of only by the state in a direct proceeding against the company, but that the whole proceeding became of no effect upon the expiration of the twelve months. *New York, Housatonic and Northern R. R. Co. v. Boston, Hartford and Erie R. R. Co.*, 36 Conn., 196. 1869.

140. — Where a location of a road had been accepted by the commissioners before the passage of the above statute, and the statute was prospective only in its terms, it was *held*, that the case came within the spirit of the statute, and that on the failure of the company to secure and pay for the land covered by its route within twelve months after the passage of the act, its right to the land was gone. *Ib.*

141. — The provision in the act of December 25, 1844, requiring that damages assessed in favor of land owners for land taken for railroad corporations, shall be paid into the treasury by the corporations, and tendered by the commissioners, before any entry to construct the railroad, was designed for the protection of the land owner, and may be waived by him. And a railroad corporation that has

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adopted that act, and entered upon land taken under its provisions, is liable in debt for the damages awarded, at the suit of the land owner. *Smart v. Portsmouth and Concord R. R. Co.*, 20 N. H., 233. 1850.

142. — A right of action having attached under the act of 1844, prior to the act of July 2, 1847, is not divested by a change of the location of the road, and an assessment of the actual damage to the land owner, under the provisions of the latter act. *Ib.*

143. **Report — amendment.** Where the charter of a railroad company required that in assessing damages for right of way, the benefits and damages should be specified separately in the report; an omission to set out said particulars may be corrected by amendment to their return. *Greenville and Columbia R. R. Co. v. Nunnamaker*, 4 Richardson's Law (So. Car.), 107. 1850.

144. — **confirmation.** Where it appears that the commissioners have been regular in their proceedings, and due notice of the motion for confirmation has been given, it is a matter of course under the statutes to confirm the report. *New York and Erie R. R. Co. v. Corey*, 5 Howard's Pr. (N. Y.), 177. 1850.

145. — **diagram.** Where land has already been taken for the track of a railroad, and the road has already been located and built, and is being operated, a report of commissioners thereafter made, appraising the value of the land taken, and assessing damages for taking it, in which is a diagram showing the slope of the land and the course the road takes across it, stating upon which subdivision of a particular section the land is located, contains a sufficient description of the land taken, although no survey is made. *Strang v. Beloit and Madison R. R. Co.*, 16 Wis., 635. 1863.

146. — **evidence annexed.** The testimony annexed to the report of commissioners appointed to appraise property taken for railroad purposes, pursuant to statute, is to be considered a part of the report, for the purpose of a review of the commissioners' proceedings. *Rondout and Owego R. R. Co. v. Deyo*, 5 Lansing (N. Y.), 298. 1871.

147. — **filing.** The act of the legislature (sess. acts of 1850-51, § 4, p. 443), authorizing assessments of damages to the owners of land through which the Louisville and Nashville

railroad might pass, required these assessments to be filed in the county court, and until so filed they were only private papers, and not binding upon the party for whose benefit they were made, and not pleadable in bar of such party in a claim for damages. *Louisville and Nashville R. R. Co. v. Thompson*, 18 B. Monroe (Ky.), 735. 1857.

148. — **form.** Where the commissioners in their report use numerals only, where it is evident from the report that the commissioners intended that such numerals should represent dollars and cents, the report is not void because the commissioners omitted to use either the dollar mark, or the words "dollars" and "cents," or some abbreviation of the same. *Hunt v. Smith*, 9 Kan., 137. 1872.

149. — It is not necessary for the jury to state in their report how the damages accrued. *Tucker v. Erie and Northeast R. R. Co.*, 27 Penn. St., 281. 1850.

150. — A report embracing awards to different owners, signed by the viewers, is sufficient. It is not necessary that such award should be separately signed. *Ib.*

151. — Each owner has a right, under the statute, to have a finding as to the value of his land and the necessity for taking it; and a general finding, giving a single sum for the taking of the land of several owners, is invalid. *Chicago and Michigan Lake Shore R. R. Co. v. Sanford*, 23 Mich., 418. 1871.

152. — The report of the railroad commissioners in the laying out of a road should contain a description of such fixed, substantial and visible monuments from point to point, that a jury, in going upon the ground, can readily discover where the laying out is. *Northern R. R. Co. v. Concord and Claremont R. R. Co.*, 27 N. H., 133. 1853.

153. — **gross sum.** Where the law required the viewers in assessing the damages to find and report separately the damages and the benefit, and the difference between the benefits and advantages, and instead the jury found a gross sum due the owner, the report was held insufficient. *Ohio and Pennsylvania R. R. Co. v. Wallace*, 14 Penn. St., 245. 1850.

154. — **motion.** The railroad act of 1850 does not give the court power to set aside the report of commissioners of appraisal upon motion. *Albany Northern R. R. Co. v. Cramer*, 7 Howard's Pr. (N. Y.), 104. 1852.

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155. — **new trial.** The provisions of the practice act in relation to new trials have no application to a motion to set aside the report of commissioners appointed to assess damages. *Central Pacific R. R. Co. v. Pearson*, 35 Cal., 247; *Western Pacific R. R. Co. v. Reed*, ib., 621, 1868.

156. — **review.** The report of the commissioners must show a strict compliance on their part with the provisions of the statute. *Central Pacific R. R. Co. v. Pearson*, ib., 247.

157. — Their report is to be reviewed upon all matters which should be therein stated, upon the report itself, and not upon bills of exceptions. *Ib.*

158. — The court can compel the commissioners to amend their report. *Ib.*

159. — Fraud, or misconduct on the part of the commissioners, may be shown by affidavits or other competent evidence. *Ib.*

160. — Statements made by way of a bill of exceptions after the report is made should be considered as an amendment to the report. *Ib.*

161. — The proceedings being regularly conducted, the opinion of the commissioners on the facts, and also the propriety of the instructions or declarations of law asked on a motion to set aside the report of the commissioners, cannot be reviewed in the supreme court. *Lee v. Tebo and Neosho R. R. Co.*, 53 Mo., 178. 1873.

162. — **set aside.** Where the report of the viewers is set aside, the judge, in ordering a review, must appoint a new set of viewers. Acts of 1857, p. 250, § 9. *Hannibal and St. Joseph R. R. Co. v. Rowland*, 29 Mo., 337. 1860.

163. — But where the judge, upon the making of the report of the viewers, sets the same aside on the ground that the damages had not been estimated in the mode required by law, the award of damages being conditional, and sends back the same viewers with instructions as to the rule in assessing damages, this would not be a review. *Ib.*

164. — **signature.** The general railroad act of 1850 requires the report to be signed by a majority of the commissioners, but does not require them all to be together at the signing; nor is there any rule of law or principle of public policy requiring it. *Rochester and Genesee Valley R. R. Co. v. Beckwith*, 10 Howard's Pr. (N. Y.), 168. 1854.

165. — Any commissioner, on application for confirmation of a report, which he has properly signed, should not be permitted to stultify himself by alleging that he signed the report without reading or hearing it read. His affidavit should not be received in proof of such facts. *Ib.*

166. — **under charter.** Under the act of assembly to authorize the governor to incorporate the Philadelphia and Delaware county and Southwark railroad companies, passed the 2d day of April, 1831, the court of common pleas by which the jurors may be appointed to assess the damages sustained by the owner of land taken for the railroad, has no power to examine into the merits of the report and set it aside on the mere ground of inadequacy or excessiveness of damages. *Willing v. Baltimore R. R. Co.*, 5 Wharton (Penn.), 460. 1840.

6. Appeals and writs of error.

167. **Appeal.** An appeal will lie from the assessment of commissioners, appointed under the act of March 3, 1845. *Austin v. Belleville and Illinois town R. R. Co.*, 19 Ill., 310. 1857.

168. — The necessity or propriety of taking lands by a railway company, cannot be determined on an appeal from the award of the commissioners fixing the value of the lands. In that appeal the only question is the value of the land taken. *Burns v. Milwaukee and Mississippi R. R. Co.*, 9 Wis., 450. 1859.

169. — On appeal, the damages may be either increased or diminished. *St. Paul and Sioux City R. R. Co. v. Murphy*, 19 Minn., 500. 1873.

170. — Where the conditions and restrictions on which the C. & S. R. R. Co., proposed to take land of B. for right of way, had been signed by the attorneys for the company and by B., it was held, that B. was not thereby precluded from recovering, on appeal, the damages sustained over and above the value of the land taken by the company. *Charleston and Savannah R. R. Co. v. Blake*, 12 Richardson's Law (So. Car.), 634. 1860.

171. — **acceptance of compensation.** — Where a party to a proceeding to assess damages has accepted the amount assessed, he is not afterwards entitled to appeal. *Mississippi and Missouri R. R. Co. v. Byington*, 14 Ia., 572. 1863.

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172. — agreement. Where a judgment by consent was entered for damages in the county court, for the purpose of having the cause removed by appeal to the circuit court, and it afterwards appeared that such right of appeal did not exist, *held*, that although the damages were excessive, a court of equity would not interfere and grant relief. *Richmond and Petersburg R. R. Co. v. Shippen*, 2 Patton and Heath (Va.), 327. 1856.

173. — bond. The county clerk is the proper officer to approve the appeal bond given by the land owner who appeals from the decision of the county commissioners as to the appraisement and assessment of damages to land appropriated by a railroad company for right of way. *Missouri River, Fort Scott and Gulf R. R. Co. v. Owen*, 8 Kan., 409. 1871.

174. — The filing of an appeal bond by the corporation, in a proceeding for the assessment of damages, will be regarded as securing the compensation. *Weir v. St. Paul, Stillwater, etc., R. R. Co.*, 18 Minn., 155. 1872.

175. — Camden and Woodbury R. R. Co. Under the charter of the Camden and Woodbury R. R. Co. the company cannot, pending an appeal, obtain the right to enter upon the land and construct its road, by tendering the amount awarded by the commissioners. *Browning v. Camden and Woodbury R. R. Co.*, 3 Green's Ch. (N. J.), 47. 1837.

176. — description of land. An appeal under the act of December 25, 1844, § 5, by one whose land has been taken for the use of a railroad, need not describe the land so taken. *Chuse v. Sullivan R. R. Co.*, 20 N. H. 195. 1849.

177. — discretion. A scrupulous regard must be observed in ascertaining the value of private property taken for railway purposes. Therefore, where one set of commissioners had assessed the value of the property, and, at the request of the company, the report was set aside and another assessment made, reducing the value below one-half the first assessment, which was approved by the judge, the supreme court, in the exercise of its discretionary powers, will remand the cause, with instructions that a new commission be appointed. *New Orleans, Mobile and Chattanooga R. R. Co. v. Zeringue*, 23 La. An., 521. 1871.

178. — effect of appeal. Where land has been entered upon by the company, valued under the judge's warrant, and an appeal from the valuation has been taken and carried to the common pleas, it is error in that court to order the warrant and proceedings under it to be quashed. *Little Miami R. R. Co. v. Perrin*, 16 Ohio, 479. 1847.

179. — evidence — report. On an appeal from their determination, the report of the commissioners in the condemnation proceedings, is legal evidence for the appellant. *Missouri River, Fort Scott and Gulf R. R. Co. v. Owen*, 8 Kan., 409, 1871; *St. Joseph and Denver R. R. Co. v. Orr*, *ib.*, 419.

180. — excessive damages. The remedy of a railway company in case of an excessive assessment of damages, is by an appeal, and not by exceptions. *Roberts v. Central Passenger R. R. Co.*, 1 Brewster's Eq. (Penn.), 538. 1868.

181. — hearing on appeal. The party deeming himself aggrieved by the decision of the commissioners, must bring the matter before the court on appeal, under the statute. And upon such appeal, the court can look only at the matters contained in the report of the commissioners, as the foundation of any order to be made upon the appeal. *Ex parte* affidavits and papers cannot be received. *New York and Erie R. R. Co. v. Corey*, 5 Howard's Pr. (N. Y.), 177, 1850; *Same v. Coburn*, 6 *ib.*, 223, 1851.

182. — how taken. In the absence of any statutory direction as to the manner of taking an appeal from the assessment of damages, it seems that any act of the party usually required in cases of appeal from one tribunal to another, is sufficient. *Robertson v. Eldora R. R. and Coal Co.*, 27 Ia., 245. 1860.

183. — It was accordingly *held*, that notice of appeal to the the opposite party is sufficient. And it seems that no bond is necessary, but if it is, an omission to file it would not operate to dismiss the appeal, as the court could require one to be filed. *Ib.*

184. — It seems that service of notice of such appeal upon a director of the company is sufficient, but if not, it is waived by the appearance of the company. Rev. of 1860, § 2825. *Ib.*

185. — The statute of January 18, 1853, provides for an appeal from the assessment

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of the commissioners, but does not say how it shall be taken; *held*, that the filing of an appeal bond with the clerk of the district court and a claim of appeal, within the required time, was sufficient. It is not essential that notice of the appeal should be given within the required time. *Dubugue and Pacific R. R. Co. v. Crittenden*, 5 Ia., 514. 1857.

186. — Where such bond was filed with the sheriff, it was held sufficient. *Dubugue and Pacific R. R. Co. v. Shinn*, *ib.*, 516. 1857.

187. — *Henderson and Nashville R. R. Co.* No appeal is authorized in controversies between the Henderson and Nashville R. R. Co. and individuals, unless the appeal be prayed at the time of rendering the judgment, and an appeal bond entered into within the time allowed by the court for that purpose. (Acts of 1850-1, p. 281.) *Henderson and Nashville R. R. Co. v. Dickerson*, 16 B. Monroe (Ky.), 297. 1855.

188. — *immaterial errors.* In the exercise of the discretion vested in the court, upon appeal from an award of commissioners, it will not interfere with their proceedings, unless satisfied that some substantial error has been committed. *Troy and Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barbour (N. Y.), 100. 1852.

189. — *increase of amount.* Where an assessment of damages was made by commissioners and the railway company deposited the amount assessed and took possession of the land, and the land owner appealed, and the chancellor reversed the appraisal and ordered the company to pay a larger amount, which it refuses to do, the land owner may maintain ejectment, although the act incorporating the company provides that on depositing the amount awarded by the commissioners, and giving notice thereof, the title to the land should vest in the corporation in fee simple. *Dater v. Troy Turnpike and R. R. Co.*, 2 Hill (N. Y.), 629. 1842.

190. — On appeal, the jury is not limited in the assessment of damages to the amount fixed by the commissioners. *North Eastern R. R. Co. v. Sineath*, 8 Richardson's Law (So. Car.), 185. 1855.

191. — *irregularity.* Where it appears from the report of commissioners for the appraisal of damages for taking property, that there was no irregularity committed by

the commissioners, and no error existed which would authorize the court to set aside the proceedings, this court on appeal must affirm the order confirming the report, although affidavits were used on the motion for confirmation of the report to show error. *Rondout and Oswego R. R. Co. v. Field*, 38 Howard's Pr. (N. Y.), 187. 1869.

192. — *Irregularities in the initial proceedings to assess damages must be brought up by certiorari.* An appeal waives the irregularities. *Delaware, Lackawanna and Western R. Co. v. Burson*, 61 Penn. St., 369. 1869.

193. — *joint owners.* Where damages for right of way are assessed jointly to two persons as owners of the land, an appeal cannot be taken and prosecuted by one of them without uniting the other therein, or making him a party thereto, by notice or otherwise. *Chicago, Rock Island and Pacific R. R. Co. v. Hurst*, 30 Ia., 73. 1870.

194. — *jurisdiction.* The district court has concurrent jurisdiction with the circuit court of appeals in right of way proceedings. *Davey v. Burlington, Cedar Rapids and Minnesota R. R. Co.*, 31 Ia., 553. 1871.

195. — *jury trial.* On appeal from the assessment of damages, either party has the right to a jury trial under the constitution. *Isom v. Mississippi Central R. R. Co.*, 36 Miss., 300. 1858.

196. — *land owner as plaintiff.* Upon an appeal by the owner of the land, he assumes the position of plaintiff. *Minnesota Valley R. R. Co. v. Doran*, 17 Minn., 188. 1871.

197. — *Lawrenceburg, etc., R. R. Co.* The 15th section of the charter of the Lawrenceburg and Upper Mississippi R. R. Co. does not preclude the company from prosecuting a writ of error to the supreme court from an award of damages for land taken by the company in the construction of its road, although that section states that the judgment of the circuit court shall be final. *Lawrenceburg and Upper Mississippi R. R. Co. v. Smith*, 3 Ind., 253. 1851.

198. — *limitation.* The statute of 1836, prescribing the mode by which damages shall be obtained for injuries done by chartered companies running their roads through the aggrieved party's land, makes the award of the appraisers final, unless an appeal is taken within 30 days after the award is made; and

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such appeal must be governed by the same rules and regulations as appeals from judgments from justices of the peace, except that no bond is required of the state when a party. *Pruitt v. Shelbyville Lateral Branch R. R. Co.*, 2 Carter (Ind.), 530. 1851.

199. — The plaintiffs applied to the Shelbyville Railroad Company for damages occasioned by the road of the company running through their land. Appraisers were appointed, who awarded the plaintiffs \$100. The plaintiffs moved the circuit court to grant them an appeal, on affidavit filed, stating that the applicants were not notified of the award until about six months after it was made, and had they been notified, they would have taken an appeal within 30 days. *Held*, that these facts did not authorize the circuit court to grant the appeal. *Ib.*

200. — notice. Where two separate awards have been made to the same owner on two separate parcels of land in different towns, one notice of appeal from both awards is sufficient. *Neff v. Chicago and Northwestern R. R. Co.*, 14 Wis., 370. 1861.

201. — Where a notice of appeal to the circuit court from an appraisal of lands taken for railroad purposes (which notice was required to be served on the company and also upon the clerk of the court) was served upon said company, and afterwards filed with the clerk, and he was made acquainted with its contents: *held*, that although the notice to the clerk was informal, it was not error for the court to refuse to dismiss the appeal on that ground. *Black v. Chicago and Northwestern R. R. Co.*, 18 Wis., 208, 1864; *Ford v. Same*, *ib.*

202. — Where a party appeals to the district court, from the assessment of damages of a jury appointed by the sheriff, he is in court for all substantial purposes; and if he does not appear and urge his right to a new assessment, and the verdict of the jury is affirmed, he cannot object to the proceedings in the appellate court, on the ground of a want of notice. *Borland v. Mississippi and Missouri R. R. Co.*, 8 Ia., 148. 1859.

203. — When the report of commissioners assessing damages was taken to the district court on appeal, fourteen months after the filing of the appeal bond, it was *held*, that the court erred in hearing the cause, and rendering a judgment therein, before notice of ap-

peal was served on the appellee. *Burlington and Missouri River R. R. Co. v. Sinnamon*, 9 Ia., 208. 1859.

204. — order. No appeal lies from an interlocutory order in such proceedings. *Pack v. Chesapeake and Ohio R. R. Co.*, 5 W. Va., 118. 1872.

205. — new trial. An appeal lies from an order granting or refusing a new trial in a proceeding to condemn lands. *San Francisco and San Jose R. R. Co. v. Mahoney*, 29 Cal., 112. 1865.

206. — owner not made a party. Where a railroad company proceeded to condemn land for its road, and the proceedings were not against the real owner, who, however, joined in an appeal from the appraisal, it was not error for the court, on motion, to dismiss the proceedings and set aside the award, with costs in favor of the appellants, as in case of a nonsuit. *Wright v. Wisconsin Central R. R. Co.*, 20 Wis., 341. 1872.

207. — Whether a judgment would have been binding on the appellant is not decided, but the company had the right to dismiss its proceedings upon equitable terms, in order to commence them against the true owner. *Ib.*

208. — Penn. R. R. Co. The court of common pleas has supervisory power over the proceedings of viewlers to assess damages against the Pennsylvania R. R. Co.; no appeal is given to the supreme court, and the judgment of the court below is conclusive except for errors apparent in the record. *Heise and Mifflin v. Pennsylvania R. R. Co.*, 62 Penn. St., 67. 1869.

209. — Depositions and documentary evidence in such cases are not a part of the record, and cannot be read in the supreme court. *Ib.*

210. — pleadings. In an appeal from proceedings to assess damages occasioned by the construction of a railway, it is unnecessary for the plaintiff to file a declaration. *Lehigh Valley R. R. Co. v. Lazarus*, 28 Penn. St., 208. 1857.

211. — presumptions. The presumptions are in favor of the correctness of the finding in the court below. *Mississippi and Missouri R. R. Co. v. Byington*, 14 Ia., 572. 1863.

212. — record. Objections to the proceedings before a sheriff's jury, that the respondent had no notice of the application to the

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commissioners for a jury, or that three disinterested commissioners were not present, as required by the Rev. Sts., ch. 14, § 27, or that there were other cases of the same kind, which ought to have gone to the same jury, cannot be taken advantage of on appeal, unless the grounds of such objections appear on the record. *Walker v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 1. 1849.

213. — refusal to grant right of way. Upon appeal, where it appears from the record, that the jury were selected and required "to assess the damages done to each and every piece or tract of land in the county, in all cases not agreed upon with the owners of the land," that the landowner was notified of the day when the assessment would be made; that on the day of the assessment, he gave notice of appeal and filed his bond; and that afterward she filed with the sheriff his exceptions to the report of the jury; it is sufficiently shown that the owner of the land had refused to grant the right of way through his premises, and that the sheriff had power to have the damages assessed by a jury, *Mississippi and Missouri R. R. Co. v. Rosseau*, 8 Ia., 373. 1859.

214. — review. The quantity and quality of the lands or materials, with their value, should appear upon the face of the report; and it should be stated that there has been a comparison of the advantages and disadvantages; and the amount of damages and to whom payable should be reported. *Reitenbaugh v. Chester Valley R. R. Co.*, 21 Penn. St., 100. 1853.

215. — The review will be confined to errors appearing upon the face of the report; as the law makes no provision for bringing up the evidence, the question of amount of damages will not be considered. *Ib.*

216. — right of appeal. A railroad company having obtained the appointment of commissioners to appraise damages for the taking of land under § 3 of the railroad act of 1851, has the right to appeal from their award. *Troy and Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barbour (N. Y.), 100. 1852.

217. — right to enter pending appeal. After the report of viewers, and during the pendency of the appeal, the company have a qualified right to enter upon and use the land in the meanwhile and until the final result;

but, unless they pay the amount found by the verdict and judgment, the owner may recover the land in ejectment. *Levering v. Philadelphia, Germantown, etc. R. R. Co.*, 8 Watts & Sergeant (Penn.), 459. 1844.

218. — right to open and close. In case of an appeal from the assessment of damages by the commissioners, the court may direct which party shall have the opening and closing of the evidence and argument. But if the court makes no such order, the owner of the land shall have the right to open and reply. *Charleston and Savannah R. R. Co. v. Blake*, 12 Richardson's Law (So. Car.), 634. 1860.

219. — statute. The statute of Minnesota in relation to appeals, construed. *McNamara v. Minnesota Central R. R. Co.*, 12 Minn., 388 1867.

220. — Upon appeal from an assessment of damages by a sheriff's jury, under act of January 18, 1853, the cause is to be heard on its merits, and not upon exceptions taken to the action of the sheriff or jury, or to the competency of either of them to act in the premises. *Mississippi and Missouri R. R. Co. v. Rosseau*, 8 Ia., 373. 1859.

221. — The appeal is from the assessment of the jury, and the question is whether the owner is entitled to, or shall be adjudged, a greater amount of damages than was awarded him by the sheriff's jury. *Ib.*

222. — The right of appeal is purely a statutory right, and unless given by the statute, it does not exist. *Western Union R. R. Co. v. Dickson*, 30 Wis., 389. 1872.

223. — Where no provision is made for an appeal from an order of the county judge appointing commissioners, his refusal to appoint could be remedied by a *mandamus*, and an appointment without authority by a *certiorari*. *Ib.*

224. — The party who objects to the appointment of commissioners by the county judge, on the ground of lack of authority, may have that question determined on an appeal from their award. *Ib.*

225. — to supreme court. An appeal to the supreme court, from the confirmation of a report of an assessment of damages by a jury, empanelled under laws of 1864, p. 13, brings up the case as it stood before the court that confirmed the report. *Peninsular R. R. Co. v. Howard*, 20 Mich., 18. 1870.

226. — The supreme court will not review the evidence upon which the viewers of a right of way, taken by a railroad company, assess damages. *Winebiddle v. Pennsylvania R. R. Co.*, 2 Grant's Cases (Penn.), 32. 1852.

227. — The plaintiff obtained an appropriation of the defendant's land by proceedings before the probate court, and paid in the amount of the assessment, \$1,425. The plaintiff then, by *certiorari* of the court of common pleas, obtained a reversal of the proceedings of the probate court, and a second assessment was made at \$1,612, in the court of common pleas. Without paying the excess or obtaining final judgment for title, the plaintiff filed a petition in error in this court. *Held*, that the petition in error was prematurely prosecuted, the court of common pleas not having finally disposed of the case. *Steubenville and Indiana R. R. Co. v. Patrick*, 7 Ohio St., 170. 1857.

228. — A proceeding instituted in a circuit court in behalf of the North Mo. R. R. Co., under its charter, to obtain a condemnation of land for its right of way, is a proceeding in which the court acts in its judicial capacity; an appeal will lie to the supreme court from the final judgment of the circuit court, in such proceeding. *North Missouri R. R. Co. v. Lackland*, 25 Mo., 515. 1857.

229. — The statute providing for bringing cases before the supreme court upon exceptions, extends only to cases in which the proceedings in the court below are according to the course of the common law; therefore road cases, and proceedings to assess land damages, where land is taken for a railroad, cannot be brought up on exceptions. *Courser v. Vermont Central R. R. Co.*, 25 Vt., 476. 1853.

229. — In a doubtful case, after the circuit court has passed upon the question, the High Court of Errors and Appeals will not set aside the inquest of a jury assessing damages. *New Orleans, Jackson and Great Northern R. R. Co. v. McBride*, 38 Miss., 32. 1859.

230. — *suspends payment.* Where damages have been assessed by a sheriff's jury, and the amount so assessed has been deposited with the sheriff and the company has appealed, the right of the land owner to receive the amount so assessed and deposited is suspended until the appeal is heard. *Peterson v. Ferreby*, 30 Iowa, 327. 1870.

231. — *tender.* The party on whose behalf an assessment of damages is made, must tender the amount assessed before the right of entry can arise; and if it should be important that the entry should be made before an appeal from the assessment can be disposed of, the party entering will not be precluded from further litigating the amount of damages by making such tender as would, under the constitutional provision, authorize him to enter. The tender should be the full amount of the assessment. The fact that it is accepted, will not change the rights of the parties. *Indianapolis and Cincinnati R. R. Co. v. Brower*, 12 Ind., 374. 1859.

232. — *time.* Appeals from such assessments must be entered within thirty days from the *filing*, not from the *confirmation* of the report. The act of April 27, 1855, is repealed by the act of April 9, 1856. *Gwinner v. Lehigh and Delaware Gap R. R. Co.*, 55 Penn. St., 126. 1867.

233. — *verdict.* On the trial of an appeal, under the charter in this cause, it is not sufficient that the verdict should be given for a gross sum in damages. *Peoria and Rock Island R. R. Co. v. Bryant*, 57 Ill., 478. 1870.

235. — *view.* On appeal, the jury will try the question of damages as in other cases, and not upon a view of the premises as made by the appraisers; so *held* under the charter of the N. & C. R. R. Co. *Hord v. Nashville and Chattanooga R. R. Co.*, 2 Swan (Tenn.), 497. 1852.

236. — *Wilmington, etc. R. R. Co.* The jurisdiction of the county courts to review, confirm or set aside inquisitions under the law authorizing the W. & S. R. R. Co. to condemn land, is special and limited, and no appeal lies from its decisions to any other court. *Wilmington and Susquehanna R. R. Co. v. Condon*, 8 Gill and Johnson (Md.), 443. 1837.

237. *Writ of error.* A petition in error may be entertained in the supreme court to revise the judgment of the probate court in a proceeding for the appropriation of land by a railroad corporation for its right of way. *Atlantic and Ohio R. R. Co. v. Sullivan*, 5 Ohio St., 276. 1855.

238. — The limitation of fifteen days, fixed for the commencement of proceedings in error, by § 9 of the act of April 30, 1852, "to provide for the compensation of owners of

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property appropriated to the use of corporations," is not, by implication, repealed nor superseded by the provisions of § 523 of the Code of Civil Procedure. *Buckingham v. Steubenville and Indiana R. R. Co.*, 10 Ohio St., 25, 1859; see *Little Miami R. R. Co. v. Hopkins*, 19 ib., 279, 1869.

239. — An order that all proceedings on a judgment shall be stayed, and that no writ of *habere facias possessionum* shall issue thereon, until the final determination of a pending proceeding, to assess damages for taking the land recovered, "subject to such further order of the court as the justice of the case may require," is not a final judgment, and is not removable by writ of error. *O'Hara v. Pennsylvania R. R. Co.*, 2 Grant's Cases (Penn.), 241. 1858.

7. Costs.

240. Appeal. A railroad act provided for an appeal from the judgment of a justice of the peace, on an assessment of damages for land taken, etc., "as in other cases." *Held*, that by reducing plaintiff's judgment five dollars or more on the appeal, the appellant was entitled to costs. *Indiana Central R. R. Co. v. Atkinson*, 6 Ind., 149. 1855.

241. — Where the estimate of a petitioner's damages, as made by the county commissioners, is revised by a jury, on the application of either party, and the amount reduced, and the verdict of the jury is accepted by the court of common pleas, neither party is entitled to recover the costs of the hearing before the jury. *Gray v. Lowell and Lawrence R. R. Co.*, 4 Cushing (Mass.), 609, 1849; *Harvard Branch R. R. Co. v. Rand*, 8 Cushing (Mass.), 218. 1851.

242. — charter. On an appeal, under the charter of the G. & C. R. R. Co., from the commissioners appointed to assess damages, the landowner may have judgment and execution against the company for the amount assessed by the jury, but neither party is entitled to costs. *Greenville and Columbia R. R. Co. v. Partlow*, 6 Richardson's Law (So. Car.), 286. 1852.

243. — There is no provision of law, by which the A. & St. L. R. R. Co. can be compelled to pay for the services and expenses of

the commissioners employed in assessing the damages sustained by the owners of the lands through which the road was built. *Atlantic and St. Lawrence R. R. Co. v. Cumberland County Commissioners*, 28 Me., 112. 1848.

244. — losing party. R. S., ch. 51, § 8, provides that when an appeal is taken from the county commissioners' assessment of damages, the losing party is to pay the cost thereon. Where the commissioners had estimated the damages at \$650, and, on appeal by the corporation, the jury estimated the damages at \$435, it was *held*, that the company was the losing party, and liable for costs. *Bangor and Piscataquis R. R. Co. v. Chamberlain*, 60 Me., 285. 1872.

245. — must be paid by company. Expenses attending an assessment of damages in acquiring right of way include costs; both costs and damages are to be paid before the land condemned can be taken. *Chicago and Milwaukee R. R. Co. v. Bull*, 20 Ill., 218. 1858.

246. — not recoverable unless provided by law. In a proceeding against a railroad company to recover damages for injury done to the lands of an individual, costs are not recoverable unless given by the statute which provides the remedy. *Herbein v. Railroad Co.*, 9 Watts (Penn.), 272. 1840.

247. — A judgment in a proceeding to assess damages for land taken by a railroad company, which requires that not only the amount assessed by the jury, but also the costs of suit shall be paid before the land shall vest in the company, is erroneous. *Evansville, Indianapolis and Cleveland R. R. Co. v. Fitzpatrick*, 10 Ind., 120, 1858; *Same v. Stringer*, ib., 551.

248. — Under the act of the 8th of February, 1834, supplementary to the act to incorporate the Philadelphia, Germantown and Norristown R. R. Co., one who obtains an award for damages is not entitled to the costs of his witnesses examined before the jury appointed to assess the damages. *Philadelphia, etc., R. R. Co. v. Johnson*, 2 Wharton (Penn.), 275. 1836.

249. — what fees are costs. The term costs includes officer's fees as well as the party's own charges for witnesses, where witnesses can legally be called and examined. *Pennsylvania R. R. Co. v. Keiffer*, 22 Penn. St., 356. 1853.

8. *General matters.*

250. Abandonment. In contemplation of law, the right of way for a railway, acquired under the right of way act, is taken by the state for public use; it is therefore competent for the legislature to provide for its transfer to another company, upon the failure of the company, for whom it was first condemned, to construct its road for a prescribed period, and upon compensation being made to the latter. *Noll v. Dubuque, B. and M. R. R. Co.*, 32 Ia., 66. 1871.

251. — Where the right of way is conveyed to a railway company upon condition that the road shall be built within three years, and kept up and operated, the grantor cannot inquire into the legality of the conveyance of such right of way by the company to another company, so long as the road is operated as a railroad. *Louisville and Nashville R. R. Co. v. Covington*, 2 Bush (Ky.), 526. 1866.

252. — An easement acquired by express grant, instead of by prescription, is not lost by mere nonuser, where the owner of the servient estate does no act which prevents the use. *Noll v. Dubuque, B. and M. R. R. Co.*, 32 Ia., 66. 1871.

253. Action at law. Where no remedy is given for the taking of private property for railway purposes, a suit may be brought at common law. *Indiana Central R. R. Co. v. Boden*, 10 Ind., 96, 1858; *Lafayette Plankroad Co. v. New Albany and Salem R. R. Co.*, 13 ib., 90, 1859.

254. Additional lands. Additional lands should not be taken for railway purposes unless in a case of actual necessity, and it must clearly appear that the company has not already a sufficient quantity. On such application it is not necessary for the owner to raise the objection in his pleadings that the company has land enough; the court will act upon the ascertained facts. *Jefferson and Pontchartrain R. R. Co. v. Hazeur*, 7 La. An., 182. 1852.

255. — The S. & E. R. R. Co. was authorized to take a strip of land for its road not exceeding 66 feet wide. The C. R. R. Co. was authorized to purchase the road of the former company. The latter company had the right to a roadway 100 feet in width. *Held*, that under the legislation in this case, the C. R. R.

Co. had the right to widen the road purchased to a width not exceeding 100 feet. *Childs v. Central R. R. Co.*, 4 Vroom (N. J.), 323. 1869.

256. — The fact that a railway company has constructed its road in accordance with the maps and surveys originally filed, does not prevent it from condemning other land which may be necessary for its purposes. *Virginia and Truckee R. R. Co. v. Lovejoy*, 8 Nev., 100. 1872.

257. Alteration of line. The S. C. R. R. Co. may, under its charter, acquire lands by purchase or otherwise, as well for the purpose of varying, altering and repairing the road, as for the original purpose of locating and constructing it. *South Carolina R. R. Co. v. Blake*, 9 Richardson's Law (So. Car.), 228. 1856.

258. — But the land owner may have the preliminary question of the necessity for taking such land, first tried. *Ib.*

259. — The company is not confined to its first location, but may alter the same. *South Carolina R. R. Co., ex parte*, 2 Richardson's Law (So. Car.), 434. 1846.

260. — Where a railroad company changes the line of its road, the change operates as an abandonment by it of the land upon the line deviated from, so that it can no longer claim any right or interest in such land, or in any easement growing out of it. *Stacey v. Vermont Central R. R. Co.*, 27 Vt., 39. 1854.

261. — The defendant surveyed and located its road over plaintiff's land, and had the damages appraised and the award of the commissioners recorded, but did not pay or deposit the sum awarded, and subsequently altered the location of its road and abandoned the route over plaintiff's land. *Held*, that an action of debt could not be maintained on the award. *Ib.*

262. — Where there is no detriment to the public, and there is a manifest necessity for the change, a railway company may relocate and change its line, and in so doing, it has the power to take lands *in invitum* for the purpose of such relocation. *Mississippi and Tennessee R. R. Co. v. Devoney*, 42 Miss., 555. 1869.

263. — This is a right incidental to the power to repair and maintain a railway. *Ib.*

264. Arbitration. Where the officers of a railway company were intrusted with the power of making purchases, and, without ex-

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press authority from the company, were in the habit of agreeing upon a price by a submission to arbitrators, and the awards in such cases were paid by the company's financial officers, under a general resolution to pay the amount they directed, *held*, that the officers had power to submit the question of price to arbitrators, and their award was binding on the company. *Wood v. Auburn and Rochester R. R. Co.*, 8 N. Y., 160. 1853.

265. — Under the act incorporating the Auburn and Rochester R. R. Co., the corporation was authorized, after determining upon the line of its road, but before it had filed its certificate of location, to acquire lands for the construction of the road by purchase, or by an agreement to purchase at a price to be fixed by arbitrators. *Ib.*

266. — Although a charter provides for a compulsory arbitration of the value of property, it is competent for the parties to mutually agree upon a greater or less number of persons than is provided by law. *La Crosse and Milwaukee R. R. Co. v. Seeger*, 4 Wis., 268. 1855.

267. — The assessment of damages against railroad companies for the appropriation of lands may legally be made by arbitrators appointed by the court, or by jurors selected in the manner prescribed by the statute; but no person owning land within one mile of the contemplated railroad is competent to act either as an arbitrator or juror. *McMahon v. Cincinnati and Chicago Short Line R. R. Co.*, 5 Ind., 413. 1854.

268. — On an appeal in the supreme court from a judgment of the court of common pleas, accepting the verdict of a sheriff's jury impaneled to revise the estimate of county commissioners, on an application for damages, it cannot be objected that the commissioners had no jurisdiction, by reason of the parties having agreed to refer the damages to arbitration; but such objection, if relied upon, must be taken before the commissioners as a ground for not ordering a jury. *Field v. Vermont and Massachusetts R. R. Co.*, 4 Cushing (Mass.), 150. 1849.

269. — Where the question of damages is submitted to arbitration, and the time of payment is not agreed upon, the damages must be paid before the right of way can vest in the company. *Stewart v. Raymond R. R. Co.*, 7 Smedes & Marshall (Miss.), 568. 1846.

270. — Where it is submitted to arbitrators to determine the value of land to be taken for a railroad, by reason of the road running across it, an award of damages need not specify separately the sum fixed for the value of the land, and for the damages. All that is necessary is that the whole shall be considered. *Wood v. Auburn and Rochester R. R. Co.*, 8 N. Y., 160. 1853.

271. — A railroad company took possession of land required for its track under an agreement to pay the value, to be appraised by arbitrators, in ten days after notice of their award, and upon the tender of a deed conveying an unincumbered title. *Held*, that after a tender of a deed and a failure to specify the objection, to an incumbrance upon the title — which was removed eight days afterwards — the corporation continuing in the possession of the land, could not resist a specific performance on the ground that the plaintiff had not strictly performed the condition precedent on his part. *Viele v. Troy and Boston R. R. Co.*, 20 N. Y., 184, 1859. *Same v. Same*, 21 Barbour (N. Y.), 381. 1855.

272. Coal mining companies. A mining company has no right under its charter to condemn land for use in the construction of a railway from its mine to another railway, unless such right is clearly granted to it. A provision that "in respect to such railroad, it shall be governed by the acts in relation to railroads, so far as applicable thereto," is not sufficient to confer the power to condemn land for its railway track. *Miami Coal Co. v. Wigton*, 19 Ohio St., 560. 1869.

273. Competing lines. The acquisition of lands to prevent interference of competing lines, or for purposes of speculation, cannot be consummated under the statutes authorizing the taking of private property for public use. *Rensselaer and Saratoga R. R. Co. v. Davis*, 43 N. Y., 137. 1870.

274. Such statutes are to be strictly construed. *Ib.*

275. Coroner. Where proceedings for the assessment, by a jury, of damages for land taken by a railroad company, are conducted in part by a coroner, under the Revised Statutes, ch. 24, § 23, and in part by the sheriff, it is the duty of each of those officers to certify the proceedings which take place before him, and, in such case, where the coroner presides,

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it is no objection to the verdict, that the jury are not attended by a deputy sheriff. *Pittsfield and North Adams R. R. Co. v. Foster*, 1 Cushing (Mass.), 480. 1848.

276. Corporate authority. Corporate existence, and the right to exercise the power of eminent domain, can only be derived from legislative enactment; and before a company can demand a judgment of condemnation, it must show that both have been conferred upon it by a valid law, and that it has substantially complied with the conditions which the law has annexed to the exercise of the power. *Atkinson v. Marietta and Cincinnati R. R. Co.*, 15 Ohio St., 21. 1864.

277. Estoppel. The owner of lands having received compensation for the right of way, is estopped from afterwards claiming any right to the lands while they are in the possession of the company. *Dodge v. Burns*, 6 Wis., 514, 1859; *Burns v. Milwaukee and Mississippi R. R. Co.*, 9 Wis., 450. 1859.

278.—The acceptance of the value is also an acquiescence in the taking of the land as to the amount taken. *Ib.*

279.—Though equity might estop a land owner permitting a railway company by laying a track upon land for the use of its road, from regaining possession, it would not estop him from recovering damages. The company would not be permitted to hold land and money both. *Western Pennsylvania R. R. Co. v. Johnston*, 59 Penn. St., 290. 1868.

280.—The company having taken and appropriated lands, and having, by an agreement with the parties, had the damages assessed, is estopped from disputing the title of its vendor without showing a paramount title in itself. *La Crosse and Milwaukee R. R. Co. v. Seeger*, 4 Wis., 268. 1855.

281. Heirs. Where a bill in equity alleged that the plaintiff and his brothers and sisters, as the heirs-at-law of their mother, were the owners of certain land taken for railroad purposes, and that the company had never made them any compensation for his interest therein; and it was alleged, in the answer of the company, that all the damages arising from the taking of the same, except thirty-five cents, were paid over to the heirs of plaintiff's mother; and the committee to whom the cause was referred, found that D., one of the heirs, for the purpose of making an equitable

distribution, divided the sum received by him among his co-heirs; *held*, that such finding was consistent with the allegations of the pleadings. *Whittlesey v. Hartford, Providence and Fishkill R. R. Co.*, 23 Conn., 421. 1855.

282. Joint liability of two companies. Two railway companies authorized by statute jointly or severally to locate, construct and maintain a railroad, if they file a joint location, are jointly liable for damages. *Grand Junction R. R. Co. v. County Commissioners of Middlesex*, 14 Gray (Mass.), 553. 1860.

283. Limitations. The statute of limitations as to actions for damages caused by taking lands for railway purposes, may be changed by the legislature. *Gowen v. Penobscot R. R. Co.*, 44 Me., 140. 1857.

284.—The filing, with the clerk of the county commissioners, within three years after the filing of the location of the railroad, of a petition for the assessment of damages for land taken for such road, is not a sufficient application to the commissioners, under the Rev. Sts., ch. 39, § 58; and if the commissioners first take action thereon after the expiration of the three years, their proceedings will be quashed on *certiorari*. *Charles River Branch R. R. Co. v. County Commissioners of Norfolk*, 7 Gray (Mass.), 389. 1856.

285.—A right of way, acquired by deed, will not be forfeited by a mere nonuser. *Barlow v. Chicago, Rock Island and Pacific R. R. Co.*, 29 Iowa., 276. 1870.

286. Lunatic. Where the land of a lunatic had been occupied for several years by a railroad, it was held proper, in assessing the damages, to allow interest thereon from the time of the entry to the time of the assessment. *Railroad v. Gesner*, 20 Penn. St., 240. 1853.

287. Minors. Where one of the owners of land taken was an infant, it was *held*, that it was indispensable that some proper person should be appointed to appear for such infant before the jury of appraisers, and to attend to her interests, on the appraisalment. *Hotchkiss v. Auburn and Rochester R. R. Co.*, 36 Barbour (N. Y.), 600. 1862.

288.—*Held, also*, that although an attorney was appointed to appear before the jury and protect the interests of the infant, on the appraisalment, yet if he failed to attend before the jury, or to represent her interests there, his appointment was nugatory. *Ib.*

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289. Monopoly. The plaintiff was not permitted to go into a general exhibit of the defendant's corporate transactions and rates of charge, to show that the defendant was claiming the land solely for the purpose of monopoly or to prevent competition. *Oregon Cascades R. R. Co. v. Baily*, 3 Or., 164. 1869.

290. Necessity of taking land. The courts cannot enquire into the necessity of taking land for railway purposes. *South Carolina R. R. Co. ex parte*, 2 Richardson's Law (So. Car.), 434. 1846.

291. — Upon the application of a railroad company to appropriate lands, it is for the court to decide as to the necessity and extent of such appropriation, and the determination of the board of directors of such company is not conclusive upon that question. *Rensselaer and Saratoga R. R. Co. v. Davis*, 43 N. Y., 137. 1870.

292. Offer to donate not accepted. Evidence is inadmissible to show that the owner of the land had offered to permit the construction of the road upon a certain route without compensation, which offer was not accepted at the time. *East Pennsylvania R. R. Co. v. Heister*, 40 Penn. St., 53. 1861.

293. Side tracks. Under the general corporation act of 1853, a railroad company has power to condemn land for new side tracks leading from the main road to its depot buildings, whenever they become necessary in the proper management and operation of the road. *Toledo and Wabash R. R. Co. v. Daniels*, 16 Ohio St., 390. 1865.

294. — Railroad companies have implied powers under their charters to make such side tracks and continuations at the *termini* of their roads as may be reasonable and necessary for the transaction of their business and the accommodation of the public; and they may take private property for that purpose. *Protzman v. Indianapolis and Cincinnati R. R. Co.*, 9 Ind., 467. 1857.

295. — A continuation of the track of the Indianapolis and Cincinnati Railroad 200 rods beyond the depot at Lawrenceburgh was not an unreasonable exercise of such power. *Ib.*

296. Statute. The legislature cannot take land from the owner and give it to a corporation, even for a public purpose; it must proceed in conformity to the law, and the compensation must be judicially ascertained, and

cannot be fixed by statute. *United States v. Illinois Central R. R. Co.*, 2 Bissell (U. S. C. C.), 174. 1869.

297. — If a statute which gives a remedy to recover damages be repealed, and afterwards the repealing statute be repealed, it revives the remedy under the original statute. *Directors of the Poor v. Railroad Co.*, 7 Watts and Sergeant (Penn.), 236. 1844.

298. Substantial compliance. When the law concerning the condemnation of lands for railroads (W. S., 326, Art. 5), is substantially complied with, and a sufficient certainty is used to prevent surprise, or so much as not to mislead, it is all that the law requires. *Quincy, etc., R. R. Co. v. Kellogg*, 54 Mo., 334. 1873.

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299. Jury — appeal. The provision in the charter of the Vermont Central R. R. Co. which authorizes a person, whose land has been taken for the use of the company, and who feels aggrieved by the appraisal of damages by the commissioners appointed in pursuance of the charter, to appeal to the county court, and which provides that the decision of the county court shall be final in the matter, does not entitle the person thus appealing to have his damages assessed by a jury; as, in analogous cases, damages are assessed by the court or commissioners appointed by it, and no different rule is prescribed in the charter. *Gold v. Vermont Central R. R. Co.*, 19 Vt., 478. 1847.

300. — by whom applied for. County commissioners' appraisal of the damage done to an individual by the location of a railroad across his land, may be revised by a jury, as well upon the application of the corporation as upon that of the land owner. *Kimball v. Kennebec and Portland R. R. Co.*, 35 Me., 255. 1853.

301. — challenge. No peremptory challenge lies to any member of a jury summoned to assess damages for the right of way, unless such right is given by statute. *Convers v. Grand Rapids and Indiana R. R. Co.*, 18 Mich., 459. 1869.

302. — The statute — 2 Comp. Laws, § 4400 — allowing two peremptory challenges

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in "civil cases," does not apply to special proceedings. *Ib.*; *Peninsular R. R. Co. v. Howard*, 20 Mich., 18. 1870.

303. — constitutional law. The appraisers are a jury within the meaning of the constitution of New York. *Cruger v. Hudson River R. R. Co.*, 12 N. Y., 190. 1854.

304. — A citizen has no right to a jury trial in proceedings by the state under her powers of eminent domain. *Pennsylvania R. R. Co. v. Lutherrn Congregation of Pittsburgh*, 53 Penn. St., 445. 1866.

305. — A law providing for the assessment of damages is not unconstitutional because it provides that the assessment shall be made by commissioners instead of a jury. *Buffalo Bayou, Brazos, etc., R. R. Co. v. Ferris*, 26 Tex., 588, 1863; *Houston Tap, etc. R. R. Co. v. Milburn*, 34 ib., 224, 1870.

306. — The assessment need not be made by a jury of twelve freeholders, it not being a controversy respecting property within the meaning of § 14 of the Bill of Rights. Nor is it such a "trial by jury as that section requires to remain 'sacred and inviolable.'" *Raleigh and Gaston R. R. Co. v. Davis*, 2 Devcreux and Battle's Law (N. C.), 451, 1837; *McIntire v. Western North Carolina R. R. Co.*, 67 N. C., 278. 1872.

307. — In order to take land for railway purposes, compensation must be made, but it is not necessary that the law should give the right to try the question of damages by a jury. *Mt. Washington R. R. Co., Petition of*, 35 N. H., 134. 1857.

308. — Upon an appeal to the circuit court from a proceeding before a justice of the peace to assess damages sustained by the owner of land taken for public use under § 9 of the act to incorporate the Evansville and Illinois R. R. Co. (Local Laws, 1849), the circuit court, sitting as a court of chancery, may take the opinion of a jury upon a single question of fact, but in such cases trial by jury is not a constitutional right. *Evansville and Crawfordsville R. R. Co. v. Miller*, 30 Ind., 209. 1868.

309. — drawing. Under the statute, Laws of 1864, p. 14, the jury must be drawn under the order of the court and in the presence of the court, and if not made thus, it is illegal. *Convers v. Grand Rapids and Indiana R. R. Co.*, 18 Mich., 459. 1869.

310. — empaneling. In empaneling a

sheriff's jury, summoned to assess damages for land taken for railway purposes, the parties are not entitled to have the names of the jury placed separately in a box and drawn in accordance with R. S., ch. 82, § 66. Nor have they the right to two peremptory challenges. *Davis v. Bangor and Piscataquis R. R. Co.*, 60 Me., 303. 1872.

311. — fees. In an action to expropriate land for a railway, the plaintiffs are not bound to pay jurors for their attendance. Act, 1855. *Vicksburg, Shreveport and Texas R. R. Co. v. Hart*, 15 La. An., 507. 1860.

312. — instructions to sheriff's jury. On a trial before a sheriff's jury, the sheriff cannot be called upon to instruct the jury as to the weight, effect, or sufficiency of the evidence. *Commonwealth v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 25. 1849.

313. — notice. Where the charter of a railroad company directed that in case of a disagreement between the company and the owner of any land taken for the construction of the road, as to the value of the land, upon the presenting of a petition to a judge, the latter should direct the sheriff to give public notice in at least one newspaper printed in the county, that on a specified day he would, together with the county clerk, at the clerk's office, proceed to draw a jury, to appraise the damages. *Held*, that this was all the notice of the drawing of the jury which the owner was entitled to. *Polly v. Saratoga and Washington R. R. Co.*, 9 Barbour (N. Y.), 449. 1850.

314. — parties. The want of proper parties, to a proceeding before a sheriff's jury, for the assessment of damages for land taken for a railroad, must be urged before the commissioners, upon the application for such jury. *Meacham v. Fitchburg R. R. Co.*, 4 Cushing (Mass.), 291. 1849.

315. — qualifications. Under the charter of the N. O., etc., R. R. Co., it is not necessary that a juror should be a freeholder in the county in which the damages are to be assessed. It is sufficient if he is a freeholder in the state. *New Orleans, Jackson and Great Northern R. R. Co. v. Hemphill*, 35 Miss., 17. 1858.

316. — And if the juror holds the title to lands under a bond conditioned that the obligor shall convey a fee title to the purchaser, upon the payment of the purchase money, this constitutes him a freeholder. *Ib.*

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317. — When several applications are made, at the same time, by owners of lands in different towns for a jury to assess damages caused by the laying out of a railroad, the jurors are to be taken from three towns nearest to the town in which the land of either of the applicants is situated. And when a single application, for such purpose, is made by one who owns lands in different towns, the jurors are to be taken from three towns nearest to either of the towns in which his lands are situated. This is all that is practicable under R. S., ch. 24, § 15, and ch. 39, § 57. *Wyman v. Lexington and West Cambridge R. R. Co.*, 13 Metcalf (Mass.), 316. 1847.

318. — In summoning a jury under the Gen. Sts., ch. 43, § 28, to assess damages for the taking of land for a public use, the direction of the statute that the jurors shall be returned from the "three nearest towns" refers to the neighborhood of these towns to the town in which the land lies, without regard to the situation of the land within that town. *Reed v. Hanover Branch R. R. Co.*, 105 Mass., 303. 1870.

319. — The "three nearest towns not interested," from which jurors are to be taken to estimate the damages caused by the laying out of a highway or railroad, are the three towns nearest to and exclusive of the town in which the land lies, over which the highway is laid. *Meacham v. Fitchburg R. R. Co.*, 4 Cushing (Mass.), 291. 1849.

320. — Where the claimant was present and did not make any challenges, the objection to the report of the jury that it does not appear that they were freeholders, in the absence of any showing to the contrary, is not well taken. *Mansfield, Cold Water and Lake Michigan R. R. Co., v. Clark*, 23 Mich., 519. 1871.

321. — The first appraisers appointed under § 15 of the railroad act (1 G. & H., 509, 510), must be freeholders; and if the court, upon exceptions, order a new appraisement, the appraisers must possess the same qualification; but if either of the parties excepting to the first appraisement insists upon a jury trial, the jurors need only be reputable householders. It is otherwise, if the proceedings are under the act relating to the writ for the assessment of damages. *Louisville, New Albany, etc., R. R. Co. v. Dryden*, 39 Ind., 393. 1872.

322. — selection of jurors. Under an act directing that a precept be issued to the sheriff to summon a jury, it is irregular for the sheriff to select a jury from a list of names prepared by his deputy. *Pennsylvania R. R. Co. v. Heister*, 8 Penn. St., 445. 1848.

323. — stockholder. A stockholder of a railway corporation is not a competent juror to assess damages for taking lands for right of way for such corporation. *Peninsular R. R. Co. v. Howard*, 20 Mich., 18. 1870.

324. — When such juror is known to the railway company to be a stockholder, it must disclose the fact. *Ib.*

325. — The assessment of a jury, a member whereof is thus disqualified, is void. *Ib.*

326. — Such jurors must be freeholders. *Ib.*

327. — struck jury. Where a jury is formed under the statute, by each party striking out certain names, furnished by the sheriff, the sheriff cannot, in filling up the panel, take as a juror a person whose name has been stricken out. *In re Detroit and Pontiac R. R. Co.*, 2 Douglass (Mich.), 367. 1845.

328. — swearing the jury. The return of the sheriff that the jury "were duly empanelled and sworn according to law, to discharge their duties," will be construed to be a statement that the jury were properly sworn, and not a recital of the substance of the oath administered. *New Orleans, Jackson and Great Northern R. R. Co. v. Hemphill*, 35 Miss., 17. 1858.

329. — time of applying for a jury. — Though an original petition for a jury to assess damages is not seasonably filed, if it be after the regular meeting of the county commissioners next following that at which they completed and returned their estimate, yet if such petition be filed at the same meeting at which they complete and return such estimate, and they thereupon, without notice to the railroad corporation, pass an order and issue a warrant for the summoning of a jury, and the warrant is not served, they are authorized, and ought, upon motion of the land owner, though the motion be not made until after their next regular meeting, to issue an order of notice to the railroad corporation to show cause why a jury should not be summoned on the original petition; the first order for a jury being void, for want of such notice, and the original petition being

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still pending. *Porter v. County Commissioners of Norfolk*, 13 Metcalf (Mass.), 479. 1847.

330. — Under the Rev. Sts., ch. 39, § 57, which provides that a party, who is dissatisfied with the estimate made by county commissioners, of the damages caused by taking land for a railroad, "may apply for a jury to assess the damages, either at the same meeting at which such estimate shall be completed and returned, or at the next regular meeting thereafter, if a party applies for a jury at the same meeting at which the estimate is completed and recorded, and a jury is then ordered, and a warrant therefor issued, he cannot, by merely omitting or refusing to proceed under that order and warrant, entitle himself to a jury on applying therefor at the next regular meeting of the commissioners. *Taylor v. County Commissioners of Plymouth*, 13 Metcalf (Mass.), 449. 1847.

331. — when to be applied for. Under the statute of January 18, 1837, "providing for the assessment of damages for land taken for railroad corporations," an application for a jury is seasonable if made at the term next after the acceptance of the report of the committee. *Concord R. R. Co. v. Greely*, 20 N. H., 157. 1849.

332. — verdict — amount of land taken. Where commissioners to determine compensation for land taken for a railroad, awarded such compensation for a strip one hundred feet wide, it was not necessary, on appeal to the circuit court, to determine by verdict the amount of the land taken. *Bigelow v. West Wisconsin R. R. Co.*, 27 Wis., 478. 1871.

333. — If the judge has directed the jury to return a verdict determining that question, he may receive a verdict which fails to determine it. *Ib.*

334. — damages. Where the court of common pleas was authorized to set aside the verdict of a jury empanelled to assess damages and refused to do so, the supreme court will not interfere on the ground that it differs from the jury as to the amount of damages. *Railroad v. Gesner*, 20 Penn. St., 240. 1853.

335. — Nor will the supreme court examine the evidence given before the viewers. *Ohio and Pennsylvania R. R. Co. v. Bradford's heirs*, 19 Penn. St., 363. 1852.

336. — impeaching verdict. The verdict of the jury will not be set aside on the cer-

tificate of one of the jury that their verdict is too high, when there is no evidence of misconduct upon the part of the jury. *Carrollton R. R. Co. v. Avert*, 11 La. (O. S.), 190. 1837.

337. — Whether the evidence of jurors summoned to assess damages will be received to impeach their verdict, *quære?* *New Orleans, Jackson and Great Northern R. R. Co. v. Mc Bride*, 38 Miss., 32. 1859.

338. — necessity of the taking. A finding in the verdict that "it is necessary that said real estate and property should be taken for the purposes of the company," is not such a finding of the necessity for taking property for public use, as is required by art. 18, § 2 of the state constitution. *Mansfield, Cold Water and Lake Michigan R. R. Co. v. Clark*, 23 Mich., 519, 1871; *Grand Rapids, Newaygo and Lake Shore R. R. Co. v. Van Driele*, 24 ib., 409, 1872.

339. — The jury must be satisfied, not only that the taking is necessary for the construction of the work, but that the work itself is one of public importance. *Ib.*

340. — special findings. The court in answer to a point that the jury should be instructed to specify the damages, charged that they ought to consider each item separately and the sum total would be their verdict, and their verdict might be returned, with or without the specification of the items. *Held*, not to be error. *Western Pennsylvania R. R. Co. v. Hill*, 56 Penn. St., 460. 1867.

341. — It is not error to direct the jury that if they find for the plaintiff, they should specify in their verdict the items or subjects for which they allowed damages, stating the sum for each item, adding them together, and returning in one general sum the items, with the addition. *Harvey v. Lackawanna and Bloomsburg R. R. Co.*, 47 Penn. St., 428. 1864.

342. — A jury is not bound to state the items of the damage in their verdict, and should they do so, a court of error will not look at the items. *Delaware, Lackawanna and Western R. R. Co. v. Burson*, 61 Penn. St., 369. 1869.

343. — A sheriff's jury, in making up their verdict, may, if they think proper, consider each item or charge of damage separately, and state in their verdict what items they allow, and the amounts thereof, severally, and what they reject, and where the verdict is returned in this form, any item of damage,

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which, in point of law, is objectionable, may be remitted or deducted, without setting aside the verdict. *Fitchburg R. R. Co. v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 58. 1849.

344. — unanimous. A verdict must be unanimous under the general railroad law, or it is a nullity. *Chicago and Michigan Lake Shore R. R. Co. v. Sanford*, 23 Mich., 418. 1871.

345. — when set aside. A verdict of a jury empanelled to assess damages, unless it is manifestly against the evidence, will not be disturbed. *Illinois and Wisconsin R. R. Co. v. Van Horn*, 18 Ill., 257. 1857.

446. — The superior court has authority, under Gen. Sts., ch. 43, § 40, to set aside the verdict of a sheriff's jury, upon the ground that the verdict is against the weight of the evidence. *Fitchburg R. R. Co. v. Eastern R. R. Co.*, 6 Allen (Mass.), 98. 1863.

347. — Where the question of damages for a right of way is fairly submitted to a jury, no benefit being likely to result to the owner of the land, the superior court will not disturb the verdict on account of the amount. *Tonica and Petersburg R. R. Co. v. Unsicker*, 22 Ill., 221, 1859; *Same v. Roberts*, ib., 224.

348. — view. The propriety of sending the jury to view the premises, rests in the sound discretion of the court. *King v. Iowa Midland R. R. Co.*, 34 Ia., 458. 1872.

349. — Where the jury was sent to examine the premises, and the record contained nothing in relation to the impression produced upon the minds of the jury by the examination, *held*, that the evidence was not all in the record, though the bill of exceptions stated that it contained it all. *Evansville, Indianapolis, and Cleveland R. R. Co. v. Cochran*, 10 Ind., 560, 1858; overruled, see *Jeffersonville etc., R. R. Co. v. Bowen*, 40 ib. 545, 1872.

350. — When a view has been had, and counsel have accompanied the jury, and knowing the facts, consent to conclude the trial, it is too late, after verdict, to raise the point that the jury did not have a full view of the premises. *Oregon Cascades R. R. Co. v. Oregon Steam Nav. Co.* 3 Or., 178. 1869.

351. — Where the jury had viewed the premises, it was *held* proper to refuse to permit the plaintiff to ask a witness whether the roads crossing and recrossing the railroad rendered it more or less dangerous for horses,

cattle and teams. The question was immaterial. *Pinneo v. Lackawanna and Bloomsburg R. R. Co.*, 43 Penn. St., 361. 1862.

352 — waiver of objections. Any objection to the competency of a sheriff's jury will be deemed waived, unless taken at the trial. *Jameson v. Androscoggin R. R. Co.*, 52 Me., 412, 1864; *Merrill v. Same*, ib.; *White v. Same*, ib.

353. — Their verdict will not be set aside because the officer presiding at the hearing, instructed the jury that they should first view the several lots of the several respective petitioners, and the hearings thereon should be at one time, and in their order. *Ib.*

354. — warrant for a jury. Where the damages, occasioned by the construction of a railway, are estimated by county commissioners, and both parties being dissatisfied with the estimate, apply to the commissioners for a warrant for a jury to revise the damages, it is only necessary that one warrant should be issued; but if separate warrants are issued on both petitions, the sheriff should execute and return them as one. *Davidson v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 91. 1849.

355. — appeal. The propriety of the order appointing the commissioners which contained their instructions, is subject to examination by the supreme court. *Lee v. Tebo and Neosha R. R. Co.*, 53 Mo., 178. 1873.

356. Viewers and commissioners — appointment. If a railroad company fails to comply with the necessary prerequisite for obtaining the appointment of commissioners of appraisal, it does not secure the right to have the property condemned, against the opposition of its owners. *New York and Boston R. R. Co., In matter of*, 62 Barbour (N. Y.), 85. 1871.

357. — by whom appointed. There is no reason why commissioners should not be appointed to assess damages by the courts, instead of by the executive department of the government, as the constitution does not point out the way in which private property shall be taken. *Virginia and Truckee R. R. Co. v. Elliott*, 5 Nev., 358. 1870.

358. — An act which provides for a condemnation of land by an application to the senior county commissioner, in the absence of the circuit judge, may be executed by the judge of the county court, these latter officers

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having taken the place of the county commissioner. *Shute v. Chicago and Milwaukee R. R. Co.*, 26 Ill., 436. 1861.

359. — how appointed. Under the railroad act of 1850, the land owner may name six persons as commissioners, but each owner is not entitled to name six persons. *Troy and Rutland R. R. Co. v. Cleveland*, 6 Howard's Pr. (N. Y.), 238. 1851.

360. — Before commissioners of appraisal can be appointed under the general railroad act, the preliminary provisions of the act must be strictly complied with. *New York and Boston R. R. Co. v. Godwin*, 12 Abbott's Pr., N. S. (N. Y.), 21. 1871.

361. — Appraisers for the condemnation of land for the use of the Galena and Chicago Union R. R. Co., receive but one appointment, and when once sworn under it, their proceedings will be valid, although they may be directed to make a reappraisal. *Low v. Galena and Chicago Union R. R. Co.*, 18 Ill., 324. 1857.

362. — oath of viewers. Where, in proceedings instituted in behalf of the Hannibal and St. Joseph R. R. Co., under its charter, to obtain the condemnation and appropriation of land upon which said railroad had been located, it was stated in the report of the viewers appointed to assess the damages, that before proceeding to examine the damages, they took the oath prescribed by the statute, but the oath itself was not set forth: *held*, it not appearing that any objection was made to the report on this ground, that the recital in the report was sufficient to show that the required oath had been taken. *Hannibal and St. Joseph R. R. Co. v. Morton*, 27 Mo., 317. 1858.

363. — qualifications. The supreme court will not quash the proceedings to assess damages for the reason that the record thereof does not show affirmatively that the viewers were citizens of the county. *Id.*

364. — Nor for the reason that the damages are inadequate. *Id.*

365. — The commissioners are *quasi* jurors, and should be, like them, free from all illegal disability. *Rock Island and Alton R. R. Co. v. Lynch*, 23 Ill., 645. 1860.

366. — It seems, that the relation of cousin existing between the wife of one of the commissioners, and a stockholder in the company, is not such an affinity as to vitiate the report — no unfairness or injustice being complained

of. *Albany, Northern R. R. Co. v. Cramer*, 7 Howard's Pr. (N. Y.), 164. 1852.

367. — interested parties. It is no cause for setting aside the report of commissioners appointed to assess damages, that when they were appointed and made their report they were stockholders in the company, where the objection is urged by the company itself. *Strang v. Beloit and Madison R. R. Co.*, 16 Wis., 635. 1863.

368. — report of reviewers. The decision of the Court of Common Pleas, on an exception to a report of viewers for the improper interference of a party with a jury, is the exercise of a discretion, which, like the granting or refusing of a new trial, will not be reviewed by the Supreme Court. *North Pennsylvania R. R. Co. v. Davis*, 26 Penn. St., 238. 1856.

369. — A report of viewers, appointed under the act of March 27, 1848, § 4, is fatally defective if it omits to state the value and quality of the land taken. *Zack v. Pennsylvania R. R. Co.*, 25 Penn. St., 394. 1855.

370. — It is not necessary that the owner of the land should have notice of the presentation of the petition and the appointment of viewers. *Id.*

371. — The report must also state the advantages and disadvantages to the owners, and also what part of the land is necessary for the use of the company. *O'Hara v. Pennsylvania R. R. Co.*, 25 Penn. St., 445. 1855.

372. — It is unnecessary for the report to set forth affirmatively that the parties were present at the time of the view, or that the witnesses were regularly called and sworn; the presumption is in favor of the regularity of the action of the viewers. *Pennsylvania R. R. Co. v. Porter*, 29 Penn. St., 165. 1857.

373. — The remedy for any actual illegality of this kind is confined exclusively to the Common Pleas, where the facts may be shown by evidence *in pais*. *Id.*

374. — In a proceeding to assess damages, under the act of March 29, 1848, for land taken by the Pennsylvania R. R. Co., a report, setting out the adjoiners and boundaries, with a draft showing the length, breadth, courses and distances of the ground taken, without calculation of the contents, sufficiently sets forth the quantity of land taken. *Pennsylvania R. R. Co. v. Bruner*, 55 Penn. St., 318. 1867.

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375. — The quality is sufficiently described where it appears from the report that the land was in the town of C., and that it was used as a lumber yard, etc. *Id.*

376. — view. The commissioners cannot hear evidence. They are to judge from their examination of the premises. *Vanwinckle v. Camden and Amboy R. R. Co.*, 2 Green's Law (N. J.), 162, 1833; *Coster v. New Jersey R. R. Co.*, 4 Zabriskie (N. J.), 730, 1853.

377. — The commissioners need not be controlled by the evidence taken before them as to the value of the property, but must decide according to their own judgment; and an award made without testimony would be regular. *Rondout and Oswego R. R. Co. v. Deyo*, 5 Lansing (N. Y.), 298. 1871.

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378. General principles; damages. In estimating the damages the correct rule is to ascertain the value of the whole tract of the owner without the railroad, and also what will be the value of the part not taken after the road is constructed, and the difference in value is the true compensation to be awarded. *San Francisco, Alameda and Stockton R. R. Co. v. Caldwell*, 31 Cal., 367; 1866; *East Pennsylvania R. R. Co. v. Hottenstine*, 47 Penn. St., 28, 1864; *Rochester and Syracuse R. R. Co. v. Buddlong*, 6 Howard's Pr. (N. Y.), 467, 1851; *Hornstein v. Atlantic and Great Western R. R. Co.*, 51 Penn. St., 87, 1865; *Delaware, Lackawanna and Western R. R. Co. v. Burson*, 61 ib., 369, 1869; *Canandaigua and Niagara Falls R. R. Co. v. Payne*, 16 Barbour (N. Y.), 273, 1853; *Albany and Susquehanna R. R. Co. v. Dayton*, 10 Abbott's Pr. (N. Y.), N. S., 182, 1865; *Troy and Boston R. R. Co. v. Lee*, 13 Barbour (N. Y.), 169, 1852; *Virginia and Truckee R. R. Co. v. Henry*, 8 Nev., 165, 1873; *Winona and St. Peter R. R. Co. v. Denman*, 10 Minn., 267, 1865; *Missouri River, Ft. Scott and Gulf R. R. Co. v. Owen*, 8 Kan., 409, 1871.

379. — In estimating the damages, the owner is entitled to recover: 1. The actual value of the land taken without any deduction for benefits. 2. Such damages as he actually sustains, resulting immediately and directly from the proper construction of the road, but

not remote and speculative damages. 3. Necessary fencing caused by the construction of the road should be considered. 4. Damages to the entire tract caused by the construction of the road. In estimating the benefits, those only are to be considered which are peculiar to the owner, and not enjoyed in common with the community. *Robbins v. Milwaukee and Horicon R. R. Co.*, 6 Wis., 636, 1859; *Elizabethtown and Paducah R. R. Co. v. Helm's Heirs*, 8 Bush. (Ky.), 681, 1871.

380. — In estimating the damages for taking a strip of land across a lot for the location of a railroad, the award must be restricted to direct injuries to the lot in question. *Bangor and Piscataquis R. R. Co. v. McComb*, 60 Me., 290. 1872.

381. — The jury should consider the value of the land taken; the diminution in value of the remainder of the lot; and in estimating the diminution in value, they may consider the use for which the strip is taken, the character, situation, present and probable use of the remainder of the lot, the distance of the owner's buildings from the railway, and any facts which from the testimony and view the jury shall find injure the value of the premises by a proper and legal use of the road. *Id.*

382. — The ringing of bells, the sounding of whistles, the rattling of the trains, the jarring of the ground and the smoke should be considered. *Id.*

383. — The "value" — in the sense of § 9, of the act incorporating the Pacific R. R. Co. — of the land taken, is its value independent of the location of the railroad; and the "disadvantages," that may be taken into consideration, are the injuries resulting to the landowner, in respect to the residue of the tract unappropriated, from the particular mode in which part thereof is taken, or the use to which it is applied. *Pacific R. R. Co. v. Chrystal*, 25 Mo., 544, 1857; *Snyder v. Western Union R. R. Co.*, 25 Wis., 60, 1869.

384. — The actual damages resulting directly from an invasion of the rights of property by the railroad company, is the true measure of damages. *Selma, Rome and Dalton R. R. Co. v. Camp*, 45 Ga., 180. 1872.

385. — In assessing the damages caused by the construction of a railway through a farm, a proper standard is the market value of the

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land taken; the jury may also allow for the disadvantages resulting from the manner in which it is cut. *East Pennsylvania R. R. Co. v. Hottentstine*, 47 Penn. St., 28. 1864.

386. — In assessing damages the jury should consider the value of the land appropriated, together with any injury to the residue of the land, naturally resulting from the appropriation, such as the cutting of fields into inconvenient shapes, the interruption of convenient access to stock water, the necessity of additional fencing, etc. *White Water Valley R. R. Co. v. McClure*, 29 Ind., 536. 1868.

387. — The measure of damages to a land owner is the difference between what the property would have sold for before and after the road was built; but an increased competition with the plaintiff by others in the same business, caused by the construction and extension of the road, is not a ground of claim. *Harvey v. Lackawanna and Bloomsburg R. R. Co.*, 47 Penn. St., 428. 1864.

388. — In estimating damages under ch. 92, R. S., the true rule in estimating advantages and disadvantages accruing to the owner of land through which a railroad passes, is to take into consideration all which are appreciable. *Alton and Sangamon R. R. Co. v. Carpenter*, 14 Ill., 190. 1852.

389. — In estimating the damages to lands, the value will be considered not at what the lands will bring for cash at a forced sale, but what they would bring to a prudent seller at liberty to fix the time and conditions of sale. *Somerville and Easton R. R. Co. v. Doughty*, 2 Zabriskie (N. J.), 495. 1850.

390. — In valuing lands taken for public use, the gross estimates of common life, the market prices, are all that courts and juries can use as measures of value; all other measures are necessarily arbitrary and fanciful. *Searle v. Lackawanna and Bloomsburg R. R. Co.*, 33 Penn. St. 57. 1859.

391. — If the valuation is made before the company enters to construct its road, it may take such quantity as may be needed; but if the entry is made without valuation, one hundred feet in width is the quantity upon which damages shall be assessed. This is the rule in view of the wording of the charter of the G. & C. R. R. Co. *Greenville and Columbia R. R. Co. v. Nunnamaker*, 4 Richardson's Law (So. Car.), 107. 1850.

392. — And where the valuation is made after entry, not only the value of the land shall be assessed, but the damages sustained by the land owner in the construction of the road may also be considered. *Ib.*

393. — Where the jury were told that in estimating the damages the law in relation to highways applied generally to railroads, and the court was not at the time asked to make the instruction more definite, it was held, not sufficient to set aside the verdict. *March v. Portsmouth and Concord R. R. Co.*, 19 N. H., 372. 1849.

394. — It is erroneous for appraisers appointed under the general railroad law, to determine the compensation to be made to the owner of land "for the damages occasioned by the construction and operation of the railroad over his premises." *Canandaigua and Niagara Falls R. R. Co. v. Payne*, 16 Barbour (N. Y.), 273, 1853; *Albany and Susquehanna R. R. Co. v. Dayton*, 10 Abbot's Pr., N. S. (N. Y.), 182, 1865.

395. — Their office is to determine the compensation to be made to the owner of the real estate "proposed to be taken for the purposes of the company." *Ib.*

396. — The question as to the proper measure of damages, examined. *Minnesota Valley R. R. Co. v. Doran*, 17 Minn., 188. 1871.

397. — **adjoining lands.** The jury must take into consideration the deterioration in value of the adjacent parts of the same tract by the proximity of the railroad, either for agricultural purposes or for sale as building lots, the increased risk of and increased care required for family and stock, the risk of fire, the inconvenience caused by embankments and excavations, and the obstruction to the free use of the buildings. *Somerville and Easton R. R. Co. v. Doughty*, 2 Zabriskie (N. J.), 495. 1850.

398. — In estimating the damages to a tract of land where the plaintiff owned a quarter section, and the road was all in one forty acre tract thereof, the diminution in value of the whole quarter section should be considered. *Bigelow v. West Wisconsin R. R. Co.*, 27 Wis., 478. 1871.

399. — **public house.** In estimating loss or damage, the jury may estimate the value of the land occupied by the company; the deterioration of parcels isolated; the alterations

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of arrangements required about the homestead; the loss of time and expenditures caused by any increase of care or distance which had been occasioned; and the injury to the value of the place as a stand for a public house. *White v. Charlotte and South Carolina R. R. Co.*, 6 Richardson's Law (So. Car.), 47. 1852.

400. — reservation. Appraisers are not authorized to appraise the land of an individual with a reservation of easements and privileges to the owner. They must appraise it at its actual value. *Hill v. Mohawk and Hudson River R. R. Co.*, 5 Denio (N. Y.), 206, 1848; *Same v. Same*, 7 N. Y., 151, 1852.

401. — separate tracts. Where the right of way is taken through a farm, the damages to the entire tract are to be assessed. But where there are two separate farms, though contiguous and belonging to the same owner, no damages will be assessed, excepting upon that farm through which the right of way runs. *Minnesota Valley R. R. Co. v. Doran*, 15 Minn., 230. 1870.

402. — time of estimate. In estimating the damages, the value should be considered at the time when taken. *San Francisco and San Jose R. R. Co. v. Mahoney*, 29 Cal., 112, 1865; *Driver v. Western Union R. R. Co.*, 32 Wis., 569. 1873.

403. — The amount to be paid for the land appropriated, should be its value at the commencement of the action. *Oregon and California R. R. Co. v. Barlow*, 3 Or., 311. 1871.

404. — Damages will be presumed to have been assessed as of the date of the assessment. *Pennsylvania R. R. Co. v. Lutheran Congregation of Pittsburgh*, 53 Penn. St., 445. 1866.

405. — town lots. Where certain lots in a town, owned and used with other lots connected with the same business, but separated therefrom by streets and alleys, are appropriated for right of way, the jury, in estimating the damages therefor to the owner, should not consider all the lots thus used and separated as an entirety in respect to the business for which they were used, and allow damages accordingly. They should in such case estimate the value of the lots taken before the appropriation, then their value afterwards, and the difference would be the measure of damages. *Fleming v. Chicago, D. and M. R. R. Co.*, 34 Ia., 353. 1872.

406. — Plaintiff's land was within the limits of a city; it had been laid out into lots, which were acquired by him at different times, and those over which defendant's road ran were separated from his dwelling house by a highway; but all were used by him as one place for agricultural purposes. *Held*, that he was entitled to compensation for injury to the whole property, and not merely for that to the separate lots over which the road ran. *Welch v. Milwaukee and St. Paul R. R. Co.*, 27 Wis., 108. 1870.

407. — water cure establishment. Where the charter of a railroad company required it to pay not only the value of the land taken for its road, but also the damage which the land owner might sustain by reason of such taking, it was proper, in an action for damages by one who had placed certain fixtures on his premises to adapt them to use as a water cure, to instruct the jury that if, by reason of the construction of the road across the premises, they had become unfit for such use, then the difference between what those fixtures were worth in connection with the property as a water cure (not exceeding their reasonable cost, and what they were worth to be removed from the premises and applied to other uses, must be included in the estimate of damages. *Price v. Milwaukee and St. Paul R. R. Co.*, 27 Wis., 98. 1870.

408. Blasting rocks. The damage, occasioned to buildings by blasting rocks within the line of a railroad, should be considered. *Brown, v. Providence, Warren and Bristol R. Co.*, 5 Gray (Mass.), 35. 1855.

409. — The damages occasioned by laying out and making a railroad, and which, by Revised Statutes, ch. 39, § 56, county commissioners are bound to estimate, include injuries which are done, by a railroad corporation, to buildings near the line of a road, by means of blasting, in a proper manner, a ledge of rocks through which the railroad passes. *Dodge v. County Comrs of Essex*, 3 Metcalf (Mass.), 380. 1841.

410. — The appraisal of damages for the right of way includes injuries which are done by the company in blasting, in a proper manner, a ledge of rocks through which the railroad passes. *Sabin v. Vermont Central R. R. Co.*, 25 Vt., 363. 1853.

411. — Though the corporation has the

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right to throw stones by blasting, in a proper manner, upon adjoining lands, they must be removed within a reasonable time. *Ib.*

412. — A jury appointed to assess damages for land taken by a railway company, should not include in their estimate of damages the neglect of the company to remove stones thrown upon the petitioner's land by blasting while grading the road. But damages caused by the blasting should be included. *Whitehouse v. Androscoggin R. R. Co.*, 52 Maine, 208. 1868.

413. **Bridges.** A bridge, with lateral embankments, erected by a railroad company for the purpose of raising a highway and carrying it over its road, is as much a part of the structure authorized by its charter, as the railroad itself; and any person injured by the erection of such bridge and embankments, is entitled to recover his damages therefor. *Parker v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 107. 1849.

414. — The owner of flats crossed by a railroad bridge having raised the flats around and under the bridge, within the location of the road, but without the consent of the proprietors thereof, is entitled to recover by way of damages, against such proprietors, for so much filling up, as is necessary to enable him to enjoy his other lands; provided such necessity was caused by the location and construction of the railroad. *Commonwealth v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 25. 1849.

415. — Under the charter of the Philadelphia, Wilmington, etc. R. R. Co., claims for damages for bridges should not be included in the estimate. *Philadelphia, Wilmington, etc. R. R. Co. v. Trimble*, 4 Wharton (Penn.), 47. 1838.

416. **Cattle guards.** Cattle guards are not proper subjects for an assessment. *St. Louis. Vandulia and Terre Haute R. R. Co. v. Mollett*, 59 Ill., 235. 1871.

417. **Consequential damages.** The compensation provided by statute for damages occasioned by the location and construction of railroads, extends only to real estate or materials taken. *Rogers v. Kennebec and Portland R. R. Co.*, 35 Maine, 319. 1853.

418. — The law affords no remedy for indirect damages. *Ib.*

419. — Remote disadvantages that may or may not accrue in the future, should not be

considered in estimating the damages. *Isom v. Mississippi Central R. R. Co.*, 36 Miss., 300. 1858.

420. — Where the charter of a railroad company has made no provision for the consequential damages to adjoining property occasioned by the excavation of the road bed, such damages may be recovered in an action on the case. *Bradley v. New York and New Haven R. R. Co.*, 21 Conn., 294. 1851.

421. — There is no certain rule by which the injury done to property, by reason of the construction of a railroad through it, is to be measured; it must be referred to a jury as a matter of fact under all the circumstances. And that the plaintiff owned property at another place, separate and unconnected with the property alleged to be injured, which was enhanced in value by the road, is not a legitimate subject of inquiry by the jury. *Railway Company v. Gilson*, 8 Watts (Penn.), 243. 1839.

422. — Where no part of the property of an existing company, or of an individual, is taken, unless the statute plainly authorizes a proceeding to assess damages for consequential injuries, such damages may be recovered in an ordinary action at law. *Lafayette Plank Road Co. v. New Albany and Salem R. R. Co.*, 13 Ind., 90. 1859.

423. — Consequential damages are not to be estimated unless provided for in the act of incorporation, and the failure to provide compensation for such damages will not render an act unconstitutional. *Reitenbaugh v. Chester Valley R. R. Co.*, 21 Penn. St., 100. 1853.

424. — Damages should be given for all injury done by the laying out of the road, to the tract of land through which it passes, including not only the value of the land actually taken, but all damage from inconvenient division of the tract, and the necessity for additional fencing. *Mt. Washington R. R. Co., Petition for*, 35 N. H., 134. 1857.

425. — But damages should not be given for the probable injury which the business of a landowner may suffer from competition, introduced by the building of the new road. *Ib.*

426. — A railroad company, claiming to act under legislative authority, removed a natural barrier situated north of E.'s land, which there before had completely protected E.'s meadow from the effects of the floods of a neighboring river. In consequence of this removal, the

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waters of the stream at times overflowed and injured E.'s land. *Held*, that this was a taking of E.'s property within the meaning of the constitutional prohibition, and that such injury could not be inflicted without compensation. *Eaton v. Boston, Concord and Montreal R. R. Co.*, 51 N. H., 504. 1872.

427. — An action on the case would lie for the injury sustained. *Ib.*

428. — If the owner of land, with buildings standing thereon, situated near the track of a railroad, but not crossed thereby, sustain any actual damage, capable of being pointed out, described and appreciated in such estate, in consequence of and as incident to the construction of the railroad, he will be entitled to recover compensation therefor, against the proprietors of the railroad, in the mode provided by the revised statutes. *Parker v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 107. 1849.

429. — If, in consequence of the excavation made for a railroad, the water of a well on an estate adjoining but not crossed by the railroad, is drawn off and the well thereby rendered dry and useless, the owner of such estate will be entitled to recover damages therefor, in the same manner as for land taken for the railroad. *Ib.*

430. — All incidental loss, inconvenience and damages, present and prospective, which may reasonably be expected to result from the construction and operation of the road in a legal manner, should be considered by the jury. *Missouri, Kansas and Texas R. R. Co. v. Haines*, 10 Kan., 439. 1872.

431. — The deposit of stones and earth beyond the sixty feet appropriated for the road, is, in some sense, a taking of the land, and is a proper subject of compensation. *East Pennsylvania R. R. Co. v. Schollenberger*, 54 Penn. St., 144. 1867.

432. — In assessing, under the Gen. Sts., ch. 63, § 21, the damages occasioned to a vacant tract of land by the location of a railroad which cuts off a corner of it, the depreciation of the land in value by reason of the proximity of the railroad, such as by "frightening horses and the like causes," does not constitute, of itself, a ground for recovery. *Presbrey v. Old Colony and Newport R. R. Co.*, 103 Mass., 1. 1869.

433. — The jury cannot consider, as an element of damages, that by the taking of his

land for a railway, the plaintiff is deprived of the advantage of keeping others from his neighborhood, and thus saving himself from the annoyance and risk of their proximity. *Patten v. Northern Central R. R. Co.*, 33 Penn. St., 426. 1859.

434. — Nor that he will suffer inconvenience and delay by having to convey his manufactures across the railroad, and by reason of the obstruction of trains passing along it. *Ib.*

435. — Individual property is exclusive as against individuals, but not as against society. Individual rights must yield to social ones. *Ib.*

436. Consolidation of companies. A petition against a railroad company to recover damages for the taking of land, alleged a location over part of the land by a former railroad company; a consolidation of such company into the respondent corporation; a subsequent location by the respondents "in place of that previously made," whereby it "adopted and confirmed as its own" the former location and taking; and "that by the location of said road and taking aforesaid," the petitioner sustained damage. *Held*, that the petitioner could recover not only for the land taken by the former location, but also for additional land included in the new location. *Pinkerton v. Boston and Albany R. R. Co.*, 109 Mass., 527. 1872.

437. Crossings. The jury may allow the actual damages incident to the taking of the land, arising from inconvenience in crossing the railway, and interfering with crossings already established, also, from the failure or neglect of the company to construct the crossings required by law, but not for making the crossings themselves; they are to be made by the company. *East Pennsylvania R. R. Co. v. Hiestler*, 40 Penn. St., 53. 1861.

438. — Where crossings are made by the company, the jury, in estimating the damages, should not allow the expense of making the crossings to the landowner. *March v. Portsmouth and Concord R. R. Co.*, 19 N. H., 372. 1849.

439. — Whether it is the duty of the company or of its engineer to see to and keep in safe condition a crossing, or other unsafe point on a railroad, is a question of fact for the jury. *Indianapolis and Cincinnati R. R. Co. v. Love*, 10 Ind., 554. 1858.

440. — At the time of the appraisal of the lands of plaintiff no location of the farm

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crossing was indicated on the profile before the commissioners, and there had been no agreement with reference to it, except that the plaintiff had in the presence of the defendants' agents, and before the commissioners, pointed out the place where he wanted the crossing made. *Held*, that the plaintiff was entitled to an injunction to restrain the railway company from locating the road through his land until a suitable crossing was provided or compensation for the damages sustained by making an unsuitable one. *Wheeler v. Rochester and Syracuse R. R. Co.*, 12 Barbour (N. Y.), 227. 1851.

441. — The land owner may select the place for the crossing, and if it is not built there, the company is liable to make compensation for the selection of a more inconvenient place. *Ib.*

442. — Where the plat required by the statute to be annexed to the petition of a railroad company shows that the road is to be constructed with a viaduct at a particular point, for the convenient passage of the owner of lands which are severed by the construction of the railroad, the jury should assess the damages with reference to such plan of construction. And if the corporation afterwards attempts to deprive the land owner of the benefit of such contemplated viaduct, the court of chancery will interfere for his relief. *Kyle v. Auburn and Rochester R. R. Co.*, 2 Barbour's Ch. (N. Y.), 489. 1847.

443. — The owner of land over which a railroad is constructed has no right of action against the railroad company for damages resulting from the want of necessary farm crossings and cattle passes, unless it appears that the company has agreed to provide them, or that the land owner has made application to three justices of the peace and obtained their report, determining where and within what time such crossings and passes shall be made, agreeably to the provisions of § 5, ch. 593, Statutes of 1850. *Horne v. Atlantic and St. Lawrence R. R. Co.*, 36 N. H., 440. 1858.

444. — Neither the railway company nor the land owner has the right to determine separately, and without the consent of the other party, the number and location of the farm crossings. Ch. 26, § 43, Comp. St. *Connecticut and Passumpsic Rivers R. R. Co. v. Holton*, 92 Vt., 43. 1859.

445. — The land owner has no right to build a farm crossing at any other point than the one fixed by the commissioners, or agreed upon with the company, nor to cross the track at any other point than the established crossing. *Ib.*

446. — Where a railway has been built through a town lot, cutting off a small portion of such lot of little value the court will not enforce a specific performance against the railway company of its statutory obligation to construct a crossing, but will leave the land owner to his remedy for damages. *Clarke v. Rochester, Lockport and Niagara Falls R. R. Co.*, 18 Barbour (N. Y.), 350. 1854.

447. Ditching. Where ditching the adjacent land becomes necessary by reason of embankments thrown up for the road, the expense thereof should be considered in assessing the damages. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Mollet*, 59 Ill., 235. 1871.

448. — Where a suit was instituted for damages alleged to have been sustained by plaintiff in consequence of the closing of the ditches on his plantation by the building of the road, and no evidence was given on the trial from which the estimation of damages could be formed, and the jury found a verdict for the plaintiff, the court remanded the cause for a new trial. *Trudeau v. New Orleans, Jackson and Great Northern R. R. Co.*, 15 La. An., 717. 1860.

449. Embankment. In estimating the damages done in the construction of a railway through lands, the erection of an embankment, whereby communication between different parts of the land is destroyed, should be included. *Mason v. Kennebec and Portland R. R. Co.*, 81 Me., 215. 1850.

450. — The injury from location in relation to the peculiar features of the premises, proximity to buildings, interruption of their ordinary use and of the avenues of passage, inconvenience by embankments, deep cuts and the like, are proper subjects for consideration in estimating the depreciation in the value of the property as a whole. The legislature intended to provide for compensation for every injury usually recognized as such by the common law, if committed by a private individual. *Wilmington and Reading R. R. Co. v. Stauffer*, 60 Penn. St., 374. 1869.

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451. Excavations. In an action for damages for the construction of defendant's road over plaintiff's lot, where it appeared that the lot needed for its protection along the line of the excavation for the road, a retaining wall, which would cost \$100, it was not error to reject defendant's offer to show that such wall was necessary also for the security of its road bed, and that its engineer had been directed to construct the same, and had got the stone ready, and was about to do the work; although defendant offered, in connection with this proof, to file a stipulation that it would build this wall, and that in case it failed to do so, the verdict in this action should not impair plaintiff's right to recover in another action the expense of building it. *Thompson v. Milwaukee and St. Paul R. R. Co.*, 27 Wis., 93, 1870; *Price v. Same*, ib., 98.

452. — A railway company is not liable for consequential damages resulting from the caving in of the plaintiff's land in an excavation, where the company has been without fault or negligence. *Boothby v. Androscoggin and Kennebec R. R. Co.*, 51 Me., 318. 1862.

453. — Where defendant, in constructing a railway, made an excavation upon its own land, but so near the line of plaintiff's land adjoining, that the soil of plaintiff's, without any artificial weight being placed thereon, slid into the excavation, it was held, that defendant was liable for the injury. *Richardson v. Vermont Central R. R. Co.*, 25 Vt., 465. 1853.

454. — But where the company, in constructing its road, raised a high embankment near to and in front of plaintiff's house, so that plaintiff could not pass and repass to and from the same, this was held to be a consequential damage only, and the company was, therefore, not liable for the injury. *Id.*

455. Fences. If by the construction of a railroad through the enclosure of a farmer, it becomes necessary to construct fences on either side of the road to protect his crops, the cost of the fences must be included in the compensation to be paid by the railroad company. *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal., 74, 1856; *St. Louis, Jacksonville and Chicago R. R. Co. v. Mitchell*, 47 Ill., 165, 1868; *Winona and St. Peters R. R. Co. v. Waldron*, 11 Minn., 515, 1866; *Same v. Denman*, 10 ib., 267, 1865; *Grand Rapids and Indiana R. R. Co. v. Horn*, 41 Ind., 479, 1873.

456. — In assessing damages, the fencing along the line of the road where it passes through fields should be considered. Also the depreciation in price occasioned by the road passing through the land should be considered. The sale of a portion of the land at an enhanced price, where such sale was not owing to the construction of the road, is not chargeable to the owner as a benefit. But speculative benefits, as the increase in value of the lands by the proximity of the road, should be considered. *Greenville and Columbia R. R. Co. v. Partlow*, 5 Richardson's Law (So. Car.), 428. 1852.

457. — The cost of fencing may be considered by the jury in estimating the damages; but they cannot in their return impose any condition as to making fences upon the railway company. *Vandegrift v. Delaware R. R. Co.*, 2 Houston (Del.), 287. 1860.

458. — Where a charter makes no provision for consequential damages, a railroad company is responsible for all injuries which are the direct and immediate consequence of the construction of the road, to the whole tract of land through which it passes. *Watson v. Pittsburgh and Connellsville R. R. Co.*, 37 Penn. St., 469. 1860.

459. — The exclusive appropriation of a part, the inconvenience arising from a division of the property, or from increased difficulty of access, and the cost of additional necessary fencing are alike the direct and immediate result of such construction. *Id.*

460. — The measure of damages is the difference between what the whole property would have sold for, unaffected by the road, and what it would have sold for as affected by it. *Id.*

461. — The fact that a landholder is obliged, by the construction of a railroad through his farm, to make additional fences, may be considered in estimating the damages. *Evansville, Indianapolis and Cleveland R. R. Co. v. Fitzpatrick*, 10 Ind., 120, 1858; *Mt. Washington R. R. Co., Petition for*, 35 N. H., 134, 1857.

462. — When the damages so assessed have been paid by the railroad company, it may maintain an action against the land owner, if he neglects to fence, and this obligation becomes a covenant running with the land. *St. Louis, Jacksonville and Chicago R. R. Co. v. Mitchell*, 47 Ill., 165. 1868.

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463. — After the assessment and payment of damages, the company is not bound to make fences on either side of the road. *Alton and Sangamon R. R. Co. v. Baugh*, 14 Ill., 211. 1852.

464. — The Vermont and Canada R. R. Co. is required to have its road fenced at least as soon as it is put in operation. *Clark v. Vermont and Canada R. R. Co.*, 28 Vt., 103. 1855.

465. — In estimating the damages for taking the right of way, such damages are based upon the consideration that the road will be constructed properly and in a prudent manner. *Ib.*

466. — But the land owner cannot recover as against the railway company for the wrongful acts of the servants of a contractor in leaving open his fences and bars while building the road. *Ib.*

467. — In estimating the damages which the owner of lands taken for the use of a railroad will sustain by the running of the road through his lands, he should be allowed for the expense of making and maintaining only one half of the partition fences, as the other half, the railroad company is liable to make and maintain. *Rensselaer and Saratoga R. R. Co., In the matter of*, 4 Paige Ch. (N. Y.), 553. 1834.

468. — As no reciprocal obligation exists between the owner of the right of way over, and that of the fee, in the land, whereby either may compel the other to fence, the building of fence is not necessarily an element to be taken into consideration by the commissioners. *Henry v. Dubuque and Pacific R. R. Co.*, 2 Ia., 288, 1855; *Kennedy v. Same*, ib., 521, 1856; *Richards v. Des Moines Valley R. R. Co.*, 18 ib., 259, 1865.

469. — In case the land was fenced, and by taking the right of way, it is thrown open, and left in a manner unfenced, this fact will be taken into consideration in arriving at the depreciated value of the remaining premises. *Ib.*

470. — In the absence of a statute requiring it, a railway company is under no obligation to fence its road. *Ib.*

471. — The cost of fencing cannot be estimated in the damages, but how much the burthen of fencing may detract from the value of the land may be considered. *Delaware, Lackawanna and Western R. R. Co. v. Burson*, 61 Penn. St., 369. 1860.

472. — The jury cannot take into consideration the possible damages that may arise from the killing of stock by the cars on a railroad, or the possible necessity of an increase in the quantity of fencing on said land. *Alabama and Florida R. R. Co. v. Burkett*, 46 Ala., N. S., 569. 1871.

473. — agreement. If, on a hearing before a jury it is agreed between the parties, that the company shall erect and maintain fences along the line of the road, such agreement, if valid, can only be enforced against the company in an action by the party with whom it is made, and not by any subsequent purchaser of the estate to which it relates. *Morse v. Boston and Maine R. R. Co.*, 2 Cushing (Mass.), 536. 1848.

474. — The fact, that the company has erected fences along the line of its road, against the land of a particular individual, is not of itself any evidence of any obligation on its part, to make or maintain fences for the benefit of such person. *Ib.*

475. — award. Where county commissioners, in assessing damages before the act of 1841, ch. 125, was passed, awarded a sum of money to be paid to the complainant, and also provided that the company should make and maintain certain fences for his benefit, and such complainant appealed from the award of the commissioners to a jury, who assessed damages in his favor, but made no order in their verdict as to the fences, it was held, that the company was under no legal obligation to make and maintain fences, agreeably to the award of the commissioners. *Ib.*

476. — record. An assessment of damages for fencing against a railroad company, must be made a matter of record. *Rock Island and Alton R. R. Co. v. Lynch*, 23 Ill., 645. 1860.

477. — statute. As the statutes of Massachusetts confer upon railroad corporations no right to enclose land taken for their road with high fences, so as to prevent the passage of the adjoining land owner to and from the different portions of his estate, the land owner cannot rely upon such anticipated obstruction as a ground of damage against the company for taking his land. *Boston and Worcester R. R. Co. v. Old Colony R. R. Co.*, 12 Cushing (Mass.), 605. 1853.

478. — unenclosed land. Damages can

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not be assessed for fencing along the road through unenclosed land used for grazing. *North Eastern R. R. Co. v. Sineath*, 8 Richardson's Law (So. Car.), 185. 1855.

479. Fire. The land owner cannot be compensated for the risk of fire to his barn and contents, but if from the proximity of the road to the building, the danger of the fire is necessarily so imminent that no man of common prudence would use it for the purposes of a barn, then the owner is injured in this respect, and the jury must consider it in estimating the effect of the road on the property. *Wilmington and Reading R. R. Co. v. Stauffer*, 60 Penn. St., 374. 1869

480. — The depreciation of the value of property arising from the road and not an anticipated injury to the premises by fire is the subject of compensation. *Ib.*

481. — The increase of risk by fire from locomotives, is properly included in the estimate of damages. *Utica, Chenango and Susquehanna R. R. Co., In matter of*, 56 Barbour (N. Y.), 456. 1868.

482. — Increased exposure to fire of buildings already constructed, may be properly considered in estimating the damages. *Colvill v. St. Paul and Chicago R. R. Co.*, 19 Minn., 283. 1872.

483. — In estimating the damages the jury may consider any diminution in value occasioned to the remainder of the land by exposure to fire from the engines of the company, though they should also consider that by statute the company is absolutely liable for such loss. *Bangor and Piscataquis R. R. Co. v. McComb*, 60 Me., 290. 1872.

484. — If a railroad is to be constructed so near to the defendant's barns as to improperly expose them to danger from fire from passing trains, that is a proper subject to be considered by the jury in estimating damages. If the danger is such as to render it advisable to remove the barns, the cost of removal is a proper subject to be considered by the jury in estimating damages. *Oregon and California R. R. Co. v. Barlow*, 3 Or., 311. 1871.

485. — The appraisal of land damages is a bar to claims for injuries by fire from engines, obstructing access to buildings, exposing persons or cattle to injury, cutting off the flowage of water, etc., even though such damages were unknown to the appraisers at the time

of the assessment. *Lafayette Plankroad Co. v. New Albany and Salem R. R. Co.*, 13 Ind., 90. 1859.

486. — should not be considered. The consequential damages apprehended by increased danger of fire, and depreciation in value of a flax mill occasioned thereby, are not proper elements to be considered in estimating the damages. *Union Village and Johnsonville R. R. Co., In matter of*, 53 Barbour (N. Y.), 457, 1868; 35 Howard's Pr. (N. Y.), 420, 1868.

487. — The risk of fires from locomotives, to buildings erected or to be erected on the land over which the railroad passes, is not the subject of compensation. *Sunbury and Erie R. R. Co. v. Hummell*, 27 Penn. St., 99, 1856; *Lehigh Valley R. R. Co. v. Lazarus*, 28 ib., 203, 1857.

488. — Railway companies are responsible for the damage done by fire occasioned through the negligent management of their locomotive engines. *Ib.*

489. — The increased rate of insurance occasioned by the proximity of a railway is not a proper matter to be considered in estimating the damages. *Patten v. Northern Central R. R. Co.*, 33 Penn. St., 426. 1859.

490. Gates. Mere inconvenience in opening, gates and putting up and letting down bars, are not proper subjects to be considered in estimating the damages. *Minnesota Valley R. R. Co. v. Doran*, 17 Minn., 188. 1871.

491. Interest. The owner of land taken for the location of a railway is entitled to interest on the amount of the damages from the time of the taking to the time of assessment. *Bangor and Piscataquis R. R. Co. v. McComb*, 60 Me., 290, 1872; *Delaware, Lackawanna and Western R. R. Co. v. Burson*, 61 Penn. St., 369, 1869; *Whitman v. Boston and Maine R. R. Co.*, 7 Allen (Mass.), 313, 1863.

492. — The statute makes no provision for interest, in cases of lands taken for railroads, but where the amount has been fixed by the award of the commissioners, the court has allowed interest for the detention, from the time of the award, unless the corporation make a tender, in cases arising under the act of 1837, or deposit the money, in cases arising since the act of 1844. *Concord R. R. Co. v. Greeley*, 5 Foster (N. H.), 237. 1851.

493. — Where a railroad company, in pro-

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ceedings under the statute for condemnation of private property, pays into court the damages assessed, and takes possession of the property, and upon petition in error the assessment is set aside, and a new assessment awarded, it is competent for the jury, in making the latter assessment, to allow and include in their verdict interest from and after the time when possession was taken, and while the money was retained by the court. *Atlantic and Great Western R. R. Co. v. Koblentz*, 21 Ohio St., 334. 1871.

494. — The report of the viewers bears interest from the time it is filed, although final confirmation may be delayed by exceptions. *Pennsylvania R. R. Co. v. Cooper*, 58 Penn. St., 408. 1868.

495. — Where the land owner has appealed from the assessment of damages by the commissioners, and his damages have been tendered, he is not entitled to interest unless his damages have been increased on appeal. *March v. Portsmouth and Concord R. R. Co.*, 19 N. H., 372. 1849.

496. — On an appeal from the report of railroad commissioners, awarding damages to a land owner, if the railroad company has given security under the statute for the damages that may be adjudged on appeal, interest should be added to the whole amount of damage sustained by the land owner: but when the sum awarded by the commissioners has been paid into the treasury, and the verdict on appeal exceeds the award, interest should be given on the excess of the damage found by the jury, above the award, but not on the amount of the award. *Shattuck v. Wilton R. R. Co.*, 3 Foster (N. H.), 269. 1851.

497. **New damages.** A railroad company had the land of R. condemned for its road, and the commissioners assessed the damages, and their report was confirmed, and the company paid the amount of damages assessed to R. R. sold the land to D. *Held*, that D. may maintain an action against the company for injury to his land done since the purchase, which could not be foreseen and estimated for by the commissioners. In such cases, the assessment of damages is only a bar to an action for such injuries as could properly have been included in such assessment. *Southside R. R. Co. v. Daniel*, 20 Grattan (Va.), 344. 1871.

498. **Relaying a track.** Merely relaying

the track of a railroad is not a taking of property, within the intent of the constitutional provision requiring compensation to be made. *Hentz v. Long Island R. R. Co.*, 13 Barbour (N. Y.), 646. 1852.

499. **Removal of personal property.** The cost of removing the land owner's personal property from the premises cannot be considered in estimating the damages. *Central Pacific R. R. Co. v. Pearson*, 35 Cal., 247. 1868.

500. **Unit of land.** It is for the jury to say, under the evidence, how much of the land owner's premises should be considered as a unit. The damages should be assessed regarding all or a proper portion of the land as a unit. *St. Paul and Sioux City R. R. Co. v. Murphy*, 19 Minn., 500. 1873.

501. **Water.** Where a part of appellant's land was liable to be washed and to cave off where there was a bank, and the sand drifted from the road to the injury of his adjoining land, and the court instructed the jury that if these effects resulted unavoidably from the building of the railroad in a suitable and proper manner, then damage was to be allowed, but if caused by building the road improperly, it was not to be allowed in this proceeding. *Held*, that the evidence was admissible and the instructions correct. *Dearborn v. Boston, Concord and Montreal R. R. Co.*, 24 N. H., 179. 1851.

502. — On a trial by a jury for damages to be awarded to a land owner for land taken by a railroad corporation in making its road, evidence to prove that before the railroad was constructed a river, at high water, deposited large quantities of sediment upon the petitioner's meadow, which greatly enriched it, and that an embankment made by the railroad in its construction, had materially diminished the deposits in quantity and fertilizing properties, and that the loss had been the effect of the entire embankment, and not merely of that part which was upon the petitioner's land, was held admissible. *Concord R. R. Co. v. Greeley*, 3 Foster (N. H.), 237. 1851.

503. — **surface water.** The turning of surface water upon land by a railroad embankment is a proper element of damages. *Walker v. Old Colony and Newport R. R. Co.*, 103 Mass., 10. 1869.

504. — In the absence of any negligence, unskillfulness or mismanagement in the construction of an embankment for the bed of a

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railroad over land through which there was no natural channel for the passage of water, the injury done by such embankment in causing the water to overflow the land of the adjoining proprietors must be considered as the natural consequence of what the corporation had acquired the lawful right to do by a condemnation of the land and the assessment of damages therefor, and such damage must be taken to have been included in the compensation assessed. *Clark v. Hannibal and St. Joseph R. R. Co.*, 36 Mo., 202. 1865.

505.—If, by an improper construction of the railroad now built, the road bed acts as a dam causing ponds of water, and causes it to overflow the defendants' lands their remedy is by a proceeding to prevent or remove the obstruction, and it is not a ground for additional damages in this proceeding. The damages to be assessed are such as will result from a proper construction of the road. *Oregon and California R. R. Co. v. Barlow*, 3 Oregon, 311. 1871.

506.—If a proper construction of the road will cause ponds of water upon the defendants' adjacent land, the overflow is a proper subject to be considered in estimating damages. *Ib.*

V. PARTICULAR KINDS OF PROPERTY TAKEN OR DAMAGED.

507. Canals and canal lands. All grants made by the state, whether to the canal trustees or others, are subject to that right of eminent domain, unless the right is expressly relinquished. *Illinois and Michigan Canal v. Chicago and Rock Island R. R. Co.*, 14 Ill., 314. 1853.

508.—The grant of a charter by the legislature, authorizing a condemnation of the right of way over the lands held by the canal trustees does not violate the grant made by the state to those trustees. *Ib.*

509.—Where a railway company takes the property and rights of a canal company and constructs its railway on the land of such canal company, the railway company will hold said land subject to any easement that may have existed thereon as against the canal company. *Cincinnati and Indiana R. R. Co. v. Zinn*, 18 Ohio St., 417. 1868.

510.—Proof of a deed of land, with a

privilege in an adjacent canal to the grantee and his heirs and assigns forever is *prima facie* evidence of his title, and will authorize him and his assigns to recover damages for the destruction of a permanent easement therein. *Whitman v. Boston and Maine R. R. Co.*, 3 Allen (Mass.), 133. 1861.

511.—Whether, under § 12 of the act of May 1, 1852, to provide for the erection and regulation of incorporated companies, etc. (3 Curwen's L., 1860), a railroad company may, in the exercise of the delegated power of eminent domain, appropriate to its use, for the purposes of a railroad, the lands constituting the body of a canal acquired by the exercise of like delegated power by a canal company for the purposes of such canal, against the consent of the latter—*quære?* But be this as it may—*held*: I. Where such companies resort to the form of appropriation merely for the purpose of consummating what is in reality an amicable purchase by the railroad company, from the canal company, of its easement in the lands appropriated, and a railroad is thereupon constructed on the line, and in the place of the canal, this is not such an abandonment of the easement of the canal company as will work its reversion to the owner of the land in fee simple. *Hatch v. Cincinnati and Indiana R. R. Co.*, 18 Ohio St., 92. 1868.

512.—Where, in such case, the owner of the fee simple title to the lands covered by the easement, though denying the right to have made it, yet recognizing the appropriation by the railroad company as an accomplished fact, brings his action against the railroad company to recover damages as for a permanent appropriation, he is entitled to recover the full value of lands, if any, taken by the railroad company, and not covered by the former appropriation by the canal company; and also, a full and fair compensation for such additional burdens and inconveniences, not common to the general public, as accrue to him and his entire tract on which the easement is imposed, by reason of the change of uses to which the lands appropriated have been subjected. *Ib.*

513.—Where an entire tract of land is cut asunder by an appropriation of an easement upon it by a canal company, for the purpose of a canal; and this easement is afterward

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transferred by the canal company to a railroad company, for the purpose of a railroad; and the latter, in the construction of its railroad, throws up embankments or excavates cuts across a common public highway, skirting the tract, and constituting the only convenient medium of access between the parcels into which the tract has been thus severed, the increased inconvenience and danger of access thus occasioned between the two parts of the tract are peculiar to the owner of the tract in the use of his property, not common to the public at large, and for this increase of inconvenience and danger, he is entitled to compensation. *Ib.*

514. — A railroad company having purchased a majority of the shares of stock in a canal company, elected for the latter a board of directors who were in the interest of the railroad company, and then, with the assent of said board, appropriated the entire canal and property of the canal company as a railroad track, paying therefor a price or compensation which was agreed upon by the directors of the two companies, but which was far below the actual value of the property, *held*, that although the stockholders and creditors of the canal company cannot, after the road has been completed, reclaim the property, or enjoin its use, yet they are not concluded by such agreement, so far as regards the price of the property, but may, by action, compel the railroad company to account for its additional value. *Goodin v. Cincinnati and Whitewater Canal Co.*, 18 Ohio St., 169. 1868.

515. — Wherever the commonwealth, in the construction of her public works, acquired the fee simple in land taken therefor, either by purchase or through the exercise of her right of eminent domain, and the land was devoted to public use as a highway, a cessation of that use would not revert the title thereto in the former owner. *Haldeman v. Pennsylvania Central R. R. Co.*, 50 Penn. St., 425. 1865.

516. — The title to land permanently taken and used for the construction of the Pennsylvania canal under the acts of 1826 and 1827, became, upon payment of the damages awarded by the viewers, absolute in the commonwealth, and passed to her grantee, the Pennsylvania R. R. Co., under the act of 1857, providing for the sale of the main line of the public works; and did not revert to the origi-

nal owner, on a change in the course of the canal made by the canal commissioners before the sale. *Ib.*

517. — A license or permission by the board of canal commissioners to the plaintiff's ancestors, to construct a wharf on the berme side of the canal by excavating twelve feet back into his lot from the water line, and subsequent erection of the wharf and use for many years, could not divest the title of the commonwealth to the land thereby occupied, if it was in the line of survey reported by the viewers. *Ib.*

518. Churches. Where a lot is common, both to a church building and its parsonage, the parsonage is within the acts of April 23 and August 12, 1864, allowing the Pennsylvania R. R. Co. to "tunnel under places of public worship," and providing for assessing damages. *Pennsylvania R. R. Co. v. Lutheran Congregation of Pittsburgh*, 53 Penn. St., 445. 1866.

519. Commons. Only commoners have a beneficial estate in the Allegheny common, and they cannot be deprived of it without a compensation which will fully pay them for all the injury which they must suffer. *Bell v. Ohio and Pennsylvania R. R. Co.*, 1 Grant's Cases (Penn.), 105. 1854.

520. — The corporate authorities of the city of Allegheny have no authority to confer upon respondents the private interests of the commoners in the Allegheny commons. *Ib.*

521. — Where the state surveyed a town and reserved one hundred acres without the town for a common pasture, it was *held*, that the common was a common appurtenant, as distinguished from a common appendant. And if one of the purchasers of the lots who has a right to a common appurtenant, purchase part of the land subject to the easement, all his right of common is extinguished. So if he be a disseizor of a part of the common. Where a commoner's right has been extinguished, he has no interest in the common to entitle him to ask for an injunction to restrain a trespasser on the common rights of others. The annoyance arising from the necessary use of a railway, is not a nuisance *per se*. The fact of the nuisance in such case must be determined by the jury. *Ib.*, 25 Penn. St., 161. 1855.

522. — By the act of Sept. 11, 1787, laying out the town of Allegheny, the title to one hundred acres, reserved for a common pas-

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ture, remained in the state, the lot holders being entitled to the pasturage. These titles were both legal ones, and the state was not a trustee for them. Subsequently, the common was granted to the city, subject to the easement of the lot owners. *Held*, that the select and common councils of the city could grant a portion of the land for a right of way to a railway company, such being a public use within the meaning of the authority conferred upon the councils. *Mayor of Allegheny v. Ohio and Pennsylvania R. R. Co.*, 26 Penn. St., 355. 1856.

523. — Such grant to a railway company is to be taken most strongly against the grantee. A right of way fifty feet wide, through a city, will not carry by implication the right to erect within such line, depots, car houses and other structures. *Id.*

524. — Such grant does not authorize the company to permit its cars and engines to remain on the tracks within the fifty feet for a longer time than necessary to discharge its freight and passengers. *Id.*

525. — The company must provide suitable accommodations within the fifty feet for receiving passengers and freight, and if it does not do this, and the common is thereby trespassed upon, the company becomes a party to the intrusion. *Id.*

526. **Dwellings.** The act, Code, ch. 56, § 4, p. 292, does not apply to a case in which a railroad company is not entering upon the land of an owner of a dwelling house. *Richmond and York River R. R. Co. v. Wicker*, 13 Grattan (Va.), 375. 1856.

527. — The O. and P. R. R. Co. has the right, under its charter, to remove a dwelling house in constructing its road. *Brocket v. Ohio and Pennsylvania R. R. Co.*, 14 Penn. St., 241. 1850.

528. — A statute which provides, that in taking land without the consent of the owner, for railway purposes, no dwelling house shall be taken, does not prevent the taking of the garden, orchard or curtilage. *Wells v. Somerset and Kennebec R. R. Co.*, 47 Me., 345. 1860.

529. — In estimating the damages occasioned to the owner of a messuage, by taking part of his land, depreciation in value of his estate, arising from the proximity of the road and running of the trains, is to be considered only so far as it is due to proximity caused by

and would not have resulted but for such taking. *Walker v. Old Colony and Newport R. R. Co.*, 103 Mass., 10. 1869.

530. **Ferries.** In an action against a railroad company, for damage occasioned to the plaintiffs by the erection of the road, where a general verdict was returned for the plaintiffs, the facts, that the railroad company had employed competent engineers, and had done no willful or unnecessary damage, would not entitle the defendant to a judgment, *non obstante veredicto*, because the road may have been located, and the work performed, with the utmost care, and yet damage may have resulted to the plaintiffs. *New Albany and Salem R. R. Co. v. Huff*, 19 Ind., 315. 1862.

531. **Fruit trees.** If fruit trees, which are upon the land taken, were not included in the damages for the land itself, they may be the subject of a separate assessment. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Mollet*, 59 Ill., 235. 1871.

532. **Materials.** Where the application for the assessment of damages was made after the road had been constructed, and in such construction, a large amount of earth had been taken outside of the right of way asked, it was held that it was not error for the jury to consider the damages for taking earth as the claim of appropriation asked to have the damages occasioned by the "construction" of the road assessed, and evidence of such damage was given without objection. *Whitewater Valley R. R. Co. v. McClure*, 29 Ind., 536. 1868.

533. — The Vermont Central R. R. Co. has power under its charter, when necessary for the construction of its road, to take stone from land contiguous to the line of their survey, and to use land for the purpose of cutting and hewing stone thereon. *Vermont Central R. R. Co. v. Baxter*, 22 Vt., 365. 1850.

534. — This power, to be exercised in a proper manner, is necessarily delegated from the corporation to the contractor, and for this purpose the contractor is the agent of the corporation. *Id.*

535. — The liability of the corporation is not affected by any stipulation between the corporation and the contractor. *Id.*

536. — The commissioners, who are called to assess damages in such case may award costs to the land owner. *Id.*

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537. Mills and mill power. The consequential injury which a mill, situated on a portion of land not taken, may be likely to sustain, from the construction and operation of a railroad, is a matter with which the commissioners have nothing to do. *Canandaigua and Niagara Falls R. R. Co. v. Payne*, 16 Barbour (N. Y.), 273. 1853.

538. — The legislature may authorize the construction of railroads without requiring compensation to be made to persons whose property has not actually been taken, or appropriated, for the use thereof, but who may, nevertheless, suffer indirect or consequential damages thereby. *Arnold v. Hudson River R. R. Co.*, 49 Barbour (N. Y.), 108. 1867.

539. — The case of a railroad company acquiring its roadway subject to an easement or servitude appurtenant to mill property, consisting of the right to carry water across the land of another, to the mill, is within the above principle. *Ib.*

540. — Where a corporation was empowered by the legislature, in general terms, to locate and construct a railroad between certain *termini*, and between these *termini* lay an extensive tract of land already appropriated, under the authority of the legislature, to public use, for mill ponds, by another corporation, and this tract might be crossed by the railroad, with some diminution of the mill power, and which might be compensated in damages, but without essential injury, it was *held*, that there was nothing in the nature of such public use, and in the extent to which it would be impaired or diminished, from which the power of constructing the railroad over it might be presumed to have been restrained by the legislature. *Boston Water Power Co. v. Boston and Worcester R. R. Co.*, 23 Pickering (Mass.), 360. 1839.

541. — A railway company is responsible for the damages occasioned by constructing its road through and across a mill pond, authorized by the legislature to be raised in a navigable river; although in erecting the dam for raising such pond, the conditions of the act are not complied with. *White v. South Shore R. R. Co.*, 6 Cushing (Mass.), 412. 1850.

542. — In an issue, under act of February 19, 1849, to assess the damages done to the plaintiffs' water power by the construction of the defendants' railroad, it is error to reject

evidence that the cause of mischief complained of could be removed for \$140. *Barclay R. R. and Coal Co. v. Ingham*, 36 Penn. St., 194. 1860.

543. — A water power on one of the smaller streams of the state, is such a property as a railroad company is liable to make compensation for, if damaged by the construction of the road, although the stream might have been declared a public highway by act of assembly. *Ib.*

544. — In respect to the great rivers of the state, which are navigable by nature and therefore public highways at common law, the Mill Dam Act of March 23, 1803, is but a license to the riparian owner, subject to be revoked whenever the public interests require it. *Ib.*

545. — Such right of property is subject to the public easement of their use for purposes of navigation, so far as they are capable of it. And it is not necessary, in order to confer such easement on the public, that they should be declared public highways by the statute. *Ib.*

546. — The only effect of declaring such a stream a public highway by act of assembly, is, to bring it within the remedial provisions of the act of March 23, 1803. It does not affect the vested rights of the riparian owner. *Ib.*

547. — The act is a fuller remedy for the infringement of the public right but it does not confer a license on the riparian owner; when such riparian owner improves his water power, he does it, not under a revocable license, but as owner of the soil. *Ib.*

548. — A railway company is not liable for consequential damages occasioned by the location and construction of its road, unless made so expressly by act of assembly. *New York and Erie R. R. Co. v. Young*, 83 Penn. St., 175. 1850.

549. — The right to erect a mill dam is only a license, subject to be revoked, whenever the paramount interests of the public shall require it. *Ib.*

550. — An injury to such right, occasioned by the construction of a railroad, under authority of law, is not one for which the railroad company is liable to make compensation in damages. *Ib.*

551. — It would be error to leave it as a

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question of fact for the jury to say whether the company could without, unreasonable expense, or undue injury to the road, have so changed the site of it as to avoid having caused the damage complained of. *Ib.*

552. — The company alone is intrusted with the location of its road, subject to the liability imposed by law for the damage sustained. *Ib.*

553. — In a question of damages for the construction of a railroad, evidence was proper that the construction of the road tended to decrease the business of a mill, by making it unsafe to drive horses near it, and dangerous and inconvenient for persons going to and from it. *Western Pennsylvania R. R. Co. v. Hill*, 56 Penn. St., 460. 1867.

554. — Such damage was not consequential and prospective. *Ib.*

555. — The right of using the land of others in basins for the purpose of creating a water power is a franchise or easement, and the interference with such rights by an illegal filling up of a portion of such basins is a nuisance, and it is within the jurisdiction of a court of equity to give redress. *Boston Water Power Co. v. Boston and Worcester R. R. Co.*, 16 Pickering (Mass.), 512. 1835.

556. — In an action against a railroad company for damages done to a mill property by the construction of the road, the injury to the unused and surplus water power of the plaintiff is a legal ground of claim, and the measure of damages is its actual market value for any useful purpose, the mill property remaining as it was when the road was constructed; hence, evidence as to the power that could be gained by erecting a new dam further down the stream, making a shorter race and other alterations, was irrelevant and inadmissible. *Dorlan v. East Brandywine and Wynesburg R. R. Co.*, 46 Penn. St., 520. 1864.

557. — The admission of evidence that the company had offered to repair the damages and remove the inconvenience caused by the construction of the road, is immaterial, where the jury were instructed in the charge, that, as the work was never done, the injuries complained of were the proper subject of compensation. *Ib.*

558. — release. The plaintiffs being the owners of a tide mill, authorized the defendant to maintain a bridge, resting on piles,

across their mill pond, and to modify the structure and supports in any way that might be deemed proper, to secure and preserve them, and released all damages on account of the bridge, and of any future modification of it; with a proviso, that if it should be so altered as to increase the damages to the mill pond by diminishing the quantity of water, or otherwise impairing its efficiency, the plaintiffs should not be prejudiced in their claim for further damages. The plaintiffs subsequently released to the P. and C. R. R. Co. that part of the pond on which the bridge stood, bounding the land, released by the northerly side line of the bridge, saving and excepting all right, title, interest and privilege before conveyed to the defendant. The P. and C. R. R. Co. subsequently conveyed the land under the bridge to defendant with, the privilege of filling up the space under and to slope the northern embankment by a wall or otherwise into the mill pond. The defendant, in filling up around the piles under the bridge, allowed the earth to run out to its natural slope into the mill pond, beyond the side of the bridge. *Held*, that this was such a modification of the bridge as was contemplated by the parties to the agreement, but that a promise to pay the damages was implied, and assumpsit might be maintained therefor; but that under the release to the P. and C. R. R. Co., the plaintiffs could only recover the damages occasioned by the running out of the embankment beyond the northerly side of the bridge. *Goodrich v. Eastern R. R. Co.*, 37 N. H., 149. 1858.

559. — tide mill. The grantor of a tide mill and mill pond, who had reserved the right of boating and rafting through the pond, and of using the same as a depot for lumber, it seems, has no such interest in the premises, by virtue of such reservation, as to entitle him to become, or to render it necessary that he should be made, a party to a proceeding under the Rev. Sts., ch. 24, §§ 48, 49, 50. *Davidson v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 91. 1849.

560. — Where the petitioners rested their claim for damages on the ground, that a creek crossed by the railroad was a part of a tide mill pond belonging to the petitioners, and introduced in evidence the deed under which they held the premises, together with a plan and survey thereof, the correctness of which

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was testified to by the surveyor by whom they were made, it was *held*, that whether the creek in question was a part of the mill pond or not, was a question of fact for the jury. *Ib.*

561. — The owner of a right of flowage, which is injured by the construction of a railroad, is entitled to damages therefor. *Ib.*

562. Mines. The legislature in virtue of the right of eminent domain, may authorize the condemnation of private property by a mining company for the construction of a railroad to be used for the transportation of coal from its mines—such use being of a public nature. *New Central Coal Co. v. George's Cr. Coal Co.*, 37 Md., 587. 1872.

563. — Where compensation is claimed for the location and construction of a railroad between coal mines and a navigable river on the land owner's premises, whereby the conveniences of the river transportation for the coal to market were injured or cut off, it is competent for the railroad company to show that the river transportation, in connection with the coal banks, had ceased to be valuable, or become of less value by means of the facilities for coal transportation afforded by the railroad, for the purpose of reducing the damages. *Cleveland and Pittsburgh R. R. Co. v. Ball*, 5 Ohio St., 508. 1856.

564. — In estimating the damages that will be sustained by the construction of a railway through the property of a land owner, the jury may allow the party the market value of the land taken, and all actual damages arising from the manner in which the road passes through the property and affects the improvements; but they are not at liberty to estimate the value of unopened mines beneath the surface. *Searle v. Lackawanna and Bloomsburg R. R. Co.*, 33 Penn. St., 57. 1859.

565. — Although contingent future disadvantages may be set off against the advantages to be derived from the construction of the road, they cannot be taken into consideration as a substantive claim for damages. *Ib.*

566. — In making roads over unopened mines, it is not a subject of damage that the owner will be thereby put to expense and inconvenience when he begins to work his mines. *Ib.*

567. Private way and private railroad. The obstruction of a private way by a railroad is a proper subject for damages, within

the Rev. Sts., ch. 89, § 56. *Parker v. Boston and Maine R. R. Co.*, 8 Cushing (Mass), 107. 1849.

568. — One who has a right of way across a street not a public way, by grant from the owner of the fee, cannot recover damages under Rev. Sts., ch. 89, § 56, of a railroad company duly locating its road over and along said street, and over said right of way. *Boston and Worcester R. R. Co. v. Old Colony R. R. Co.*, 12 Cushing (Mass.), 605. 1858.

569. — Where a railroad in the course of its construction was cut through an individual's land, dividing a road which he had made on his own land, for his private use, to pass from one part of his farm to another, and also dividing his pasture, — *held*, that these were matters that were not the subject of action by virtue of the act of July 8, 1847, but were such as must be understood to have been taken into consideration by the commissioners in making their award. *Clark v. Boston, Concord and Montreal R. R. Co.*, 24 N. H., 114. 1851.

570. — The act incorporating the defendant as a railroad company, provided that if the road should be so constructed as to cross any private way, and should obstruct the safe and convenient use of it, the party aggrieved should be entitled to his action on the case against the company, and should recover reasonable damages for such injury; but that no such action should be commenced after the expiration of two years from the obstruction. *Held*, that to maintain this action it was not necessary that the railroad should be constructed or managed in an improper and illegal manner. *Greenwood v. Wilton R. R. Co.*, 3 Foster, (N. H.), 261. 1851.

571. — That, it appearing on an agreed case, that the road of the defendant was constructed and maintained across a private way of the plaintiff, in a proper manner, and that a passage was provided for the private way over the track of the railroad, the court could not decide, as a matter of law, whether the safe and convenient use of the private way was obstructed; but this was a question of fact to be settled by a jury. *Ib.*

572. — private railway. Where a railway company took a part of a railway belonging to P., and used by him in connection with his ore bed, it was *held* that in estimating P.'s damages, if his ore bed and the remaining

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section of his road were depreciated in value by reason of such taking, these facts should be considered. *Poughkeepsie and Eastern R. R. Co., In matter of*, 63 Barbour (N. Y.), 151. 1872.

573.—The laying of tramways by the plaintiff across a public road running through his land, for the use of his coal cars, is illegal and a nuisance; and the company is not liable for removing them, especially where crossings were constructed for plaintiff's use. *Harvey v. Lackawanna and Bloomsburg R. R. Co.*, 47 Penn. St., 428. 1864.

574. Springs. Where the owner of the land claims that he will lose the beneficial enjoyment of a spring on the land, that is a proper subject for compensation. *Peoria and Rock Island R. R. Co. v. Bryant*, 57 Ill., 473. 1870.

575.—The plaintiff's buildings were supplied with water from a permanent spring. After an excavation had been made on his land for the purposes of a railroad, water appeared in the excavation, about fifteen feet below the surface of the ground, and the spring disappeared. Damages were assessed to him before the excavation was made. *Held*, that the injury to the spring must be presumed to have been considered by the commissioners, and that an action to recover damages therefor could not be sustained. *Aldrich v. Cheshire R. R. Co.*, 1 Foster (N. H.), 359. 1850.

576. Riparian owners. The owner of land adjoining a navigable river owns the soil to low water mark, subject to the public right of navigation to high water mark as it exists naturally. *Lehigh Valley R. R. Co. v. Trone*, 28 Penn. St., 206. 1857.

577.—Where a spring of water on the land of such owner, situated below high water mark, has been cut off or injured by the construction of a railway over his land, he is entitled to compensation therefor. *Ib.*

578. Timber. The estimate should not include the value of timber on the defendant's adjacent lands, cut down and destroyed by the plaintiff. *Oregon and California R. R. Co. v. Barlow*, 3 Or., 311. 1871.

579.—The timber situated on the land taken for the right of way remains the property of the land owner, and the company only has the right to take and remove so much of it as may be necessary for the construction

and repair of the road and its appurtenances. Ch. 81, Laws of 1853. *Preston v. Dubuque and Pacific R. R. Co.*, 11 Ia., 15. 1860.

580.—The word "construction" in the "right of way act" implies not only the making of the road bed, but also its preparation and readiness for use in a safe and convenient manner. *Ib.*

581. Turnpike. The use and occupation of a turnpike for a horse railway is not an additional easement entitling the owner of the fee to compensation. *Peddicord v. Baltimore, etc., R. R. Co.*, 34 Md., 463. 1871.

582.—Where a railway company is authorized by its charter to erect an embankment upon a turnpike, it will nevertheless be compelled to pay to adjoining property owners the damages resulting from such erection. *Mahon v. Utica and Schenectady R. R. Co., Lator* (N. Y.), 156. 1843.

583.—Under Rev. Stat., ch. 39, § 67, providing that every railroad company "may raise or lower any turnpike or way for the purpose of having its railroad pass over or under the same," a railroad company may raise a turnpike road for the purpose of constructing the railroad across it upon the same level. *Newburyport T. Co. v. Eastern R. R. Co.*, 23 Pickering (Mass.), 326. 1839.

584.—The Vermont Central R. R. Co. has power under its charter to enter upon and cross a turnpike road, as well as any other highway, making compensation to the turnpike company for the injury. *White River Turnpike Co. v. Vermont Central R. R. Co.*, 21 Vt., 590. 1849.

585.—Where there has been a legislative grant to a corporation to erect a bridge, turnpike or other public convenience, which is not in its terms exclusive, there is no constitutional obligation on the legislature not to grant to a second corporation the right to erect another bridge or turnpike for a similar purpose, to be constructed so near the former as greatly to impair or even destroy the former, and this without making any compensation for the consequential injury. *Ib.*

586.—In assessing damages sustained by a turnpike company by reason of a railway being constructed across it, it will be assumed that the railway company will comply with the law and leave the turnpike in such a condition as will not unnecessarily impair its

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usefulness. *Troy and Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barbour (N. Y.), 100, 1852.

587. — The fact that railway competition will diminish the business of the turnpike company should not be considered. *Ib.*

588. — A turnpike was constructed in 1825, over the lands of individuals, and damages therefor were paid. In 1849, the turnpike company transferred its road, under an act of the legislature, to a railway company. *Held*, that the land owners were not estopped from claiming the additional damages occasioned by the railway, although no more ground was taken than was occupied by the turnpike. *Mifflin v. Railroad Co.*, 16 Penn. St., 182, 1851.

589. Water courses. A railroad was constructed across a water course without making a culvert, thereby setting back the water and injuring land some distance from the railroad. *Held*, that the damages could not be recovered by petition under Rev. Stats., ch. 89, § 56. *Proprietors of Locks and Canals v. Nashua and Lowell R. R. Co.*, 10 Cushing (Mass.), 385, 1852.

590. — Railway companies are liable for diverting a stream of water from its natural course to the injury of a neighboring proprietor. *Hatch v. Vermont Central R. R. Co.*, 25 Vt., 49, 1352.

591. — The defendant was the owner and occupant of a certain messuage, to which water was conducted for use, by an aqueduct, from a spring upon another portion of his land, and the Vermont Cent. R. R. Co. having located its road across the same, the commissioners were called to assess the damages. At the hearing, the defendant stated that he should use the water for the purpose of supplying a new house, which he contemplated erecting, and that the commissioners need not take the water into account in assessing the damages. The president and engineer of the company were present and heard this statement, and made no claim to the use of the water; and the water was not considered in assessing the damages. The defendant received the amount of the damages assessed, and executed an absolute deed to the premises, without condition or reservation. *Held*, that the right to use the water passed by the deed. *Vermont Central R. R. Co. v. Estate of Hills*, 23 Vt., 681, 1851.

592. — navigable streams. The owner

of land adjoining a navigable river in which the tide ebbs and flows, has no private right or property in the river or in the shore between high and low water mark, and cannot obtain compensation for the construction of a railway along such river between high and low water mark. *Gould v. Hudson River R. R. Co.*, 6 N. Y., 522, 1852; *Same v. Same*, 12 Barbour (N. Y.), 616, 1852; *Getty v. Hudson River R. R. Co.*, 21 ib., 617, 1856.

593. — The defendant constructed its road across a deep bay upon the Hudson river, about nineteen hundred feet distant from and in front of the plaintiff's wharf, placing in its structure a sufficient draw as required by § 15 of its act of incorporation. *Held*, that the plaintiff's wharf was not "cut off" by the railroad within the meaning of that section; and that an action would not lie to compel the defendant to extend the wharf across the line of the road, or to otherwise improve the same. *Tillotson v. Hudson River R. R. Co.*, 9 N. Y., 575, 1854; *Same v. Same*, 15 Barbour (N. Y.), 406, 1853.

594. Wharves. Where the value of the wharf is impaired by the construction of a railroad across the flats below it, the owner is entitled to recover of the railroad company the damages thus sustained by him. *Ashby v. Eastern R. R. Co.*, 5 Metcalf (Mass.), 368, 1842.

595. — Where the owner of a wharf and others have a joint interest in the profits of the business of such wharf, they may jointly recover the damages occasioned to the wharf by the construction of a railway. *Ib.*

596. — Where the proprietor of a wharf in the harbor of Boston was authorized by the legislature to extend the same into the channel to the line of the harbor; and, before such extension, the legislature incorporated a railroad company, with authority to locate and construct a railroad over the flats between such wharf and the line of the harbor; it was *held*, that the act authorizing such extension operated as a grant to the proprietor of the wharf, and was not a mere license revocable at the pleasure of the legislature, and revoked by the act incorporating the railroad company. *Fitchburg R. R. Co. v. Boston and Maine R. R. Co.*, 8 Cushing (Mass.), 58, 1849.

597. — In a petition for the assessment of damages caused to a wharf used for the wood and lumber business, and the land connected

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therewith, one who has been engaged in the lumber business for several years on a wharf in the vicinity, and who has also been connected for many years with railroads, but who has not had any peculiar means of knowledge as to the effect of constructing railroads over wharves similar to that of the petitioners, is not thereby qualified as an expert to testify as to the effect of the location on the value of the petitioners' wharf for that business. *Boston and Worcester R. R. Co. v. Old Colony and Fall River R. R. Co.*, 3 Allen (Mass.), 142. 1861.

598. — The F. R. R. Co. having claimed damages of the B. and M. R. R. Co. for land and wharves, and certain flats (over which it was authorized to extend its wharves), taken by the latter for its road; and the sheriff's jury having returned a verdict assessing the greater part thereof "for the land over which the company had a right to build a pier wharf," between the sea wall and the line of the harbor, "and for the injury to other land on which the said F. R. R. Co. had a right to build a pier wharf;" and it was objected, that the verdict was erroneous, in giving the damages only for land over which the petitioners had a right to build a pier wharf; it was *held*, that though there might be some inaccuracy in the verdict, there was nothing to warrant the conclusion that it did not include land owned by the petitioners and taken by the respondents. *Fitchburg R. R. Co. v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 58. 1849.

599. — An act of the legislature having authorized a railroad corporation to make certain erections for its road between the channels of Charles and Miller's rivers, in a manner particularly specified in the act; and such erections having been made accordingly, in the manner specified, whereby the course of the currents of these rivers was changed, and directed towards and upon certain wharves and flats, rendering additional sea wall and filling necessary to secure the same; it was *held*, that the damage thereby occasioned to the proprietor was *damnum absque injuria*, for which he was not entitled to recover against the railroad corporation. *Id.*

VI. BENEFITS.

600. Benefits — constitutional law. The

18th section of the railroad act, providing that an allowance shall be made for benefits, is not unconstitutional. *San Francisco, Alameda and Stockton R. R. Co. v. Caldwell*, 31 Cal., 367. 1866.

601. — may not be considered. Benefits to other lands of the owner over which the road does not run should not be considered. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Brown*, 58 Ill., 61, 1871; *Hunt v. Smith*, 9 Kans., 137, 1872; *Newcastle and Richmond R. R. Co. v. Brumback*, 5 Ind., 543, 1854; *Louisville and Nashville R. R. Co. v. Glazebrook*, 1 Bush (Ky.), 325, 1866; *Isom v. Mississippi Central R. R. Co.*, 36 Miss., 200, 1858; *Whitewater Valley R. R. Co. v. McClure*, 29 Ind., 536, 1868; *St. Joseph and Denver R. R. Co. v. Orr*, 8 Kans., 419, 1871; *Giesey v. Cincinnati, Wilmington, etc. R. R. Co.*, 4 Ohio St., 308. 1854.

602. — value. It was held proper to refuse to charge the jury "that they were to consider the particular value which the land may possess in relation to the rest of the estate from which it is dismembered;" and also it was held proper to refuse to charge the jury "that the augmentation of value, if allowed at all, is not to be allowed in compensation for damages, until the expropriation is legally effected. *New Orleans, Opelousas and Great Western R. R. Co. v. Lagarde*, 10 La. An., 150. 1855.

603. — The value of the land at the time that it is taken must be determined irrespective of any general benefits arising from the construction of the proposed road. *Carli v. Stillwater and St. Paul R. R. Co.*, 16 Minn., 260, 1871; *Schermeely v. Same*, *ib.*, 507.

604. — The rule recognized by the supreme court in *Brown v. Beatty*, 34 Miss., 227; *Isom v. Mississippi Central R. R. Co.*, 36 Miss., 300; and *Penrice v. Wallis*, 37 Miss., 172, that in estimating the damages the advantages to the owner of the land, caused by the construction of the road, are not to be considered, is approved and confirmed; and the rule also declared to apply to cases where the incidental benefits arising from the public work are sought to be set off against the incidental damages accruing to property from its construction. *New Orleans, Jackson and Great Northern R. R. Co. v. Moye*, 39 Miss., 374. 1860.

605. — The jury, in determining the amount of damages, are to exclude from their

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consideration all future benefits that may accrue to the owner of the land, from the construction or operation of the road. *Evansville, Indianapolis and Cleveland R. R. Co. v. Fitzpatrick*, 10 Ind., 120, 1858; *Same v. Stringer*, ib., 551.

606. — may be considered.. The benefits accruing from the construction of a railway may be set off against the damages occasioned thereby. *Oregon Central R. R. Co. v. Wait*, 3 Or., 428. 1869.

607. — The jury are not at liberty to consider that the defendant's railroad will be of no benefit to the plaintiff, in his business there, because he has already the use of other railroads, if his property will be thereby increased in value. *Patten v. Northern Central R. R. Co.*, 38 Penn. St., 426. 1859.

608. — In proceedings for the appropriation of private property to public uses, arising under the constitution of 1802, the construction put upon that instrument by the supreme court, that it allowed the benefits conferred to be deducted from the value of the property appropriated, and that it did not require the assessment to be made in a court, or by a jury, will be adhered to by this court. *Kramer v. Cleveland and Pittsburgh R. R. Co.*, 5 Ohio St., 140. 1855.

609. — Three disinterested freeholders of the county where the property is situated, appointed by a judge of a court of record, was a competent tribunal to make the assessment. *Ib.*

610. — In an appropriation of a right of way, by a railroad company, over the lands of an individual, under the act of February 11, 1848, and where the award by appraisers, acting under § 9 of said act, found the aggregate amount of damages sustained by the owner of the lands, irrespective of benefits to him accruing from the road, and also the amount of such benefits in a separate item of their report, it is error to adjudge to the owner the aggregate sum, without deducting for benefits. *Columbus, Piqua and Indiana R. R. Co. v. Stimpson*, 5 Ohio St., 251. 1855.

611. — If the commissioners assess the cost of fencing separately from the estimate of damages to land not taken, there is no substantial error, and the court may enter judgment for the value of the land and the cost of fencing, and the excess of damages over ben-

efits to land not taken, if there be any. *California Pacific R. R. Co. v. Frisbie*, 41 Cal., 356. 1871.

612. — If such commissioners assess the value of the land taken and then the gross amount of the damages to land not taken over the benefits to land not taken, it is a substantial compliance with the statute. *Ib.*

613. — Under the act of 1852, the jury are not confined to the consideration of the state of facts as they existed at the time the land was taken, but may consider the subject of damages and benefits in the light of the facts as they exist at the time of the trial. *Hayes v. Ottawa, Oswego and Fox River Valley R. R. Co.*, 54 Ill., 378. 1870.

614. — general advantages. In making allowance for benefits, only such benefits should be considered as the owner derives, over and above all the benefits received by his neighbors whose lands are not taken. *Lee v. Tebo and Neosho R. R. Co.*, 58 Mo., 178, 1873; *Hornstein v. Atlantic and Great Western R. R. Co.*, 51 Penn. St., 87, 1865; *Whitman v. Boston and Maine R. R. Co.*, 3 Allen (Mass.), 133, 1861; *Same v. Same*, 7 ib., 313, 1863; *Little Miami R. R. Co. v. Collett*, 6 Ohio St., 182, 1853; *Meacham v. Fitchburg R. R. Co.*, 4 Cushing (Mass.), 291, 1849; *Davis v. Charles River Branch R. R. Co.*, 11 ib., 506, 1853; *Freedle v. North Carolina R. R. Co.*, 4 Jones' Law (N. C.), 80, 1856; *Pacific R. R. Co. v. Crystal*, 25 Mo., 544, 1857; *St. Louis and St. Joseph R. R. Co. v. Richardson*, 45 Mo., 466, 1870; *Same v. Robinson*, ib., 483; *Winona and St. Peter R. R. Co. v. Waldron*, 11 Minn., 515, 1866; *Minnesota Central R. R. Co. v. McNamara*, 13 ib., 508, 1868.

615. — Under the constitution of the state and under the charter of the Baltimore and Potomac R. R. Co., incidental benefits are to be set off against incidental damages only, the value of the land taken is to be paid for in any event. *Shibley v. Baltimore and Potomac R. R. Co.*, 34 Md., 386. 1871.

616. — When private property is taken for public use, "just compensation," within the meaning of the constitution, must be made therefor in money, and any increased value of the lands of the owner arising from the public works, for which the lands are taken, cannot be considered in assessing the amount of compensation to be paid for the portion taken.

Benefits.

Alabama and Florida R. R. Co., v. Burkett, 42 Ala., 88. 1868.

617. — The intention of the legislature was, by the railroad act of 1850, to confine the commissioners to an estimate of the price to be paid by the railroad company, to the owner of land proposed to be taken, regardless of the benefits or injuries which might result to him as the owner of adjoining land, in consequence of the contemplated improvement. *Albany Northern R. R. Co. v. Lansing*, 16 Barbour (N. Y.), 68. 1852.

618. — It is a proper rule for the commissioners to adopt, that they will allow full compensation for the land taken, including therein the damages to the adjacent land by reason of such taking, but that they will not allow consequential and prospective damages. *Id.*

619. — The act of 1855 provides, "that in estimating the value of the property expropriated, the basis of assessment shall be the true value which the land possessed before the contemplated improvement was proposed, and without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement." *Held*, that the land owner has no right to claim, in addition to the value of the land taken, any damages to the rest of his land, when such damages are more than compensated by the advantages derived from the project. *Vicksburg, Shreveport and Texas R. R. Co. v. Calderwood*, 15 La. An., 481. 1860.

620. — It is not error to refuse to charge the jury that "damages to adjoining lands may be offset by benefits to the same lands," when the court has already instructed that the fair way of determining the injury is to determine the fair market value of the premises before the right of way is set apart, and then again after, the difference being the true measure of damages. *Atchison, Topeka and Santa Fe R. R. Co. v. Blackshire*, 10 Kan., 477. 1872.

621. — In case of a railroad appropriation for a right of way through a tract of land, causing incidental and local injury to the residue of the tract, although general resulting benefits from the railroad to the value of such residue of the land cannot be taken into account in estimating the amount of compensation to be paid the owner; yet where a local, incidental benefit to the residue of the

land is blended or connected, either in locality or subject matter, with a local, incidental injury to such residue of the land, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation, but of showing the extent of the injury done the value of the residue of the land. *Cleveland and Pittsburgh R. R. Co. v. Bull*, 5 Ohio St., 568. 1856.

622. — land not taken. The land owner is entitled to payment in money for the land taken. Benefits to the remaining land may be offset against disadvantages thereto. *Jones v. Wills Valley R. R. Co.*, 30 Ga., 43, 1860; *Buffalo Bayou, Brazos, etc., R. R. Co. v. Ferris*, 26 Tex., 588, 1863; *Henderson and Nashville R. R. Co. v. Dickerson*, 17 B. Monroe (Ky.), 173, 1856; *Woodfolk v. Nashville and Chattanooga R. R. Co.*, 2 Swan (Tenn.), 422, 1852; *Oregon Central R. R. Co. v. Wait*, 3 Or., 91, 1869; *Wilson v. Rockford, Rock Island and St. Louis R. R. Co.*, 59 Ill., 273, 1871; *New Orleans, Opelousas and Great Western R. R. Co. v. Lagarde*, 10 La. An., 150, 1855; *Hayes v. Ottawa, Oswego and Fox River Valley R. R. Co.*, 54 Ill., 373, 1870; see under a different statute, *Alton and Sangamon R. R. Co. v. Carpenter*, 14 ib., 190, 1852.

623. — pleadings. An exception, among others, to the award of the arbitrators was, that they took into consideration the benefits which would result to the owner's land by the construction of the railroad. The answer filed contained no answer to this exception. A demurrer to the answer was overruled; *held*, that it should have been sustained. *McMahon v. Cincinnati and Chicago Short Line R. R. Co.*, 5 Ind., 418. 1854.

624. — station. On the assessment of damages occasioned by the taking of land for a railroad, evidence that the remaining land of the petitioner would be benefited by the location of a station at that place is not admissible in reduction of damages, if no act has been done by the proprietors of the railroad toward establishing such a station. *Brown v. Providence, Warren and Bristol R. R. Co.*, 5 Gray (Mass.), 35. 1855.

625. — time of taking. In a suit against a railroad company for injury to land, the defendant will not be permitted to prove the value of the land at the time of trial. The value of the land, if referred to at all, to de-

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termine the benefits conferred upon the owner by the construction of the work, should be estimated at the time of such construction. *Indiana Central R. R. Co. v. Hunter*, 8 Ind., 74. 1856.

626.—In the present case, the defendant asked the following instruction, which the court refused, "in ascertaining the extent of the injury to the plaintiffs, an estimate of the value of the property taken, at the time of the taking, is a necessary step; but, if the benefits resulting to the plaintiffs, by the construction of the railroad, equal in pecuniary value the value of the property taken by the defendant, it is a just and legal compensation for the property so taken." *Held*, that the instruction should have been given. *Id.*

VII. STREETS, PARKS AND HIGHWAYS.

1. Streets.

627. Abandonment. The Columbus and Shelby R. R. Co. procured a right of way to run from the track of the Madison and Indianapolis R. R. Co. through the streets of the city of Columbus, toward Shelbyville, and subsequently, under a running arrangement with said Madison and Indianapolis R. R. Co., gave the control of its road to that company, and, by that company, and with the consent of the Columbus and Shelby Co. (the track through the streets still remaining), the road superstructure of the Columbus and Shelby Co., adjoining the city, was removed for the distance of a mile beyond the city, and the remaining track to Shelbyville was connected with the road of the Madison and Indianapolis R. R. Co. around said city, through lands, with the owner of which the latter company contracted to procure a release for him from the Columbus and Shelby Co. of the right of way over the land where the superstructure was removed. *Held*, that this did not constitute an abandonment of the right of the Columbus and Shelby R. R. Co. to maintain a track through the streets of Columbus. *City of Columbus v. Columbus and Shelby R. R. Co.*, 37 Ind., 294. 1871.

628. Assignment of claim. A claim for damages for taking a street, brought by an assignee, is a separate cause of action from a claim arising by injury to the same

property, after its purchase by such assignee; and a demurrer will lie, if not separately stated and numbered. *Hall v. Cincinnati, Hamilton, etc. R. R. Co.*, 1 Disney (Ohio), 58. 1855.

629. Authority to use streets. The purchase of the fee of lands in a public street, does not authorize a railroad company to construct its road upon it without express authority of law, or as against individuals who have the right of easement of passing over it. *Attorney General v. Morris and Essex R. R. Co.*, 4 C. E. Green's Ch. (N. J.), 386. 1869; *ib.*, 575.

630.—Under a charter requiring that, before a railway should be constructed in the streets of a city, the consent of a majority of the property owners along the proposed route and of the city, should be first obtained, the consent of a majority of the property owners is not a condition precedent to the consent of the city. The consents are independent, and it is immaterial which is first obtained. *Paterson and Passaic R. R. Co. v. Paterson*, 9 C. E. Green's Ch. (N. J.), 168. 1873.

631.—A railroad company may use a street or highway when authorized by it; charter, expressly or imperatively. *Cleveland and Pittsburg R. R. Co. v. Speer*, 56 Penn. St., 325. 1867.

632.—"Land" in railroad charters has its common law signification, comprehending all structures upon it. *Id.*

633. Benefits. In an action for damage to the property of plaintiff by obstructing the public highway by the construction and use of a railroad, the defendant may show, in mitigation of damages, that the work done by him in grading, etc., enhanced the value of plaintiff's property. *Porter v. North Missouri R. R. Co.*, 33 Mo., 129. 1862.

634. Carrollton R. R. Co. The right of the C. R. R. Co., of making a turn-out to communicate with the depot on Nayades street, was a necessary incident to the use of the railroad. 1 La. An., 128. *Knight v. Carrollton R. R. Co.*, 9 La. An., 284. 1854.

635. Change of grade. A railroad company, which proceeds under Rev. Sts., ch. 39, § 67, after notice to the mayor and aldermen of a city, and on terms agreed upon between the corporation and the mayor and aldermen, to raise a street, that its railroad may pass under the same, acts by virtue of its inde-

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pendent corporate powers, and not as the agent or servant of the city; and such corporation is primarily liable, to third parties, for damages thereby caused to their estates. *Gardiner v. Boston and Worcester R. R. Co.*, 9 Cushing (Mass.), 1. 1851.

636. — A bond of indemnity taken by the city, and the appointment of a superintendent to take care of the public interests in the execution of this work during its progress, do not change the character of the work, or the general liability of the company. *Ib.*

637. — By a section of an ordinance of the city of Des Moines, the right of way was granted to a railway company over and across certain streets, "on the grade of the city, or such grade as may be agreed upon." *Held*, that the company was limited to the grade established by the city unless it were shown that some other grade had been agreed upon. *Slatten v. Des Moines Valley R. R. Co.*, 29 Ia., 148. 1870.

638. — By another section of the ordinance, it was ordained, "that the right to build and operate a railroad bridge on M. St., over and across the D. M. river, is hereby granted to the D. V. R. R. Co., provided said company build, or cause to be built, a railroad bridge across said river within five years." *Held*, that the limitation in the first section as to the construction of the road in accordance with the grade of the streets did not apply to the bridge, and that by the ordinance, no requirement attached thereto, except the implied one that it should be built in a proper manner, with ordinary care and skill. *Ib.*

639. — The company had also the right to build approaches to the bridge. *Ib.*

640. — The company, having the right to build the bridge and approaches, is not liable for consequential damages resulting to a lot owner, in front of whose property an embankment had been thrown up in the proper construction of the bridge and approaches. *Ib.*

641. Change of line of road. The P. R. R. Co., removed its track in a public street, nearer to a land owner's lot, but within the limits of the street. This was not a taking of his land within the meaning of the constitution, although his line may have been in the middle of the street. *Snyder v. Pennsylvania R. R. Co.*, 55 Penn. St., 340. 1867.

642. — The street belonged to the public

for purposes of travel, and it had the right, for its own convenience, to remove to another part of the street, rails which had been lawfully laid. *Ib.*

643. — The railroad company, acting by public authority, had the right to do the same. *Ib.*

644. — This was not an entry that would have been a trespass at common law, and the acts of assembly cannot embrace it, as their design was to provide for nothing that was not remedial at common law. *Ib.*

645. — To entitle an owner of the soil to damages for a change by public authority of a highway across his land, from one kind of a passage to another, he must ground his claim on an act of assembly. *Ib.*

646. Charter. The grant in a charter of the right to construct a railroad on a specified route, without express words, gives the right, as against the public, to cross all public highways which said route may intersect. But a grant will not be implied to construct a railroad upon or along a public highway, unless this is necessary for the route as authorized. *Attorney General v. Morris and Essex R. R. Co.*, 4 C. E. Green's Ch. (N. J.), 386, 1869; *ib.*, 575.

647. Conflicting rights of companies. Where two railway companies both have the right to extend their tracks into and through a street to its terminus, as between such companies, the first which takes possession of the middle of the street by constructing and locating an extension of its track thereon acquires the right to complete and operate such line, to the exclusion of the right of the other company to interfere in any way with the extension and operation of such road. *Waterbury v. Dry Dock, etc., R. R. Co.*, 54 Barbour (N. Y.), 388, 1866; see *Dry Dock, etc., R. R. Co. v. New York and Harlem R. R. Co.*, 30 Howard's Pr. (N. Y.), 39, 1865; 32 *ib.*, 193, 1866.

648. Constitutional law. The legislature has the constitutional power to take possession of, and appropriate the streets of an incorporated city to the use of a railroad, either directly or through a company created for the purpose. *Philadelphia v. Empire Passenger R. R. Co.*, 3 Brewster's Eq. (Penn.), 547. 1869.

649. — The provision in the constitution,

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that private property shall not be taken for public use without compensation, does not prohibit the legislature granting to a railroad company the privilege of laying rails on the streets of a city or town, and of using the railroad so made. *Philadelphia and Trenton R. R. Co., Case of*, 6 Wharton (Penn.), 25, 1840; *Faust v. Passenger R. R. Co.*, 3 Philadelphia Rep. (Penn.), 164, 1858.

650. Dedication. A street laid out by the property owner thirty years ago, dedicated by him to the use of the public and accepted by the public, is a highway; and purchasers from the original proprietor have no other rights in it than have adjoining owners in any other street, whether opened according to law, or dedicated to public use by the owner of the soil. *Mercer v. Pittsburgh, Ft. Wayne and Chicago R. R. Co.*, 36 Penn. St., 99, 1859; *Commonwealth v. Same*, ib.

651. — The power of the legislature to authorize the building of a railroad in a street, or other public highway, is indubitable; and the exercise of that power may be devolved, at discretion, upon the local authorities. *Id.*

652. Ejectment. Where a railroad company constructs its railway through the streets of a city, and uses the same in the ordinary way, by running its cars and locomotives thereon, without any claim of title to, or interest in the street, beyond the actual enjoyment thereof for the purposes mentioned, the public using and enjoying the street, as such, without disturbance, the premises cannot be said to be "occupied" by the company, within the provisions of the statute requiring ejectment to be brought against the "actual occupant." (2 R. S., 304, §4.) *Redfield v. Utica and Syracuse R. R. Co.*, 25 Barbour (N. Y.), 54, 1851.

653. — Nor, in such case, will the action lie in favor of one claiming to be the owner of the freehold of the street subject to the easement of the public therein. *Id.*

654. — The owner of land dedicated for a public street may maintain ejectment against a railroad company permanently occupying any part of the same for its roadway. *Weisbrod v. Chicago and Northwestern R. R. Co.*, 21 Wis., 602, 1867.

655. Embankments. Where an injury was done to real estate by reason of a change

in the grade of a street, occasioned by the erection of an embankment by a railway company, it was held, that although the embankment of the company did not of itself cause the injury, yet the change of grade in the street was the proximate result of such embankment, and the company was therefore liable. *Louisville and Nashville R. R. Co., v. Hodge*, 6 Bush (Ky.), 141, 1869.

656. Injunction. If the right of way over a street of the owner of a lot fronting thereon is so unlawfully obstructed as to subject him to special injury, not common to, but distinct and different from that suffered by the public, and for which he cannot obtain adequate compensation at law, he is entitled to the summary interference of a court of equity by injunction. *Baltimore and Ohio R. Co. v. Strauss*, 37 Md., 237, 1872.

657. — The owners of lots abutting upon a reservation dedicated to public use, have such an interest in such reservation, having purchased the lots with reference thereto, that they may have the aid of a court of equity to enjoin the conveyance of such reservation to a railway company for its exclusive and private use. *Cook v. City of Burlington*, 30 Iowa, 94, 1870.

658. — It seems, however, that a right of way over such reservation might be conveyed to such railway company. *Id.*

659. — Where a railway company, under authority of law, and with the consent of the city authorities, had commenced to lay a track through certain streets in the city of New York, it was held, that an injunction would not be issued to restrain such use of the streets. *Drake v. Hudson River R. R. Co.*, 7 Barbour (N. Y.), 508, 1849.

660. — If the company neglects or refuses to make compensation to lot owners, or to provide means to make it, an injunction will be granted, to prevent such an appropriation, until compensation is provided. *People v. Law*, 34 Barbour (N. Y.), 494, 1860; 22 Howard's Pr. (N. Y.), 109; *Ford v. Chicago and Northwestern R. R. Co.*, 14 Wis., 609, 1861.

661. Legislative power. The legislative power may authorize the building of a railroad on a street or other public highway, but such power must be given by the legislature. *Commonwealth v. Erie and Northeast R. R. Co.*, 27 Penn. St., 339, 1856.

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662. License. In an action against an incorporated company for building and continuing a railroad on a street in front of the plaintiff's house, so as to obstruct his right of egress and ingress, it was *held*, that the company might give evidence of a parol license from the plaintiff to build the road, and thus defeat his claim for all damages sustained while the license remained unrevoked. *Miller v. Auburn and Syracuse R. R. Co.*, 6 Hill (N. Y.), 61. 1843.

663.—The courts will not presume, in a cause in which it is alleged that a railway company is acting illegally and wrongfully in destroying a street, that it is acting under a license from proper authority, when the same is not alleged in the pleading. *Scheckner v. Mil. and Pr. du Ch. R. R. Co.*, 21 Ia, 515. 1866.

664. Lot owners can recover. Adjoining lot owners are entitled to damages arising from the construction of a railroad through the streets. *South Carolina R. R. Co. v. Steiner*, 44 Ga., 546, 1871; *Central R. R. Co. v. Hetfield*, 5 Dutcher (N. J.), 206, 1861; *Hinchman v. Paterson R. R. Co.*, 2 C. E. Green's Ch. (N. J.), 75, 1864; *People v. Law*, 34 Barbour (N. Y.), 494, 1860; *Same v. Same*, 22 Howard's Pr. (N. Y.), 109, 1860.

665.—Adjoining lot owners own the fee of the street to its centre, and in case a railway is located through such street, they are entitled to compensation for the additional servitude. *Harrington v. St. Paul and Sioux City R. R. Co.*, 17 Minn., 215, 1871; see also *Gray v. St. Paul and Pacific R. R. Co.*, 13 ib., 315, 1868; *Molitor v. Same*, 14 ib., 285, 1869; *Adams v. Hastings and Dakota R. R. Co.*, 18 ib., 260, 1872; *Schurmeier v. St. Paul and Pacific R. R. Co.*, 10 ib., 82, 1865.

666.—The owner of lands bounding on a street or highway is presumed to own the fee to the centre of the street. *Higbee v. Camden and Amboy R. R. Co.*, 4 C. E. Green's Ch. (N. J.), 276, 1868; *Perrin v. New York Central R. R. Co.*, 36 N. Y., 120, 1867; reversing *Same v. Same*, 40 Barbour (N. Y.), 65, 1863.

667.—It is settled in Wisconsin that a lot owner takes title to the centre of the street, subject only to the public easement. *Milwaukee v. Milwaukee and Beloit R. R. Co.*, 7 Wis., 85, 1859; *Ford v. Chicago and Northwestern R. R. Co.*, 14 ib., 609, 1861; *Hegar v. Chicago and Northwestern R. R. Co.*, 26 ib., 624, 1870.

668.—Where a railroad company occupied the street in front of plaintiff's lot with its roadbed and ditches, so as to destroy the ordinary use of the street on plaintiff's side to the middle thereof, it must be regarded as having taken possession of the whole of said half street, although some five feet thereof were not actually occupied by the roadbed and ditches; and plaintiff may recover the whole, or damages for the taking thereof. *Hegar v. Chicago and Northwestern R. R. Co.*, 26 Wis., 624. 1870.

669.—The measure of damages would be the value of the use of the land in question by the plaintiff as a street. *Ib.*

670.—The right which the owner of a lot fronting on a street has to have carriages and vehicles of all kinds stop in front of his lot and stand there for the time necessary for the letting out and taking of in persons and goods, is a right in that part of the street different from the right of the public at large, and any incroachment or appropriation of the street opposite his premises which abridges or takes away that right, is an injury peculiar to him, for which he may have redress by suit in his own name. *Attorney General v. Morris and Essex R. R. Co.*, 4 C. E. Green's Ch. (N. J.), 336, 1869; *ib.*, 575.

671.—The legislature have no power to authorize the construction of a railroad along or across a highway or street without providing for a compensation to the owner of the land over which it passes. *Trustees of Presbyterian Society v. Auburn etc., R. R. Co.*, 3 Hill (N. Y.), 567, 1842; *Williams v. New York Central R. R. Co.*, 16 N. Y., 97, 1857; reversing *Same v. Same*, 18 Barbour (N. Y.), 222, 1864; *Carpenter v. Oswego and Syracuse R. R. Co.*, 24 N. Y., 655, 1861; *Wager v. Troy Union R. R. Co.*, 25 ib., 526, 1862; *Craig v. Rochester and Brighton R. R. Co.*, 39 ib., 404, 1868; *Same v. Same*, 39 Barbour (N. Y.), 494, 1862.

672.—The establishing and running a street railway in the public streets of the city of Rochester is an imposition of an additional burden upon the land of an adjoining proprietor covered by such street. *Craig v. Rochester City and Brighton R. R. Co.*, 39 N. Y., 404. 1868.

673.—The common council of a city cannot give a railroad company the right to take

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and use the street of the city for the track of its road, without making compensation to the adjoining lot owners. *Pomeroy v. Milwaukee and Chicago R. R. Co.*, 16 Wis., 640. 1863.

674. — If the authorities of a city grant to a railway company the right to lay its track along a public street, this grant does not preclude the owners of lots along the line of the street from recovering such damage as they sustain thereby. *Southern Pacific R. R. Co. v. Reed*, 41 Cal., 256. 1871.

675. — Such lot owners are entitled to damages if the value of their lots is diminished thereby. *Id.*

676. — A railroad company cannot monopolize a street in derogation of public and private uses to which it is applied. *Janesville v. Milwaukee and Mississippi R. R. Co.*, 7 Wis., 484. 1859.

677. — An action lies by the owner of land against a railroad company, if in the construction of its road upon or across a public highway it raises an embankment by which the owner of the land is obstructed in passing to and from the road, and his property is otherwise rendered less valuable, notwithstanding the charter of the company authorizes the entry upon and use of such public highway; the license relates only to the road, and leaves the company liable to consequential damages sustained by individuals. *Fletcher v. Auburn and Syracuse R. R. Co.*, 25 Wendell (N. Y.), 462. 1841.

678. — Where a railroad company, under the authority of its charter and an ordinance of a city, "constructs a railroad through a street of a city, thereby making embankments of earth, gravel, wood and iron above the level of the street, so as to obstruct free and safe passage to and from a lot and dwelling house thereon, adjoining on said street; and where such company, under the authority aforesaid, runs steam engines, locomotives and cars along such street and railroad, thereby making noises, and shaking, disjoining and disturbing such dwelling house; and where such company, under the authority aforesaid, and for the purpose of propelling such engines, locomotives and cars, keeps up dangerous fires, thereby generating noxious vapors, smoke and filth, near to, and diffusing the same in and about, such lot and dwelling house, as to render the air unwholesome and

to discommode the occupant and owner of such lot and dwelling house." *Held*, that such owner and occupant is entitled to damages for any obstruction to the street by earth, gravel, timber or rail, substantially affecting his use of such street as an appurtenance to his premises. That in respect to the noises, smoke, vapor or other discomforts arising from the ordinary use of the railroad by the company, the occupant and owner of such lot and dwelling house has no more right to recover damages of the company than any citizen who resides, or may have occasion to pass, so near the street and railroad as to be subjected to like discomforts. That a railroad authorized by law, and lawfully operated, cannot be deemed a private nuisance. *Parrott v. Cincinnati, Hamilton and Dayton R. R. Co.*, 10 Ohio St., 624. 1858.

679. — The right to use and enjoy the street is an appurtenance to a lot abutting upon a street, and an injury to an appurtenance is an injury to the whole property. *Protzman v. Indianapolis and Cincinnati R. Co.*, 9 Ind., 467, 1857; *New Albany and Salem R. R. Co. v. O'Daily*, 13 ib., 353, 1859.

680. — Where a street is taken by a railroad company, a party entitled to use and enjoy such street cannot pursue the statutory remedy, but must sue for damages for a consequential injury. *Id.*

681. — The defendant has no right, under its charter, to appropriate any part of a street to its exclusive use, nor in this case it does not seem to have done so. It was, therefore, error in estimating damages to instruct the jury that they might estimate the damages upon the theory that the company had appropriated the whole of the east side of the street. *Farrand v. Chicago and Northwestern R. R. Co.*, 21 Wis., 435. 1867.

682. — Besides the right of way which the public have in a street, there is a private right which passes to a purchaser of a lot upon the street, as appurtenant to it, which he holds by an implied covenant that the street in front of his lot shall forever be kept open for his enjoyment; and for any obstruction thereof to the owner's injury, he may maintain an action *Tate v. Ohio and Mississippi R. R. Co.*, 7 Ind., 479. 1856.

683. — The right which the owner of a lot has to the enjoyment of an adjoining street,

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is part of his property, and can only be taken for public use, on just compensation being made, pursuant to the constitution. *Ib.*

684. — The grant to a railroad company of a right of way merely over a public street in a city or town, will not authorize the placing of any obstructions in the street such as will render it useless as a street; for the purpose of establishing depots, depot yards or other structures for the convenience or business of the railroad company, ground must be procured not already dedicated to uses inconsistent with such purpose. *Lackland v. North Missouri R. R. Co.*, 81 Mo., 180, 1860; *Same v. Same*, 34 ib., 259, 1863.

685. — The grant to a city of a power to "open, alter, abolish, widen, extend, establish, grade or otherwise improve and keep in repair streets," would not authorize an appropriation of a street to such uses as would be entirely inconsistent with its use as a street. *Ib.*

686. — The right of the owner of a lot, in a town or city, to the use of the adjoining street, is as much property as the lot itself; the owner of the lot cannot be deprived of this right by the obstruction of the street without compensation. It is immaterial in such case whether the owner of the lot owns to the middle of the street or not. *Ib.*

687. — The streets of a city or town are established, not only for the public, but for the special convenience of those who may purchase the adjacent lots; and such proprietors have certain rights of use, facilities and easements, constituting franchises in the nature of hereditaments incorporeal, incident to their titles, which neither the general nor local public can claim, and which are as inviolable as the rights of property in the lots. *Lexington and Ohio R. R. Co. v. Applegate*, 8 Dana (Ky.), 289. 1839.

688. — B., owning land with buildings thereon lying upon each side of a street that had been raised by a railway company by a bridge and embankments so as to pass over the railroad, brought his action against the company for the damages occasioned by the erection of the embankments, no damages having been assessed therefor. *Held*, that the power to alter a highway might properly be delegated by the legislature subject to the liability of making compensation for the property taken and the injury occasioned. That although

the plaintiff might recover on a count in trespass, for any appreciable incidental damages, occasioned by the acts complained of, the defendant was not liable therefor of course, and as *prima facie* trespassers, and that the question as to whether plaintiff had sustained damages was for the jury to determine. *Nicholson v. New York and New Haven R. R. Co.*, 23 Conn., 74. 1852.

689. Lot owners cannot recover. Depreciation in the value of real estate not abutting on a railroad, caused by laying a railroad across the street leading thereto, cannot be recovered under revised statutes, ch. 39, § 56. *Proprietors of Locks and Canals v. Nashua and Lowell R. R. Co.*, 10 Cush. (Mass.), 385, 1852; *Corey v. Buffalo, Corning and New York R. R. Co.*, 23 Barbour (N. Y.), 482. 1856.

690. — Conceding that the lot owner has an interest in the streets, under the peculiar state of legislation with relation to the town of Columbia, if the terms imposed by the charter have not been violated by the company, so as to authorize the interference of the state, no legal wrong has been done to the lot owner. If there is no ground for interference on the part of the state, there can be no action on the part of the lot owner. *McLaughlin v. Charlotte and South Carolina R. R. Co.*, 5 Richardson's Law (So. Car.), 583. 1850.

691. — The plaintiff can have no action for trespass on another's land. *Ib.*

692. — Where property is taken for public uses under the right of eminent domain, the remedy by assessment of compensation is necessarily exclusive. *Ib.*

693. — The mere leveling of the street, preparatory to putting down the track, is no obstruction. *Ib.*

694. — The use by a railroad company, under authority of its charter, of a portion of a street in its ordinary use as a means of travel and transportation, is not a perversion of the highway from its original purposes. Any damage to the property abutting on the street, resulting from such obstruction, is *damnum absque injuria*. *Porter v. North Missouri R. R. Co.*, 33 Mo., 128. 1862.

695. — Where the city authorities lawfully grant permission to locate railway tracks along a street, the owners or occupants of property fronting on such street, cannot enjoin the laying of such tracks, nor receive any

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damage or compensation for such use of a street. *Moses v. Pittsburgh, Fort Wayne and Chicago R. R. Co.*, 21 Ill., 516. 1859.

696. — An action cannot be maintained by a citizen for injury to his property from noise, smoke and stench of locomotives and trains, arising from the location of railroad switches and side tracks near his house. *Cleveland and Pittsburgh R. R. Co. v. Speer*, 56 Penn. St., 325, 1867.

697. — The municipal authorities of the city of Frankfort had full power to admit the Louisville and Lexington Railroad to pass through Broadway street, and to permit such grading as was proper to secure the passage of the cars through that street, and no right of action for any partial injury to the owners of property on said street accrued therefrom. *Louisville and Frankfort R. R. Co. v. Brown*, 17 B. Monroe (Ky.), 763. 1856.

698. — Purchasers of lots in cities and towns take them subject to the discreet exercise by the town authorities of all the power which the law gives them over the streets and alleys. *Ib.*

699. — To allow a street in a city to be used for a railroad track, either upon its natural surface, or by tunneling, is not a misapplication of it; provided such use does not interfere with the free and unobstructed use of it by the public, as a highway for passage and repassage. *Plant v. Long Island R. R. Co.*, 10 Barbour (N. Y.), 26, 1850; *Chapman v. Albany and Schenectady R. R. Co.*, *ib.*, 360, 1851.

700. — The temporary inconvenience to which the adjoining proprietors are subjected, while the work of excavation and tunneling is going on, is *damnum absque injuria*. *Ib.*

701. — Where the land of an individual is taken for a street in a city, and compensation is made for it, the city has the right to appropriate the land so taken to all such legitimate uses and servitudes as custom and the public good require in respect to a street. *Ib.*

702. — The footway of a street is no more private property than a cartway. *Clark v. Second and Third Street R. R. Co.*, 3 Philadelphia Rep. (Penn.), 259. 1858.

703. — The fee of streets acquired by the city of New York under § 118 of the act of 1813, is held by it in trust for the public use of all the people of the state, and not as mu-

nicipal property. *People v. Kerr*, 27 N. Y., 188, 1863; *N. Y. and Harlem R. R. Co. v. Forty-Second St. R. R. Co.*, 50 Barbour (N. Y.), 809, 1867; see *People v. Kerr*, 20 Howard's Pr. (N. Y.), 130, 1861; *People v. Mayor of N. Y.*, *ib.*, 144; see *Kelsey v. King*, 38 *ib.*, 39, 1866; *Same v. Same*, 11 Abbott's Pr. (N. Y.), 180, 1860.

704. — The construction of a city railroad upon the surface of the street, without change of grade, is an appropriation to public use, but it is not such a taking of private property for public use as to entitle the city to compensation. *Ib.*

705. — The possibility of reverter to the owners of land abutting upon the street, after its public uses have ceased, is not a property constitutionally exempt from unremunerated appropriation at the will of the government. Its value, if any, is inappreciable. *Ib.*

706. — Under the laws of Kansas, the fee of streets and other grounds dedicated to public use, is in the county in which they are situated, and not in abutting lot owners. The counties may therefore grant the privilege of using said streets for railway purposes without compensation; but railway companies will be liable to any person who may receive actual injury from the illegal or unnecessary blocking up or obstructing of such streets or grounds. *Atchison and Nebraska R. R. Co. v. Garstide*, 10 Kan., 552. 1873.

707. Measure of damages. In an action by the owner of land, bordering on a public street, the measure of damage is the loss and inconvenience sustained by such owner, in view of the use to which such land has been put during the existence of such nuisance. *Hatfield v. Central R. R. Co.*, 4 Vroom (N. J.), 251. 1860.

708. — In an action on the case against a railroad company for injury done to a house and lot, in a town, by the construction of a railroad cut in the street opposite, it is competent to show that the value of the rent of the property was thereby diminished; but it is not competent to show that the rent or other property, similarly situated, belonging to third persons, was diminished by the same cause. *Selma and Meridian R. R. Co. v. Knapp*, 42 Ala., N. S., 480. 1868.

709. Municipal corporation. The city authorities of Savannah had no right to authorize the taking of an entire street for

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railway purposes. *Savannah, Albany and Gulf R. R. Co., v. Shields*, 33 Ga., 601. 1864.

710. — A city may grant a right of way along one of its streets to a railway company, without the consent of adjacent lot owners. *Ingraham v. Chicago, D. and M. R. R. Co.*, 34 Ia., 249. 1872.

711. — Towns have a qualified interest in the roadways and bridges they have erected, and may maintain an action upon the case for the destruction or obstruction of the road, or the conversion of the materials. *Troy, Town of v. Cheshire R. R. Co.*, 3 Foster (N. H.), 83. 1851.

712. — Where land is gratuitously dedicated to the public by the proprietor, for the purpose of a street or highway, in a city or village, and the public authorities accept it as such, the character of the street, and the power and authority of the municipal corporation over it, are the same as if such street had been laid out originally and opened as a public street, by the order and direction of the corporation. *Williams v. New York Central R. R. Co.*, 18 Barbour (N. Y.), 222, 1854; see *Same v. Same*, 16 N. Y., 97, 1857.

713. — A city ordinance authorized the construction of a railroad on either of two streets through the corporate limits, under suitable restrictions as to grade, etc., to be regulated thereafter. *Held*, that the ordinance authorized the railroad company (so far as the city had the power to do so), to run the road along the street, but not to obstruct the street to the injury of adjoining proprietors. *Held*, also, that the road was to be constructed on the grade of the street substantially as it then existed, unless an alteration was made, (if the city had the power to make it), by a proper municipal regulation. *Tate v. Ohio and Mississippi R. R. Co.*, 7 Ind., 479. 1856.

714. — Under the laws of Kansas, a railway company is forbidden to construct or operate its road through the streets of an incorporated city without the consent of the corporate authorities. *Pacific R. R. Co. v. Leavenworth City*, 1 Dillon (8 U. S. Cir. Ct.), 393. 1871.

715. — The city authorities may not only grant or refuse the right of way, but may impose proper conditions upon which they will give their assent, and if the company accept the right of way, it will be bound by the conditions. *Ib.*

716. — If the company fail to comply with the conditions of such grant, such as the construction of a depot at a certain place, and grading and paving the street used, the grant will be forfeited. *Ib.*

717. — Where the title to the streets of a city has been vested, in fee, in the city, the legislature may authorize their use by a railroad company without the consent of the city, and without compensation to said city. The streets of a city are not the private property of the corporation so as to entitle it to compensation for an additional public use. *Clinton City v. Cedar Rapids and Missouri River R. R. Co.*, 24 Ia., 455. 1868.

718. — It was therefore held that the act of March 26, 1860, requiring the building of a railway by said company from the city of Lyons to a point of intersection with a certain railway in the city of Clinton, conferred upon the company the right to use so much of the streets of the city of Clinton as were necessary for that purpose. *Ib.*

719. — The city of Milwaukee has no such an interest or property in the public squares and streets along and across which the M. & B. R. R. Co. is building its road, as to enable the city to maintain an action to enjoin or restrain said company from such construction of its road. *Milwaukee v. Milwaukee and Beloit R. R. Co.*, 7 Wis., 85. 1859.

720. — The public do not own the fee of lands dedicated to public use. *Ib.*

721. — Where the B. & A. R. R. Co. had, at great expense, graded a street in the city of Albany wide enough to lay two tracks, on the assurance of the city surveyor that if the S. W. R. R. Co. should desire to use the street, it would be compelled to pay for half the grading, etc.; and afterwards the city granted the right to the S. W. R. R. Co. upon such condition. *Held*, that the city would not be permitted to revoke the conditions and direct the S. W. R. R. Co. to pay the money to the city. *Southwestern R. R. Co. v. Screven*, 45 Ga., 613. 1872.

722. — The city government of Louisville had a right to permit the Lexington and Ohio R. R. Co. to locate, construct and use the road in a street of the city, and having done so, no writ of *ad quod damnum* was necessary, unless the road, or some use made of it, was a purpresture or nuisance, injurious to private prop-

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erty or private rights; and it could not be so considered, unless the road itself, or some use made of it, was inconsistent with the objects to which the street was originally dedicated. *Lexington and Ohio R. R. Co. v. Applegate*, 8 Dana (Ky.), 289, 1839; *Wolfe v. Covington and Lexington R. R. Co.*, 15 B. Monroe (Ky.), 404. 1854.

723. — The railroads used in the streets of Louisville could be no breach of the compact with Virginia, nor of any contract with the purchasers of lots, unless private rights were injuriously affected by it. But, if it was a purpresture or nuisance injurious to individuals, the chancellor might protect them by stopping the use of the road by his injunction. But where the road and the manner of using it were authorized by both the legislature and city authorities, that power of the chancellor should not be exercised for such a purpose, without strong grounds, clearly established. *Ib.*

724. — As to the claim for private damages sustained by an individual in such case, where the jury find the plaintiff, as a member of the city council, advocated and voted for the location of the road as now complained of, and it is proved that he had other property on the same street, etc., and said that its location there would be worth \$1,000, that it in fact increased the value of his property on that street, and of this particular lot as a place of business, though not as a residence. *Held*, that he could not recover, and the circuit court was right in so instructing the jury. *Wolfe v. Covington and Lexington R. R. Co.*, 15 B. Monroe (Ky.), 404. 1854.

725. Negligence. The right of a railroad company to lay its track in a street or public highway carries with it the obligation to lay the same in a proper manner and to keep it in repair; and if an injury occurs by reason of a neglect in either of these respects, it is liable. *Worster v. Forty-second Street R. R. Co.*, 50 N. Y., 203. 1872.

726. — Notice to the company of a patent defect is necessary; but when it appears that the defect existed and an injury was caused thereby, the presumption of negligence is complete. *Ib.*

727. New York City. The corporation of the city of New York has the exclusive right to control and regulate the use of the

streets in the city. In this respect it is endowed with legislative sovereignty. *Milbau v. Sharp*, 27 N. Y., 311, 1863; *Same v. Same*, 15 Barbour (N. Y.), 193, 1853; *Same v. Same*, 17 ib., 435, 1854; see *Same v. Same*, 9 Howard's Pr. (N. Y.), 102. 1853.

728. — An ordinance regulating a street is a legislative act, entirely beyond the control of the judicial power of the state. *Ib.*

729. — But a resolution declaring that certain individuals shall, upon certain conditions and stipulations, have the authority and consent of the common council to lay a double track for a railway, in Broadway street, and to establish a railway therein, and conferring privileges exclusive in their nature, and designed to be perpetual, is not a legislative act, regulating the use of the street, but is a grant of the use itself, to the extent specified. *Ib.*

730. — Such a resolution is not within the powers conferred upon the common council, and is therefore void. *Ib.*

731. — The Hudson River R. R. Co. has no authority, either with or without the consent of the city, to extend railway tracks through College place and Warren street, in the city of New York. *People v. Hudson River R. R. Co.*, 32 Howard's Pr. (N. Y.), 394; *Same v. Same*, 2 Abbott's Pr., N. S. (N. Y.), 249, 1866.

732. Nuisance. Railways in streets of cities are not nuisances *per se*. *Hamilton v. New York and Harlem R. R. Co.*, 9 Paige Ch. 171, 1841; *Drake v. Hudson River R. R. Co.*, 7 Barbour (N. Y.), 508, 1849; *Plant v. Long Island R. R. Co.*, 10 ib., 26, 1850; *Hentz v. Long Island R. R. Co.*, 13 ib., 646, 1852; *Milbau v. Sharp*, 15 ib., 193, 1853; *Williams v. New York Central R. R. Co.*, 16 N. Y., 97, 1857; *Davis v. Mayor, etc. of N. Y.*, 14 N. Y., 506, 1856; *Wetmore v. Story*, 22 Barbour (N. Y.), 414, 1856.

733. — A railroad running through the streets of a city, which does not materially interfere with the use of the streets for ordinary purposes, or injure the value of the adjacent property, is not a nuisance. *Hamilton v. New York and Harlem R. R. Co.*, 9 Paige Ch. (N. Y.), 171. 1841.

734. — A purpresture is an enclosure, or appropriation, for private use, of that which belongs to the public. The Lexington and Ohio Railroad, within the city of Louisville, being so constructed, according to the proof in this case, as not to occupy the street in

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which it is placed, or any portion of it, exclusively; every part, as well as that in which the rails are placed as the rest, being generally open and free for the ordinary purposes; it cannot be deemed either a purpresture or nuisance. *Lexington and Ohio R. R. Co. v. Applegate*, 8 Dana (Ky.), 289. 1839.

735. — That the company may hereafter arrogate exclusive rights in the street, does not prove, or tend to prove, that it is now a nuisance or purpresture. *Ib.*

736. — Laying a railway track through the streets of a city is not such an obstruction as necessarily to amount to a nuisance; and the city authorities may grant permission to a railway company to lay such a track. *Sargent v. Ohio and Mississippi R. R. Co.*, 1 Handy (Ohio), 52. 1854.

737. — Where a railroad track is on a public street, owners of property in this vicinity, to sustain a complaint for constructing and maintaining it, must establish that it is a public nuisance, and that they have sustained special damage. *Black v. Philadelphia and Reading R. R. Co.*, 58 Penn. St., 249. 1868.

738. — The fee in the streets of towns and cities laid out and platted under the act of January 25, 1839, and the code of 1851, vests in the corporation in trust for the public, and not in the owners of the lots fronting thereon. The only interest such owners have in such streets is the right of way over the same. *Milburn v. Cedar Rapids*, 12 Iowa, 246, 1861; *Hughes v. Mississippi and Missouri R. R. Co.*, *ib.*, 261.

739. — The legislature has conferred upon railway companies the right to construct their roads over and upon the streets of the towns and cities, the consent of the council of the town or city being first obtained; and railways constructed upon such streets cannot be considered public nuisances. *Ib.*

740. — Where a railroad company, under a general grant of power, lays out and constructs its road over and along a public highway, the town within which such highway is situated, may proceed in equity against such corporation in the supreme court, under its general jurisdiction in matters of nuisance, in order to ascertain whether such construction is or is not within the power granted to the corporation; and it is immaterial in this respect, whether the way in question be a

highway properly so called, or a town way. *Springfield, Inhabitants of, v. Connecticut River R. R. Co.*, 4 Cushing (Mass.), 63. 1849.

741. *Partial taking.* A railway company may be authorized to use a public street or highway for the purposes of a railroad, retaining the use of the street or highway for the ordinary purposes of travel, and the owners of adjoining property will have no right to compensation, although they technically own the fee of the street or highway. But if the highway is to be taken entirely for the use of the railroad company, then compensation must be made. *Morris and Essex R. R. Co. v. Newark*, 2 Stockton's Ch. (N. J.), 352, 1855; see contra, *Starr v. Camden etc., R. R. Co.*, 4 Zabriskie (N. J.), 592, 1854; also *Central R. R. Co. v. Hetfield*, 5 Dutcher (N. J.), 206, 1861.

742. *Particular case.* *Held*, under the facts of a particular case, that the Atlantic and Gulf R. R. Co. had the right to run its road through a street in the city of Bainbridge. *Atlantic and Gulf R. R. Co. v. Mann*, 43 Ga., 200. 1871.

743. *Proceedings.* A petition to acquire title for railway purposes, to lands used as a street, which does not disclose whether said lands are designed to be appropriated as the property of the respondent, or whether they were included in the petition to have his damages assessed by reason of his ownership of premises fronting on the street, is fatally defective. *Mansfield, Coldwater and Lake Michigan R. R. Co. v. Clark*, 23 Mich., 519. 1871.

744. — An award, in such case, on account of the respondent "claiming" to own certain land used as a street, without determining whether in fact he did own it, and from which it does not appear whether the damages awarded were the estimated value of the land, or only of some doubtful claim that they supposed him to be setting up, cannot be sustained. *Ib.*

745. — The petition must allege that the taking is necessary for the public use. *Grand Rapids, Newago and Lake Shore R. R. Co. v. Van Driele*, 24 Mich., 409. 1872.

746. *Second track.* The condemnation of land in a street gives no right to the company except a mere easement in common with the general public. *Southern Pacific R. R. Co. v. Reed*, 41 Cal., 256. 1871.

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747. — And where such right is condemned for one track, and the company afterwards seeks to build another, further damages will be awarded. *Ib.*

748. **Street railways.** The legislature has, as against a city, the right to grant the right of way to a street railway company through its streets and squares. *Savannah and Thunderbolt R. R. Co. v. Mayor of Savannah*, 45 Ga., 602. 1872.

749. — The owners of property adjoining a street in the city of New York, laid out under the act of 1813, have an easement in the street, in common with the whole people, to pass and repass, and also to have free access to their premises; but the mere inconvenience of such access occasioned by the lawful use of the street by a railroad, is not the subject of an action. *Kellinger v. Forty-Second Street R. R. Co.*, 50 N. Y., 206. 1872.

750. **Surface water.** Where a railway company, without the consent of an adjoining lot owner, and without compensation, constructed its road through a public street, *held*, that the lot owner could recover damages for injuries to his property caused by surface water being caused to stand upon his land; although the injury might not accrue until some time after the construction of the road. *Adams v. Hastings and Dakota R. R. Co.*, 18 Minn., 260. 1872.

751. **Switches and turn outs.** Railway companies are not liable for consequential damages in the exercise of the power of eminent domain from the state. *Cleveland and Pittsburgh R. R. Co. v. Speer*, 56 Penn. St., 325. 1867.

752. — The power to construct a road, includes the authority to make switches, although not expressed; and side tracks are essential to the use of the road. *Ib.*

753. — The point of the location of the switches is in the absolute control of the company, and cannot be adjudged by a private citizen. *Ib.*

754. — The company having located its switches at one place, may, when necessity requires, locate them elsewhere. *Ib.*

755. — Where the charter of a company authorizes it to establish a railway along a public street to a particular point, and to run a locomotive on the road, the company will be entitled to make a turnout from the main

track to communicate with the depot erected by it near the terminus of the road, containing the necessary machinery for turning the engine, etc., where no objection exists to the construction of the turnout at that particular point. The right is necessarily incidental to the right to maintain the road, but the communication with the main track must be subject to the police power of the city, and must be so constructed as to interfere as little as possible with the free use of the street. *New Orleans and Carrollton R. R. Co. v. Second Municipality of New Orleans*, 1 La. An., 128. 1846.

756. **West Roxbury R. R. Co.** The authority conferred on the West Roxbury R. R. Co. by St. 1856, ch. 201, to construct and maintain a railway over certain streets in West Roxbury, was not revoked or repealed by St. 1858, ch. 38, § 10. *Dedham and West Roxbury R. R. Co. v. Metropolitan R. R. Co.*, 8 Allen (Mass.), 279. 1864.

2. Highways.

757. — **alteration of highway.** A grant of power, in laying out and constructing a railroad, to change the location of any public road, if the company shall find it necessary, and to occupy such portion of the road as it may deem necessary or expedient, the company, in such case, to cause the changed portion of such road to be reconstructed at its own expense, in as perfect a manner as the original road — does not authorize the diversion of an ancient highway, because the company finds it to its pecuniary advantage or convenience to make such diversion. The alteration or diversion must be a necessary one. *Greenwich, Inhabitants of, v. Easton and Amboy R. R. Co.*, 9 C. E. Green's Ch. (N. J.), 217. 1873.

758. — **change of grade.** In order to entitle the abutters on a highway, which has been raised or lowered by a railroad company under the provisions of the Rev. Stats., ch. 39, §§ 67, 68, to recover the damages therefor, to which they may be entitled, if any, it is not necessary that the selectmen of the town should have either authorized or directed such alteration to be made. *Parker v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 107. 1849.

759. — The remedy, for an injury occasioned by the alteration of a highway, for the

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purpose of raising or lowering the same, by a railroad company, is not by an action against the town under the Rev. Stats., ch. 25, § 3, but by a proceeding against the corporation for damages. *Ib.*

760. — crossing. The crossing of a highway, by a railway, at grade, is not unlawful, nor does such crossing require the highway commissioners' consent. *Baxter v. Spuyten Duyvil and Port Morris R. R. Co.*, 61 Barbour (N. Y.), 428, 1871.

761. — If a railroad company unreasonably neglect to comply with the order of county commissioners allowing the company, upon its petition under Stat. 1846, ch. 271, to cross a highway upon a level, the only remedy is for the penalty given by § 4 of that statute, or by a proceeding in equity under Stat. 1849, ch. 222, § 5. The commissioners cannot assess damages, or issue a warrant for a jury, in such a case. *Vermont and Massachusetts R. R. Co. v. County Com'rs of Franklin*, 10 Cushing (Mass.), 12, 1852.

762. — The bill in equity, provided by Stat. 1849, ch. 222, § 5, for enforcing the orders of county commissioners, respecting the manner of constructing a railroad where it crosses a public highway, can be maintained only by the mayor and aldermen of the city, or the selectmen of the town, within which the way is situated, and not by any individual inhabitant of such city or town, although he is owner in fee simple of the land over which the way is located. *Brainard v. Connecticut River R. R. Co.*, 7 Cushing (Mass.), 506, 1851.

763. — A bill in equity, under Stat. 1849, ch. 222, § 5, to compel a railroad company to raise or lower a highway, in compliance with an order of county commissioners, may be brought by the town or city within which such highway is situated. *Roxbury v. Boston and Providence R. R. Co.*, 6 Cushing (Mass.), 424, 1850.

764. — Where it becomes necessary, in crossing a highway, that a bridge should be built over the railroad to restore the highway to its usefulness, the railroad company is bound to build the bridge and continue it in repair, so long as the highway exists, and the corporation is allowed to enjoy the lawful exercise of its franchise. *People ex rel. v. Troy and Boston R. R. Co.*, 37 Howard's Pr., (N. Y.), 427, 1869.

765. — The mere abandonment of the railroad and the removal of its track, and its entire disuse is not enough to deprive the railroad company of the privileges of its franchise or to absolve it from maintaining and keeping in repair such bridge. *Ib.*

766. — grant of legislature. An act of the legislature, which authorizes the construction of a railroad between certain *termini*, without prescribing its precise course and direction, does not *prima facie* confer power to lay out the road on and along an existing public highway; but it is competent to the legislature to grant such authority. *Springfield, Inhabitants of, v. Connecticut River R. R. Co.*, 4 Cushing (Mass.), 63, 1849.

767. — owners of fee entitled to damages. The location of a railroad upon a public highway is the imposition of a new servitude upon the land, in addition to and distinct from that to which it was originally subjected when taken for a highway, and the owner of the fee is entitled to compensation for the damage caused thereby. *Imlay v. Union Branch R. R. Co.*, 26 Conn., 249, 1857.

768. — Under the general statute in regard to railroads, which provides that railroad companies shall pay all damages caused by laying out and making their roads, the incidental injury to land adjacent to that taken and belonging to the same proprietor, is to be considered in assessing damages. *Ib.*

769. — Whether damages are to be paid for such injury to adjacent land not belonging to the same proprietor, *quare?* *Ib.*

770. — The act incorporating the Camden and Atlantic R. R. Co. gives no power to lay its road across a public highway, without first making compensation to the owner of the soil. *Starr v. Camden etc., R. R. Co.*, 4 Zabriskie (N. J.), 592, 1854; see contra, *Morris and Essex R. R. Co. v. Newark*, 2 Stockton's Ch. (N. J.), 352, 1855.

771. — owners of fee not entitled to damages. If the land of the plaintiff over which there is an established highway, is taken by a railway company under its charter, no action at law is maintainable for such taking. *Whittier v. Portland and Kennebec R. R. Co.*, 38 Me., 26, 1854.

772. — Nor can the owners of adjoining lands recover the damages occasioned by excavations made in such highway by the rail-

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way company, or by the officers of the town grading down the highway in consequence of the construction of the railway. *Ib.*

773.—turnpike. Where land has been taken for a turnpike and afterwards transferred by legislative authority to a railroad company, without compensation by the latter to the owner of the fee, he may maintain successive action for damages resulting from such occupation, as a continual nuisance. *Mahon v. New York Central R. R. Co.*, 24 N. Y., 658. 1860

3. Parks.

774.—Cannot be taken. The power given by the general railroad act of 1850 to railroad corporations to acquire title to "any real estate required for the purposes of the incorporation," does not extend to the property already dedicated to and held for another public use by authority of law, except in the cases where it is expressly given by that act. *Boston and Albany R. R. Co. In matter of*, 53 N. Y., 574. 1873.

VIII. TAKING LAND FOR DEPOTS AND OTHER BUILDINGS.

775. Amount of land to be taken. The statute of 1865, providing that lands of the state not exceeding two acres in extent might be taken for railway depot grounds, does not limit the amount that may be taken from individuals. *Virginia and Truckee R. R. Co. v. Elliott*, 5 Nev., 358. 1870.

776. Damages. Where a railroad company has, without the consent of the owner, and without color of title, entered upon land and occupied the same, building a depot and hotel thereon, and afterwards seeks to appropriate the land under the authority of law, the value of the land at the time of the legal appropriation, with the improvements thereon, constitutes the amount for which the company is liable to the owner of the land. *Graham v. Connersville and New Castle Junction R. R. Co.*, 36 Ind., 403. 1871.

777.—A statute authorizing the taking of private property for the use of a railway company "for the purpose of running and operating", its road, will authorize the taking

of the necessary depot grounds required for the use of the company. *In re New York and Harlem R. R. Co. v. Kip*, 46 N. Y., 546. 1871.

778.—The Hannibal and St. Joseph R. R. Co. is authorized under the statute (Wagn. Stat., 298, § 2, subd. 7) and charter (§ 5) to condemn land for purposes of depots, engine houses and repair shops. Such use is a public use, for which property may be taken against the owner's consent. *Hannibal and St. Joseph R. R. Co. v. Muder*, 40 Mo., 105. 1871.

779.—The general assembly possesses the constitutional power to confer upon a corporation authorized to construct a railroad, the right to appropriate grounds necessary for its use for a depot. *Giesy v. Cincinnati, Wilmington, etc., R. R. Co.*, 4 Ohio St., 808. 1854.

780. Passenger house. A railroad company erected on a part of the land which belonged to the complainant (Hamilton), and which the company had caused to be condemned for a railroad, a house for the accommodation of passengers waiting the arrival of cars. This gives the complainant no title to relief in chancery. A building at the place of junction of two railroads, for the accommodation of passengers while detained there, is to be regarded not only as a convenience, but as indispensably necessary. *Hamilton v. Annapolis and Elk Ridge R. R. Co.*, 1 Md., 553. 1852.

781.—streets. Where the injury complained of is the building of a railroad station in the street, in front of complainant's property, and he owns the soil in the street upon which it is built, the injury is to his individual rights, and not as part of the public, and the suit must be brought in his own name. *Higbee v. Camden and Amboy R. R. Co.*, 4 C. E. Green's Ch. (N. J.), 276. 1868.

782. Workshops. The grant to a railroad company to construct a road, with such appendages as may be deemed necessary for the convenient use of the same, will authorize it to acquire land by condemnation for workshops, etc.—these being necessary appendages. *Chicago, Burlington and Quincy R. R. Co., v. Wilson*, 17 Ill., 123, 1855; *Low v. Galena and Chicago Union R. R. Co.*, 18 Ill., 324, 1857.

Condemnation of Corporate Property.

IX. CONDEMNATION OF CORPORATE PROPERTY.

783. Crossing. To authorize the Central R. R. Co. to cross the Morris and Essex Railway with its track, it is not essential that any express power should be given in the charter. *Morris and Essex R. R. Co. v. Central R. R. Co.*, 2 Vroom (N. J.), 205. 1865.

784. — The crossing of the track of a railroad company by the rails and cars of another railroad company, is not an appropriation of the property of the former for the use of the latter. *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 33 Barbour (N. Y.), 420. 1861.

785. — A railway company is entitled to damages for the construction of another railroad across its track, although such track is laid upon piles over tidewater. *Grand Junction R. R. Co. v. County Com'rs of Middlesex*, 14 Gray (Mass.), 553. 1860.

786. Damages. In an application by one railroad company against another company for damages caused by taking the petitioners' land under revised statutes, ch. 39, § 56, it is not a proper consideration for enhancing the damages, that the petitioner owns a railroad extending far into the interior, and is doing a large and profitable business, which would be incommoded by the track and conveniences of the respondents. But the fact that the land taken by the respondents is near a railroad communication with the tide waters and the harbor of Boston, and the increased value of the property, for any and all useful purposes, are proper considerations in estimating the damages. *Boston and Worcester R. R. Co. v. Old Colony R. R. Co.*, 12 Cushing (Mass.), 605. 1853.

787. Franchise may be taken. The legislature, under the power of eminent domain, can take the franchises of a corporation, for public uses, upon making due compensation. *Kerr, In matter of*, 42 Barbour (N. Y.), 119. 1864.

788. Proceedings. In a petition and warrant for the assessment of damages, occasioned by the crossing of one railroad by another, the place injured is sufficiently described as a "part of the land and bridge heretofore held and occupied by the petitioners for railroad purposes, measuring about five rods in length and forty feet in width, and lying a little west of the draw in their bridge from Charlestown

to Somerville, and nearly contiguous thereto," with a reference to the filed location and actual construction of its road. *Grand Junction R. R. Co. v. County Com'rs of Middlesex*, 14 Gray (Mass.), 553. 1860.

789. — A commission appointed to ascertain and determine the points and manner of crossing by one railroad of another, has no power to locate the crossing at any place other than that stated in the petition and order, nor to review any fact on which the order was based, nor to question the right of the petitioner to a crossing; nor has such commission power to regulate the rate of speed at which trains on the intersecting roads shall pass the crossing. *Central R. R. Co. on Long Island, In matter of*, 1 N. Y. Sup. Ct., 419. 1873.

790. — There is no privilege or right directly granted to the N. Y. and Harlem R. R. Co. of the sole and exclusive use of the 4th avenue in New York for a railroad track. As to the crossing of its track, by another railroad, that is not such an infraction of private property as to call for a preliminary injunction. *New York and Harlem R. R. Co. v. Forty-Second Street R. R. Co.*, 50 Barbour (N. Y.), 309, 1867; see *Same v. Same*, 26 Howard's Pr. (N. Y.), 68, 1863; *ib.*, 481. 1867.

791. Taking right of way of another company. One railway company cannot cause a condemnation of any portions of a railway except where it may be necessary to cross it. Land once located by a company which is proceeding with reasonable diligence in the construction of a road cannot be taken from it and appropriated by another company. *Contra Costa R. R. Co. v. Moss*, 23 Cal., 324. 1863.

792. — In the exercise of the power of eminent domain, the track and property of one railroad may be taken for the use of another, provided the public good and interests demand it. *Northern R. R. Co. v. Concord and Claremont R. R. Co.*, 27 N. H., 183, 1853; *New York and Housatonic R. R. Co. v. Boston, Hartford and Erie R. R. Co.*, 36 Conn., 196, 1869.

793. — There is properly no such thing as an extinction of the right of eminent domain. All kinds of property are subject to it, as well that which is already held under it as that which is not. *New York, Housatonic and Northern R. R. Co. v. Boston, Hartford and Erie R. R. Co.*, 36 Conn., 196. 1869.

Public Lands.

794. — In the location of such second road, no unnecessary damage should be done to the first road nor to the public, and where the location is to be approved by commissioners, the question is one that addresses itself to their judgment, and the whole matter is within their jurisdiction. *Id.*

795. — In 1846 a railroad company was authorized by its charter to locate its road within one portion of the location of another railroad north of a certain point, and to enter upon and use a certain further portion of that railroad north of that point; and it was provided that the new corporation should pay to the older one "a reasonable compensation for such use of its road as is granted by this act, the amount to be paid in one sum, and not as annual rent, and to be determined, in case of disagreement, by three referees." *Held*, that "such use of the road as is granted by this act," within the meaning of the charter, and of a submission and award made pursuant to it, was the use of a portion of a location of the old road for the construction of the new one, and not the use of the residue of the northerly portion of the old road—that being regulated by St. 1845. ch. 191. *Lowell and Lawrence R. R. Co. v. Boston and Lowell R. R. Co.*, 7 Gray (Mass.), 27. 1856.

796. — Section 16 of the charter of the Peru and Indianapolis R. R. Co., which enacts that when said company shall have procured the right of way through land, either by the voluntary release of the owner or by condemning the same, it shall be seized in fee simple of the right to such land, and shall have the sole use and occupancy thereof, does not vest in said company the right to the exclusive possession of the land occupied by the road, but vests the fee simple subject to the right of the state to take the same, upon compensation being made, for the public use. *Newcastle and Richmond R. R. Co. v. Peru and Indianapolis R. R. Co.*, 3 Ind., 464. 1852.

797. — The Newcastle and Richmond R. R. Co. has a right, under its charter, to have a sufficient quantity of land over which the Peru and Indianapolis Railroad passes, condemned for the purposes of its own road, and the fee simple vested in itself; but this will be subject to the right of way of the Peru and Indianapolis R. R. Co. *Id.*

X. PUBLIC LANDS.

798. State lands. Where a company is authorized by an act of the legislature to construct a railroad between two designated points, it has a right to occupy, in the construction of the road, any land of the state between those points, on the general route authorized, which may be necessary for the purpose. *Indiana Central R. R. Co. v. The State*, 3 Ind., 421. 1852.

799. — The act of March 30, 1869, authorizing the New York and Long Branch R. R. Co. to extend its road across the Raritan river, and to cross the river by a bridge, gave that company an absolute, unconditional authority to enter upon and appropriate the lands of the state under water, without compensation. *Pennsylvania R. R. Co. v. New York and Long Branch R. R. Co.*, 8 C. E. Green's Ch. (N. J.), 157. 1872.

800. — Where the right of way is granted by the state through its public lands, any person subsequently entering the lands, takes them subject to the easement of the railroad company. *Davis v. East Tennessee and Georgia R. R. Co.*, 1 Sneed (Tenn.), 94. 1853.

801. — The legislature may take public property for any particular public use, or delegate to a company the authority to do so, without making any provision for compensation. *Indiana Central R. R. Co. v. The State*, 3 Ind., 421. 1852.

802. — asylum. Where the general assembly authorized a railway company to enter upon, take possession of, and use any lands, etc., for the location of the road, depots, etc., and provided that "all such lands, materials and privileges belonging to the state, are hereby granted to said corporation for said purposes;" *held*, that the grant did not include the ground used by the state for the education of the blind, although adjoining the road and convenient for its use. *St. Louis, Alton and Terre Haute R. R. Co. v. Trustees of Blind Asylum*, 43 Ill., 303. 1867.

803. — The fact that the Indiana Central Railway has been located on some part of the tract of the 80 acres of land purchased for the use of the institution for educating the deaf and dumb, does not alone authorize the conclusion that the uses and purposes for which the institution was located on such

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tract would be so materially interfered with as to justify the enjoining of the company from crossing it. *Indiana Central R. R. Co. v. The State*, 3 Ind., 421. 1852.

804. United States lands. Mere occupants of mineral lands have no title which they can maintain against the United States or its grantee. Nor can the state grant a license to occupy the same. A mere possessor without title cannot recover damages caused by the construction of a railway through such lands. *Doran v. Central Pacific R. R. Co.*, 24 Cal., 245. 1864.

805.—The right of way of two hundred feet in width, granted to the C. P. R. R. Co., by act of congress July 1, 1862, extends to mineral lands. The reservation of mineral lands applies to the alternate sections. *Doran v. Central Pacific R. R. Co.*, 24 Cal., 245. 1864.

806.—In all the western states, within which have been public lands, it has been the uniform practice to make public roads through the lands of the United States. This every state may do, under its power of eminent domain. This right is subject to no power vested in the federal government. *United States v. Rock Island R. R. Bridge Co.*, 6 McLean, 517. 1855.

807.—Within a state, the jurisdiction of the state is exclusive in such cases. *Ib.*

808.—The act of congress of Aug., 1852, granting the right of way to railways through public lands, does not confer the right to enter upon premises in the actual occupancy of a settler, without payment of damages. *California Northern R. R. Co. v. Gould*, 21 Cal., 255. 1862.

809.—The act of congress of Aug., 4, 1852, which grants to railroad companies the right of way over the public lands in the states where such lands lie, ceases to operate on said lands after they have been entered by a citizen; unless the railroad company claiming right of way has located its roadway and filed a plat of the location of the same with the commissioner of the general land office of the United States at Washington, in the manner required by said act of congress, before said entry was made. *Alabama and Florida R. R. Co. v. Burkett*, 46 Ala., N. S., 569. 1871.

810.—A preëmtioner who had not proved up and made payment for his land, was held to have no rights in the land, recognized by

the laws of the United States. The grant of the right of way to the Central Pacific R. R. Co., was perfect as against such preëmtioners, upon the filing of the plat of the location in the proper land office. *Western Pacific R. R. Co. v. Tevis*, 41 Cal., 489. 1871.

XI. EVIDENCE.

811. Assessor. One who has been an assessor for eighteen years may testify to the value of land and an easement connected therewith, taken for a railroad in the first year that he was assessor, although he had no personal knowledge thereof prior to such taking. *Whitman v. Boston and Maine R. R. Co.*, 7 Allen (Mass.), 313. 1863.

812. Assessor's valuation. Parol evidence of a written statement of the value furnished the assessor is not admissible. *Oregon Cascades R. R. Co. v. Bailey*, 3 Or., 164. 1869.

813.—Though the sworn valuation of the land owner may be admissible in evidence to contradict his statements, it is incompetent as independent evidence in determining the value of property in condemning it for railroad purposes. *Virginia and Truckee R. R. Co. v. Henry*, 8 Nev., 165. 1873.

814.—A printed transcript of a copy of the assessor's valuation is not admissible in evidence of the value of land, in assessing damages. *Brown v. Providence, Warren and Bristol R. R. Co.*, 5 Gray (Mass.), 35. 1855.

815. Award and report. The award of the county commissioners, assessing damages for land taken for a railroad, is not admissible on the hearing before a sheriff's jury, to prove the amount of land taken. *Ib.*

816.—A duly attested copy of the report and estimate of county commissioners, on an application for damages occasioned by taking the petitioner's land for a railroad, estimating the petitioner's damages, and also directing the respondents to make and maintain a way therein described for the benefit of the petitioner, is admissible in evidence for the respondents, on a hearing before a sheriff's jury, to estimate the petitioner's damages. *White v. Boston and Providence R. R. Co.*, 6 Cushing (Mass.), 420. 1850.

817. Engineer—location and plans. On a claim for damages, the claimant may prove, by the testimony of the engineer who made

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the preliminary surveys and plans for such road, that the same might have been located pursuant to the charter, in various modes which would not have required the taking of the land of such claimant. *Commonwealth v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 25. 1840.

818. — The evidence of the principal engineer of a railroad as to the plan upon which it is to be finished, is admissible to affect the amount of damages for the land taken by the road. *March v. Portsmouth and Concord R. R. Co.*, 19 N. H., 372. 1849.

819. **Farmers.** Where there is a conflict of evidence as to the amount of damage to a farm, the jury may give greater weight to the testimony of farmers than to that of other persons. *Jacksonville, Alton and St. Louis R. Co. v. Caldwell*, 21 Ill., 75. 1859.

820. **Fire.** A witness, who had been for ten years secretary of an insurance company, and as such had been in the practice of examining buildings, with reference to insurance thereof, and who had also, as county commissioner, frequently estimated damages caused to estates by the laying out of highways and railroads, was held to have been rightly permitted, on a hearing before a jury empaneled to appraise damages sustained by a party by the laying out of a railroad over his lands and near to his buildings, to give his opinion that the passage of locomotive engines within one hundred feet of a building would diminish the rent and increase the rate of insurance thereof against fire. *Held*, also, that he was rightly permitted to testify that the directors of the insurance company, of which he was secretary, upon his consulting them as to an application for insurance on a building in the vicinity of the buildings of the party then before the jury, had declined to take the risk at any rate. *Webber v. Eastern R. R. Co.*, 2 Metcalf (Mass.), 147. 1840.

821. **General principles.** The commissioners should have evidence upon the question of damages, and in so doing, the ordinary rules of evidence apply. *Central Pacific R. R. Co. v. Pearson*, 85 Cal., 247. 1868.

822. — On their direct examination in such matters, witnesses cannot state the particular transactions upon which they base their judgment as to the value of the land. *Id.*

823. — The commissioners are not bound

by the evidence, but they are required to view the premises, and may found their award upon their own judgment. *Western Pacific R. R. Co. v. Reed*, 35 Cal., 621. 1868.

824. — Their award will not be set aside where there is a conflict of evidence. *Id.*

825. — Though the viewers are required to view the premises, they are not prohibited from examining witnesses during their investigation. (Act March 27, 1848.) *Pennsylvania R. R. Co. v. Keiffer*, 22 Penn. St., 356. 1853.

826. — On a question of railroad damages, a witness cannot be permitted to testify, as to inconveniences which he has suffered on his farm by the ordinary running of railroad cars, for the purpose of showing the inconveniences suffered by one owning a farm in that vicinity, as such evidence would raise an issue collateral to that on trial. *Concord R. R. Co. v. Greeley*, 3 Foster (N. H.), 237. 1851.

827. — The statements of a witness touching the value per acre of the lands appropriated, are admissible. *Evansville, Indianapolis and Cleveland R. R. Co. v. Cochran*, 10 Ind., 580. 1858.

828. — The inquiry as to the value of the land and the damages thereto, was in this case properly directed to the time when the commissioners filed their report. It was also proper to show that the damage to the land was increased by reason of the diagonal course of the railroad across the same; and it was proper to show, too, the exact condition of ditches and embankments made on the land appropriated in constructing the roadway, and the injuries resulting therefrom to appellant's land. *St. Joseph and Denver R. R. Co. v. Orr*, 8 Kan., 419. 1871.

829. — In proceedings of this character, the rules of law are to govern in the admission and rejection of evidence. *Rochester and Syracuse R. R. Co. v. Budlong*, 6 Howard's Pr. (N. Y.), 407, 1851; *Troy and Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barbour (N. Y.), 100, 1852.

830. — Where a railroad company, being unable to agree with the owner of the land, makes application to the court by petition, for the appointment of commissioners under the general railroad act of 1850, and the facts alleged in the petition are denied, and an issue is formed, the proof required to be produced by the owner to disprove the facts alleged,

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must be *legal evidence*; the party's own *affidavit* or any other *affidavit*, will not answer. *Buffalo and State Line R. R. Co. v. Reynolds*, 6 Howard's Pr. (N. Y.), 96. 1851.

831. Interrogatories. It is proper to ask a witness "What was the value of the farm when the company took possession?" and then, "What was it worth when the company entered upon it, deducting the strip taken from it by the company for its purposes?" *Simmons v. St. Paul and Chicago R. R. Co.*, 18 Minn., 184, 1872; *Colwill v. Same*, 19 ib., 283, 1872; *St. Paul and Sioux City R. R. Co. v. Murphy*, ib., 500, 1872.

832. Offers to buy or sell. Evidence of an offer made for land is inadmissible to prove its value. Such testimony is easily manufactured. It is warranted neither on principle nor on authority, and is too dangerous to be tolerated. *St. Joseph and Denver R. R. Co. v. Orr*, 8 Kan., 419. 1871.

833.—To prove the value of land, evidence of what a witness had offered for other land on the opposite side of the street, is not competent. *Davis v. Charles River Branch R. R. Co.*, 11 Cushing (Mass.), 506. 1853.

834.—Evidence is not admissible to show what other property in the vicinity has been offered at. *Lehmicke v. St. Paul, Stillwater, etc. R. R. Co.*, 19 Minn., 464. 1873.

835. Opinions of witnesses will be received. When the value of property is in controversy, persons acquainted with the property may give their opinion of its value. *Ib.*; *Simmons v. St. Paul and Chicago R. R. Co.*, 18 Minn., 184, 1872; *Grannis v. Same*, ib., 194; *Shattuck v. Stoneham Branch R. R. Co.*, 6 Allen (Mass.), 115, 1863.

836.—In estimating the damages, proof of particular instances of sales of land in the neighborhood, is inadmissible; the only proper test is the opinion of witnesses, based upon its location, productiveness, its market value, or the general selling price of land in the neighborhood. *East Pennsylvania R. R. Co. v. Hiester*, 40 Penn. St., 53. 1861.

837.—The value of the land may be proved by the testimony of witnesses personally acquainted with the subject and sufficiently familiar with it to give an opinion, although they have never bought or sold land in the vicinity, or known or heard of such sales from the buyer or seller. *Whitman v. Boston*

and Maine R. R. Co., 7 Allen (Mass.), 313. 1863.

838.—*It seems*, that at the trial of a petition for the assessment of damages occasioned to land by the construction of a railroad, the petitioner may ask a neighbor who has made sales of land in the vicinity, and knows the value of land there, whether the building of the railroad would diminish the value of the land, and if so, how much? *Brainard v. Boston and New York Central R. R. Co.*, 12 Gray (Mass.), 407. 1859.

839.—Where the questions put to the witness, preceded by a full statement in regard to his competency to give an opinion, and of all the facts upon which that opinion was founded, were as follows: 1. Will you state what, in your opinion, will be the injury to the residue of B's farm, occasioned by the construction of the proposed railroad through it? 2. State, if you can, what would be the *diminution in value* of the two fields north and south of the proposed railroad, by the construction thereof? *Held*, that they were proper. *Rochester and Syracuse R. R. Co. v. Budlong*, 10 Howard's Pr. (N. Y.), 289. 1854.

840.—Witnesses, who are farmers, owning land in the vicinity, may be asked how much, in their opinion, the land has been depreciated. *Snyder v. Western Union R. R. Co.*, 25 Wis., 60. 1869.

841.—To render the opinions of witnesses admissible as to the damage done to land, they must be experts. It is not enough that they merely reside in the vicinity of the land. *Buffum v. New York and Boston R. R. Co.*, 4 R. I., 221. 1856.

842.—Land and city lots have no standard value; and to arrive at their proper valuation, it is right to take the opinion of witnesses, and to hear the facts upon which such opinions are based. *Illinois and Wisconsin R. R. Co. v. Von Horn*, 18 Ill., 257. 1857.

843.—One residing and owning land within half a mile of land taken for a railroad, and who testifies that he has known the land for six years, and has heard of sales of land in the vicinity, may testify to his opinion of the value of the land taken. *Russell v. Horn Pond Branch R. R. Co.*, 4 Gray (Mass.), 607. 1855.

844.—On appeal, witnesses will be permitted to give their opinion of the value of

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the premises before and after the taking of the right of way, leaving the opposite party, by his right of cross examination, to learn the ability of the witness and what he considers in making up his judgment. *Henry v. Dubuque and Pacific R. R. Co.*, 2 Iowa, 288. 1855.

845. — But in such cases the opinions of the witnesses must be confined to the premises over which the right of way is taken. *Ib.*

846. **Opinions will not be received.** Witnesses will not be permitted to give their opinions as to the amount of damages sustained by reason of the location of the road. *Brunswick and Albany R. R. Co. v. McLaren*, 47 Ga., 546, 1873; *Ala. and Fla. R. R. Co. v. Burkett*, 42 Ala., 83, N. S. 1868; *Montgomery and West Pt. R. R. Co. v. Varner*, 19 Ala., N. S., 185, 1851; *Evansville, Indianapolis and Cleveland R. R. Co. v. Fitzpatrick*, 10 Ind., 120, 1858; *Same v. Stringer*, *ib.*, 551; *Atlantic and Great Western R. R. Co. v. Campbell*, 4 Ohio St., 583, 1855; *Cleveland and Pittsburgh R. R. Co. v. Ball*, 5 *ib.*, 569, 1856.

847. — The opinion of witnesses as to the damages done to the land, based upon the evidence of witnesses whose testimony they have heard is inadmissible. *Grinnell v. Mississippi and Missouri R. R. Co.*, 18 Iowa., 570. 1865.

848. — When the damages are assessed before the completion of the road, the opinion of witnesses as to what will be the value of the land after the road is completed, is inadmissible. *Watson v. Pittsburgh and Connelleville R. R. Co.*, 37 Penn. St., 469. 1860.

849. — When the damages are assessed after the completion of the road, the difference in the value of the land may be shown by the opinion of witnesses, confining them to the consideration of the direct and necessary consequences of the construction of the road. *Ib.*

850. **Plans and estimates.** The plans and estimates of the company, for the portion of the road in question should be admitted in evidence. *Jacksonville and Savanna R. R. Co. v. Kidder*, 21 Ill., 181. 1859.

851. **Reversion.** The opinion of an expert is competent as to the value of the reversion of the land over which a railroad has been located. *Boston and Worcester R. R. Co. v. Old Colony and Fall River R. R. Co.*, 3 Allen, (Mass.), 142. 1861.

852. **Sale of other land.** At a hearing by

a sheriff's jury to assess the damages caused to a vacant tract of land, evidence is not admissible to show the sum paid by the corporation to the owners of an adjoining estate, when it appears that it was paid as a gross sum, for damages to the entire estate, on which was a dwelling house near the railroad, and a well within the location of the railroad. *Presbrey v. Old Colony and Newport R. R. Co.*, 103 Mass., 1. 1869.

853. — On the trial of a petition before a sheriff's jury, evidence is not admissible to show the price paid by the respondents, for land adjoining the land in question, under an award of arbitrators mutually agreed upon to estimate the same. *White v. Fitchburg R. R. Co.*, 4 Cushing (Mass.), 440. 1849.

854. — To show the value of the land taken, evidence is admissible of the price obtained at an administrator's sale of an undivided part of the land. *March v. Portsmouth and Concord R. R. Co.*, 19 N. H., 372. 1849.

855. — On the hearing, before a jury summoned to assess damages, the owner may give evidence of the price paid by the railroad company for the adjoining land of another. But an owner of adjoining land cannot legally be permitted to state to the jury what, in his judgment, is the value of that land, though he be a farmer who has occasionally bought and sold land; and if he be permitted to make such statement, the verdict of the jury will be set aside, although they were instructed, that opinions, except of experts, were not evidence. *Wyman v. Lexington and West Cambridge R. R. Co.*, 18 Metcalf (Mass.), 316. 1847.

856. — In proving the value of the land, a witness cannot properly be asked to state at what price the right of way was purchased through adjoining tracts, unless it be first shown that there is a uniformity in the character of the lands thus brought in question. *King v. Iowa Midland R. R. Co.*, 34 Iowa, 458. 1872.

857. **Sale of residue.** The petitioner may be asked on cross examination, for what price he sold the residue of the lot, seventeen years after the taking. *Whitman v. Boston and Maine R. R. Co.*, 7 Allen (Mass.), 318. 1863.

858. **View.** Where the principal evidence of the value of the land was derived from a view of the premises, the court will not set aside the verdict as excessive. *Bangor and*

Statutory Remedy Exclusive—Title of Land Owner.

Piscataquis R. R. Co. v. McComb, 69 Me., 290. 1872.

859. Viewer. It is not a valid objection to a witness that he had been viewer, especially when he had been instructed by the court that he must speak from his own knowledge, and not give any opinion founded on evidence heard as a viewer. *Dorlan v. East Brandywine and Waynesburg R. R. Co.*, 46 Penn. St., 520. 1864.

XII. STATUTORY REMEDY EXCLUSIVE.

860. Exclusive remedy. Where a remedy is given by the statute for taking private property, that remedy is not cumulative, but is exclusive. *Indiana Central R. R. Co. v. Oakes*, 20 Ind., 9, 1863; *McCormack v. Terre Haute and Richmond R. R. Co.*, 9 ib., 283, 1857; *Lafayette and Indianapolis R. R. Co. v. Smith*, 6 ib., 249, 1855; *Colcough v. Nashville and Northwestern R. R. Co.*, 2 Head (Tenn.), 171, 1858; *Aldrich v. Cheshire R. R. Co.*, 1 Foster (N. H.), 359, 1850; *Knorr v. Germantown, etc. R. R. Co.*, 5 Wharton (Penn.), 256, 1839; *Cumberland Valley R. R. Co. v. McLanahan*, 59 Penn. St., 23, 1868; *Pettibone v. La Crosse and Milwaukee R. R. Co.*, 14 Wis., 443, 1861; *Baker v. Hannibal and St. Joseph R. R. Co.*, 36 Mo., 543, 1865; *Leary v. Same*, 38 ib., 485, 1866; *Mason v. Kennebec and Portland R. R. Co.*, 31 Me., 215, 1850; *Little Miami R. R. Co. v. Whitacre*, 8 Ohio St., 590, 1858; *Hueston v. Eaton and Hamilton R. R. Co.*, 4 ib., 685, 1855.

861.—In such case, the bar is equally as effectual, although the owner may have refused to submit to such proceedings, or to receive the amount awarded to him and deposited for his use. *Hueston v. Eaton and Hamilton R. R. Co.*, 4 Ohio St., 685. 1855.

862.—Where the owner of land seeks to recover damages for the injury resulting from the location of a railroad on his land, he must pursue the remedy prescribed by the charter of the railroad company, as this statutory provision takes away, by implication, the common law remedy by action of trespass on the case. *McIntire v. Western North Carolina R. R. Co.*, 67 N. C., 278. 1872.

863.—The C. V. R. R. Co. had, in process of its construction, the legal right to pass over and destroy a portion of a certain highway in the town of H., and a general statute of the

state provided a specific remedy for the injury so done; *held*, that where the acts were done in accordance with law, the party injured is confined to the statute remedy for such damages. *Henniker v. Contoocook Valley R. R. Co.*, 29 N. H., 146. 1854.

864.—Action against the Junction R. R. Co. for damages occasioned by the construction of the road through the plaintiff's land, *Held*, that the plaintiff's remedy was by claim for damages, etc., to be enforced in the mode prescribed in the defendant's charter. *Levis-ton v. Junction R. R. Co.*, 7 Ind., 597. 1856.

865.—The legislature cannot authorize either a direct or consequential injury to property, without compensation to the owner. *Evansville and Crawfordsville R. R. Co. v. Dick*, 9 Ind., 433. 1857.

866.—If a private corporation, voluntarily, for its own benefit, so construct a work as necessarily to injure the property of an individual, and its charter gives no remedy for such injury, it is liable in an action for damages for the injury, though the work be constructed in a proper manner and place. *Id.*

867. Not exclusive. The statutory provision for the assessment of damages in a summary way, is in derogation of a common law right, and should be strictly construed. The summary remedy is only *cumulative*, and does not take away the common law action for damages. *Doe ex dem v. Georgia R. R. Co.*, 1 Ga., 524. 1846.

XIII. TITLE OF LAND OWNER.

868. Bond for deed. The owner of an estate in fee and a person to whom he has given a bond for a deed on the fulfillment of certain conditions, may both join in a petition, under Rev. Sts., ch. 24, § 48, for damages to such estate caused by taking it for a railroad, although the condition of the bond is not then performed. *Proprietors of Locks and Canals v. Nashua and Lowell R. R. Co.*, 10 Cushing (Mass.), 385. 1852.

869. Conflicting claimants; deposit. The Vermont Central R. R. Co. took certain land under its charter, and there being conflicting claims to the land, the damages were paid into bank, subject to the future order of the chancellor, and on a petition subsequently preferred by one who claimed the money so de-

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posited, the chancellor, upon notice given to the company, no adverse claimants appearing, ordered the money so deposited to be paid to the petitioner. *Held*, that under Comp. St., 196, the proceedings before the chancellor were final, and the company had no interest in the question and could not appeal from the order of the chancellor. *Haswell v. Vermont Central R. R. Co.*, 23 Vt., 228, 1851. *Same v. Farmers' and Mechanics' Bank*, 26 ib., 100, 1853.

870. Death of claimant. Unless the real estate, which was of an intestate, be taken for public uses prior to his decease, his administrator has no right to petition for increase of damages; since, in such case, it would be the land of the intestate's heirs that was taken. *Neal v. Knox and Lincoln R. R. Co.*, 61 Me., 298. 1873.

871. Decedent's land. Where the land of one deceased is taken for a railroad, the heir, and not the administrator, is entitled to the damages for such taking, and to prosecute for the recovery thereof, although the administrator had previously represented the estate to be insolvent, and afterwards obtained a license to sell the intestate's real estate for the payment of debts. *Boynton v. Peterborough and Shirley R. R. Co.*, 4 Cushing (Mass.), 467. 1849.

872. Estoppel. A railway company is not estopped from disputing the title of one of the land owners named in its report of location, especially if such owner's name is not there given in full. *Allyn v. Providence, Warren and Bristol R. R. Co.*, 4 R. I., 457. 1857.

873. Evidence. Where a railway company commences proceedings to condemn the land of an individual, for its right of way, the land owner is not required to establish his title by proof; the petition of the corporation is sufficient evidence of his title. *Peoria and Rock Island R. R. Co. v. Bryant*, 57 Ill., 473. 1870.

874. Incumbered land; judgments. Third persons, holding liens by virtue of judgments recovered, ought to have notice, unless the statute, by its terms, clearly only requires notice to be given to the owners. *Watson v. New York Central R. R. Co.*, 6 Abbott's Pr., N. S. (N. Y.), 91. 1868.

875. — mortgages. Neither the fact that the property is under mortgage, nor the fact that it belongs to a corporation chartered by a state law, exempts it from the operation of the

right of eminent domain. *Alabama and Florida R. R. Co. v. Kenney*, 39 Ala., N. S., 307. 1864.

876. — Mortgagees are necessary parties to an action for compensation for taking land for right of way. *Davis v. La Crosse and Milwaukee R. R. Co.*, 12 Wis., 16. 1860.

877. — The mortgager of land taken by a railroad company for the purpose of its road, may recover the full amount of damages, without regard to the mortgages. *Breed v. Eastern R. R. Co.*, 5 Gray (Mass.), 470. 1840.

878. — It seems, that at the trial of a petition for the assessment of damages occasioned to land by the construction of a railroad across land adjoining, the railroad company is not entitled to show that the mortgagee of the land, who has waived all claim to damages, has conveyed to it by deed of warranty the land over which the road passes; and to have the damages assessed applied in payment of the mortgage, and judgment rendered for the residue only. *Brainard v. Boston and New York Central R. R. Co.*, 12 Gray (Mass.), 407. 1859.

879. — The existence of a mortgage which is a lien upon land taken and used by a railroad company, is one of the defects in the title to such land, contemplated in § 21 of the general railroad act of 1850, so as to authorize such company to proceed to acquire a valid title. *New York Central R. R. Co., In matter of*, 20 Barbour (N. Y.), 419. 1854.

880. — The company is not obliged to wait until the mortgaged premises are sold under a decree of foreclosure; but on discovering the existence of the incumbrance, it may proceed immediately to have the lien extinguished, as to the land occupied by it. *Id.*

881. — Where land is taken for the right of way and there is a mortgage lien upon it, the railroad company has a right to redeem such lands from the lien of the mortgage on the payment of a ratable proportion of the mortgage debt, which it must do to the full value of the property (at the time of its appropriation), with interest, if need be, irrespective of the improvements put thereon by the company. *Dows v. Congdon*, 16 Howard's Pr. (N. Y.), 571. 1858.

882. — A purchaser of land who, at the time of the purchase, executed a deed of trust to secure the purchase money, cannot convey

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the right of way over the land to a railway company, except subject to the payment of the purchase money. *Stewart v. Raymond R. R. Co.*, 7 Smodes and Marshall (Miss.), 568. 1846.

883. — Where a railroad company in taking land for its road, paid the owner an agreed price for it, if, on foreclosure of a prior mortgage, a sale of the remainder of the premises does not satisfy the mortgage, the company is entitled to relieve its land from the lien by paying its value at the time it was taken, with interest. *Kennedy v. Milwaukee and St. Paul R. R. Co.*, 22 Wis., 581. 1868.

884. — The assessment of damages occasioned to a tract of land, on the petition of several joint owners, is properly made in a gross sum. It is not necessary for the jury to apportion the damages among the claimants. *Pittsburgh and Steubenville R. R. Co. v. Hall*, 25 Penn. St., 336. 1855.

885. **Landlord and tenant.** The owner of a ground rent is not affected by proceedings of a railroad company against his tenants, to take and occupy the ground for the purposes of its road, the landlord and tenant having distinct estates. *Voegtly v. Pittsburgh and Fort Wayne R. R. Co.*, 2 Grant's Cases (Penn.), 242. 1858.

886. **Lease.** Damages by the Pennsylvania R. R. Co. depend on the appropriation of the property to railway purposes. This differs from the use of property under a lease for a term of years. *Heise and Miffin v. Pennsylvania R. R. Co.*, 62 Penn. St., 67. 1869.

887. — A railway company having title to use and occupy land under a lease may lay rails upon it and use them as a track, if not forbidden in the lease, or if no waste be committed. *Ib.*

888. — In such case the rails must be removed before the end of the lease. In case of an appropriation, a perpetual easement takes place. *Ib.*

889. — The act of limitation of railroad suits has no application to cases where rails are laid, etc., on land held by lease. *Ib.*

890. — If the company appropriate the whole under its charter, the owners would be entitled to damages, the effect of the lease only being to reduce the damages. *Ib.*

891. — A railroad company may acquire title under the statute, to lands of which it

already holds an unexpired lease. *New York and Harlem R. R. Co., In matter of*, 11 Abbott's Pr., N. S. (N. Y.), 91. 1871.

892. — Where a lease for years contains a provision that nothing in the instrument should prejudice the right of the lessor to demand and recover any damage resulting to the property from the construction of railroads, to the same extent as if he were in possession; *held*, that the lessee cannot recover damages for an injury to his term, resulting from such construction. *Burbridge v. New Albany and Salem R. R. Co.*, 9 Ind., 546. 1857.

893. — But in the absence of such a provision, a tenant for years might recover the damage to his term; and it *seems* that a tenant for life in the same lands might recover the damage to his estate, and that the remainderman might recover the damage to the reversion. *Ib.*

894. — The premises, in such case, were leased subject to the right of way of such railroads as might be constructed through them, and the lessor reserved the right of recovering all damages to the realty resulting from such construction. If the lessor should waive his right to recover such damages, the waiver would go to the benefit of the railroad company, and not to that of the lessee. *Ib.*

895. — A lessee of premises, who puts a dwelling house thereon by permission of the owner of the fee, and with the right to move off the house at the expiration of the lease, if the lessee complies with the terms of the lease, has such an interest in the realty as he or she may convey by mortgage. It is an interest in real estate, and the house and underpinning stones became attached to and a part of that interest. *Hagar v. Brainerd*, 44 Vt., 294. 1872.

896. — The mortgagee of such an interest has rights in the premises that cannot be invaded or destroyed by proceedings *in invitum* against the owner of the fee and the lessee. His interest must be condemned and appraised and paid for or he will be entitled to his action. *Ib.*

897. **Life estate.** A tenant for life may have his damages assessed alone, or he may join with those entitled to the remainder, and have the entire damages assessed. *Reading R. R. Co. v. Boyer*, 13 Penn. St., 497. 1850.

898. **Owners; who are included.** The

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charter of a railway company providing for compensation for taking the right of way, the land owner may have a view to assess the damages whenever his right is directly injured by entry upon the land. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Williams*, 54 Penn. St., 103. 1867.

899. — The term "owners" includes all owners of titles in or growing out of the land, whose rights are capable of actual privation by taking. *Ib.*

900. **Partnership.** If land is purchased by partners with partnership funds, for partnership purposes, and is not needed for the payment of debts, the title vests in the members of the firm as tenants in common; and after the death of one of them, a petition for damages sustained by reason of the location of a railroad upon it is properly brought in the joint names of his administrator and the surviving partner. *Whitman v. Boston and Maine R. R. Co.*, 3 Allen (Mass.), 133. 1861.

901. — Partners may recover damages jointly for the taking for a railroad of land of which one of them holds the legal title in trust for the firm. *Reed v. Hanover Branch R. R. Co.*, 105 Mass., 303. 1870.

902. **Possession.** Possession of land is *prima facie* evidence of title thereto: and an exclusive possession and occupancy for ten years under a claim of absolute title, and where there is no adverse showing, is sufficient evidence for a jury to infer a title in fee simple in the occupant, on an appeal from the appraisal and assessment of county commissioners, of land taken for a railroad. *Missouri River, Ft. Scott and Gulf R. R. Co. v. Owen*, 8 Kan., 409. 1871.

903. — Title in fee is not to be presumed from possession. The claimant must show some degree of title, and he can only recover according to the degree of interest that he has. *Robbins v. Milwaukee and Horicon R. R. Co.*, 6 Wis., 636. 1859.

904. — The damages must be paid to the true owner if he recovers possession before the damages are paid, although a trespasser may have been in possession when the damages were assessed. *Rooney v. Sacramento Valley R. R. Co.*, 6 Cal., 638. 1856.

905. — The damages when paid will be paid to the parties in possession although other parties may have given notice of their

ownership before payment. *Sacramento Valley R. R. Co. v. Moffatt*, 7 Cal., 577. 1857.

906. — The question of title cannot be investigated in such proceeding. *San Francisco and San Jose R. R. Co. v. Mahoney*, 29 Cal., 112. 1865.

907. — Where the title is in dispute, the money should be paid into court and remain there until the title is settled. *Ib.*

908. **Proceedings.** Under act of February 19, 1849, an objection to the *quantum* of the title in the petitioner, or that it was erroneously set forth in the petition, must be made at the time of the application for viewers, or upon appeal from their report. *Church v. Northern Central R. R. Co.*, 45 Penn. St., 339. 1863.

909. **Record.** The Court of Common Pleas may reach the question of title by prescribing rules which will bring the act of the company evidencing the appropriation in the record, and enable the court to send before the viewers the true and only question which they ought to decide. *Heise and Mifflin v. Pennsylvania R. R. Co.*, 62 Penn. St., 67. 1869.

910. **Sale after assessment.** The right to compensation from the W. & M. R. Co. for land taken for its track belongs to the owner of the tract at the time the road was finished through it, and not to a subsequent vendee. *Lewis v. Wilmington and Manchester R. R. Co.*, 11 Richardson's Law (So. Car.), 91. 1857.

911. — A person who has acquired real estate subsequent to the time when it was damaged by a railway company, cannot maintain an action for such injury. *Central R. R. Co. v. Merkel*, 32 Tex., 723. 1870.

912. **Sale before assessment.** Where a claim has accrued for damages to an entire tract of land, by reason of the actual construction of a railroad over part of it, and, before the damages have been assessed or paid, the land is sold, without any provision in respect to them, the right to such damage remains in the vendor. *Pomeroy v. Chicago and Milwaukee R. R. Co.*, 25 Wis., 641. 1870.

913. — For land sold before any steps were taken to condemn the right of way through the same, the vendor is not entitled to recover damages, unless the right to claim such damages was reserved in making the sale of the land. *Elizabethtown and Paducah R. R. Co. v. Helm's Heirs*, 8 Bush (Ky.), 681. 1871.

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914. St. Paul and Sioux City R. R. Co. Under the charter of the St. Paul and Sioux City R. R. Co. the question of the title to the land actually appropriated is to be determined by the court at the time of appointing the commissioners to assess the damages. *St. Paul and Sioux City R. R. Co. v. Matthews*, 16 Minn., 341. 1871.

915. Tenants for years. Tenants for years are such owners of lands as are entitled to damages for the taking, for railroad purposes, of the lands in which they hold an interest. *North Pennsylvania R. R. Co. v. Davis*, 26 Penn. St., 238. 1856.

916. — The interest of the tenant upon a covenant for the renewal of the lease is a proper subject for compensation. *Ib.*

917. — Nor will the fact that the viewers in their report designate it as "damages for the non-renewal of the lease," vitiate the award, it being in substance compensation for the land, and not damages for the breach of contract. *Ib.*

918. Tenants in common. An authority by one to another tenant in common to proceed to an assessment of the damages which had been suffered by the location and construction of a railroad through their farm, will not authorize the latter to proceed in his own name, treating the farm as his own. *Railroad Co. v. Bucher*, 7 Watts (Penn.), 38, 1838.

919. — A grant by one of several tenants in common of the right of way as to his interest, while it passes no fee and confers no rights against the other tenants, operates as a release of his damages. *Draper v. Williams*, 2 Mich., 536. 1853.

920. Viewers. Viewers of damages for the right of way, may pass upon the title to land taken, so far as to determine who are entitled to the damages. *Winebiddle v. Pennsylvania R. R. Co.*, 2 Grant's Cases (Penn.), 32. 1852.

XIV. TITLE ACQUIRED BY COMPANY.

921. Ditches to drain the road. The condemnation of 100 feet in width as a right of way for a railroad, gives the railroad company no right to enter upon and dig ditches through the adjacent lands through which the right of way has been so condemned, even though such ditch is necessary to the proper drainage and

protection of the railroad. *State v. Armell*, 8 Kan., 288. 1871.

622. — The rights and easements acquired by a railroad company, by the condemnation of lands belonging to another for the purposes of its road, must be definitely and precisely shown in the proceedings. The condemnation proceedings must show what is taken, and what the land owner parts with. Nothing is taken by implication or intentment. *Ib.*

923. Erection of buildings on right of way. The exercise of the right of eminent domain is in derogation of private right, and must be strictly construed. *Luncheon's Appeal*, 55 Penn. St., 16. 1867.

924. — A railway company cannot erect buildings, etc., not necessarily connected with the use of its franchises, within the limits of its right of way. *Ib.*

925. Fee simple title is acquired. The title obtained by a railway company by condemnation of lands is in fee simple. *Burnett v. Nashville and Chattanooga R. R. Co.*, 4 Sneed (Tenn.), 528. 1857.

926. Fee simple not acquired. By condemnation of lands for railway purposes, railway companies do not acquire a fee simple title, but only an easement in the lands, and this fact should be considered in the assessment of damages. *Alabama and Florida R. Co. v. Burkett*, 42 Ala., N. S., 83. 1868.

927. — The fee of the land remains in the owner subject to the easement for which it is taken. *Henry v. Dubuque and Pacific R. R. Co.*, 2 Ia., 288. 1855.

928. — Such easement is not limited to the life of the charter, but is intended to be perpetual, if the company or its grantees, or assigns continue to occupy the land for the purpose for which it was taken. *Ib.*

929. — The fee of the land taken for a railway track remains in the owner from whom the land is taken. The exclusive right of property in the land, in the trees and herbage upon its surface, and the minerals below it, remains unchanged, subject, always to the right of the corporation to construct and operate a railroad over and through it, as authorized by law. *Blake v. Rich*, 34 N. H., 282. 1856.

930. — A corporation cannot claim the exclusive use of a right of way that is not necessary and useful in its corporate business.

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Oregon Cascades R. R. Co. v. Bailly, 3 Or., 164. 1869.

931. Herbage. An agreement, in taking a right of way by location and survey, that the land owner might have the herbage grown there from year to year, is not valid as against the lessees of the company, who took possession without any knowledge of such arrangement, there being nothing to indicate its existence so as to put them on inquiry, the company being in full possession at the time the lease was made. *Troy and Boston R. R. Co. v. Potter*, 42 Vt., 265. 1869.

932. — The land owner has no right to enter upon such land to remove the herbage in the absence of any agreement authorizing him to do so. *Ib.*

933. — The right of a railway company to land taken for its road is exclusive, and those from whom the land is taken, retain no right to its use, or occupation, for pasturage or otherwise. *Hurd v. Rutland and Burlington R. R. Co.*, 25 Vt., 116. 1852.

934. Interest that may be acquired. The entire interest of the individual may be taken if, in the opinion of the legislature, the public exigency requires it. *Raleigh and Gaston R. R. Co. v. Davis*, 2 Devereaux and Battle's Law (N. C.), 451. 1837.

935. — In the condemnation of lands for railway purposes, the assessment made embraces damages of every kind naturally consequent to the use for which the land is taken. *Furniss v. Hudson River Valley R. R. Co.*, 5 Sandford (N. Y.), 551. 1852.

936. Minerals. It seems, that where land is condemned for the right of way, the decree vests in the company the title to the earth and minerals found above the grade of the road, and the excavation of which is necessary for the construction of the road. *Evans v. Hafner*, 29 Mo., 141. 1859.

937. Misappropriation. The leasing of a freight house built upon the land taken under the statute by a railway company, to private individuals for the private use of such individuals for their trade or manufactures is a misappropriation of the land which entitles the owner of the fee to maintain a writ of entry to establish his right therein, and recover damages or mesne profits. *Proprietors of Locks and Canals v. Nashua and Lowell R. R. Co.*, 104 Mass., 1, 1870.

938. Only same rights acquired as by purchases. A corporation has no higher right to property condemned by the judgment of a court, than to that acquired by purchase without condemnation. *Oregon Cascades R. R. Co. v. Bailly*, 3 Or., 164. 1869.

939. Payment. Actual payment of damages is essential to the vesting of the title in the company, where land is taken for railway purposes under the right of eminent domain. No entry upon said land prior to such payment for the purpose of constructing the road, can be justified. *Walther v. Warner*, 25 Mo., 277. 1857.

940. — It seems competent for the legislature to authorize entries for the purpose of making preliminary surveys. *Ib.*

941. — Although payment of damages is a condition precedent to the taking of land for railway purposes, this condition may be waived by the land owner, even by parol. *McAulay v. Western Vt. R. R. Co.*, 33 Vt., 311; 1860; *Knapp v. McAulay*, 39 ib. 275, 1867.

942. — Where the land owner has acquiesced in the occupation of his land without prepayment of the damages, with the understanding that the damages shall be paid in future, and the road is constructed and put in operation, he cannot maintain trespass or ejectment for the land. *Ib.*

943. — The mere prosecution of a controversy by the land owner with the company in the county court, as to the amount of the damages, is not such a prohibition of the taking of the land by the company without prepayment of damages, as is necessary to enable him to maintain trespass or ejectment after the road is put in operation. *Ib.*

944. — Notice given by the land owner to the laborers on the railroad employed by the contractors in its construction, requiring them to desist from working on his land until he shall have received his damages, is not sufficient notice or prohibition to the company to preserve his right to maintain trespass or ejectment after the road is put in operation. *Ib.*

945. — The owner retains no lien for his damages in such case. *Knapp v. McAulay*, 39 Vt., 275. 1867.

946. — Where lands were condemned for railway purposes and the court has ordered the damages to be deposited with the clerk of

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the court, which has been done, and the clerk has tendered the money to the land owner, the company is justified in entering upon the land. *Evans v. Hæfner*, 29 Mo., 141. 1859.

947. — Where a railroad company, upon an award of commissioners, has recorded the order and deposited the money as required by the general railroad act of 1850, the title to the premises taken becomes wholly vested in the company. *Crowner v. Watertown and Rome R. R. Co.*, 9 Howard's Pr. (N. Y.), 457. 1854.

948. — Where in such case, on a second appraisal, the compensation to the owners of the land is increased by the award of the commissioners, the company cannot, by changing its route, avoid the payment of such increased compensation. *Ib.*

949. — There is no vested right on either side growing out of such proceedings, until an order of the court is made confirming the report and directing payment. *Hudson River R. R. Co. v. Outwater*, 3 Sandford (N. Y.), 689. 1850.

950. State lands. Certain lands were, in 1838, taken by the state for the M. S. R. R., which was completed over said lands in 1844, and in 1846, the state conveyed the road to the M. S. R. R. Co. *Held*, that under the laws in force in 1838, the lands vested in the state, whether the claim for compensation for damages was extinguished or not, and the transfer of the road created no obligation upon the part of the company to pay the damages; that the company took the lands clear of any claim for such damages. *People v. Michigan Southern R. R. Co.*, 3 Mich., 496. 1855.

951. — The railway company has the right to fence its right of way through such lands. *Smith v. McAdam*, 3 Mich., 506. 1855.

952. Lake Superior and Mississippi R. R. Co. The Lake Superior and Miss. R. R. Co., in condemning land under its charter, acquires the exclusive use of the whole thereof at any and all times thereafter for railway purposes. *Lake Superior and Mississippi R. R. Co. v. Greve*, 17 Minn., 322. 1871.

953. — temporary use. Railway companies cannot, under the right of eminent domain, condemn a right of way for the term of three years, to be used until the construction of the main line is completed over another route. *Currier v. Marietta and Cincinnati R. R. Co.*, 11 Ohio St., 228. 1860.

954. Turf. The owner of land, subject the right of way of a railway company, where the land has been taken and paid for for such purpose, has no right to enter upon and use the land for any purpose which will in the least degree endanger or embarrass its use by the company; as in this case, for instance, to enter upon the land with teams to remove the turf therefrom, the effect of such entry and removal being to enhance the danger of cattle getting upon the track and to increase the dust at the time of the passage of the cars. *Connecticut and Passumpsic Rivers R. R. Co. v. Holton*, 32 Vt., 43. 1859.

955. When title passes. When a railroad company has pursued the course prescribed by the statute, the right of the company is perfect to the road, though the proprietor of the land refuses to accept the money awarded by the jury. *Montgomery and West Point R. R. Co. v. Walton*, 14 Ala., N. S., 207. 1848.

956. Writ of possession. Upon the consummation of the proceedings prescribed by the railroad act, the company is entitled to enter upon and take possession of the land. *Niagara Falls and Lake Ontario R. R. Co. v. Hotchkiss*, 16 Barbour (N. Y.), 270. 1853.

957. — The owners have no longer a legal right to keep the company out of possession. But this will not authorize the issuing of a writ of possession, or assistance upon the application of the railroad company. *Ib.*

958. — A writ of that nature can only be awarded in execution of a decree or judgment of the court; not to enforce a right conferred by statute. *Ib.*

XV. NEGLIGENCE AND UNLAWFUL ACTS.

959. Cattle guards. The failure of the company to erect cattle guards will not be considered in the assessment of damages. *King v. Iowa Midland R. R. Co.*, 34 Ia., 458. 1872.

960. Culvert. A railway company is not estopped from proving the necessity of a culvert through an embankment by the fact that no such culvert is shown on the location plat of the road. *Nason v. Woonsocket Union R. R. Co.*, 4 R. I., 377. 1856.

961. Intoxicating liquors. Even after the petitioner has given evidence that the land

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was peculiarly valuable as a place of entertainment, and leased as such, evidence that intoxicating liquor was sold on the land by the tenant, is not admissible to reduce the value of the estate. *Brown v. Providence, Warren and Bristol R. R. Co.*, 5 Gray (Mass.), 35. 1855.

962. Unlawful acts. Injuries that may result from the unauthorized or unlawful acts for which the company is liable in an action, are not to be considered. *Fleming v. Chicago, D. and M. R. R. Co.*, 34 Ia., 353. 1872.

963. Unnecessary damages: remedy. Where provision is made in the charter of a railway company for the assessment of the necessary damages occasioned in its construction, and other damages are occasioned by the want of care, skill and prudence of the parties building the road, an action for damages as at common law will lie for such unnecessary injuries. *Terre Haute and Indianapolis R. R. Co. v. McKinley*, 33 Ind., 274. 1870.

964. Want of Skill. An injury arising from the *unskillful* construction of its work by a railway company will not be considered by the viewers, such claims must be left for future remedy. *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Gilleland*, 56 Penn. St., 445. 1867.

965. — A railway company in constructing its road and works, is bound to bring to their execution the engineering knowledge and skill ordinarily known and practiced in such works. *Ib.*

966. — There is no liability for not constructing a culvert so as to pass *extraordinary* floods. *Ib.*

967. — This rule as to extraordinary floods would not be changed by the fact that three such *extraordinary* floods happened in quick succession and occasioned damage by the insufficiency of the culvert. *Ib.*

968. — In a proceeding to appropriate land for right of way of a railroad already constructed, evidence of damages resulting from defective construction, or the like, is not admissible. Such damages may be the subject of an action, but are not to be considered in assessing the compensation to be allowed the owner for the right of way appropriated. *King v. Iowa Midland R. R. Co.*, 34 Ia., 458. 1872.

969. — In the construction of the work for

which the property of another is taken, reasonable care and skill must be exercised, or the party will be liable to an action for the tort, as at common law. *Lafayette Plankroad Co. v. New Albany and Salem R. R. Co.*, 13 Ind., 90. 1859.

970. Water. Where the land of the plaintiff was taken by a railroad company for railway purposes, and his damages, by reason of the location of the railway on his premises were duly appraised and awarded to him by commissioners appointed for that purpose, it was *held*, that the damages awarded did not constitute a bar to an action for damages to the plaintiff occasioned by a neglect of prudent and reasonable care in the management of the road. *Waterman v. Connecticut and Passumpsic Rivers R. R. Co.*, 30 Vt., 610. 1858.

971. — And a railway company may be required to exercise care to prevent damage to the land owner by the accumulation of surface water, as well as by a running stream, where the circumstances show that such precautions are necessary. *Ib.*

XVI. CONSTITUTIONAL LAW.

972. Compensation. The constitution, § 18 of art. 1, which provides that private property shall not be taken for public use without just compensation, means that the person whose property is taken shall have a fair equivalent in money for the injury done him by such taking. *Henry v. Dubuque and Pacific R. R. Co.*, 2 Ia., 288. 1855.

973. — The word "damages" in the act of January 18, 1853, § 4, is precisely synonymous with the phrase "just compensation" used in the constitution. *Ib.*

974. — The right of way of a railroad conferred by the statute, contemplates all which is necessary and proper for the construction and maintenance of the road over the premises. *Ib.*

975. — It is the right (within the prescribed limits), to all freedom in locating, constructing, conveniently using and repairing the road and its appurtenances; and for such purpose only, of taking, removing and using any earth, gravel, stone, timber, or other materials, on or from the land so taken. *Ib.*

976. — It includes the right to make embankments and deep cuts. *Ib.*

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977. — The proper mode of ascertaining the damages is to determine the fair market value of the premises before the right is set apart, and then again after; the difference will be the true measure of damages. *Ib.*

978. — The present values, taking into consideration the extent of the rights conferred, are those which are to be arrived at; and the immediate and necessary consequence of parting with the right conferred, must necessarily enter into the consideration of the commissioners. *Ib.*

979. — The premises as left in the condition they will be after the right of way is taken, together with the damages assessed, should be equal in value to the premises immediately before the taking. *Ib.*

980. — How the road may affect the value of the land, if completed, or any other consideration of future benefit; or of any abuse of the privilege, or probability of abuse, by the company; or any unwillingness by the owner to allow the road to go over the land, is not to be considered in estimating the damages. *Ib.*

981. — where to be made. The legislature has no power, under the constitution of 1857, to authorize the taking of property for the use of a railway company, before compensation is made to the owner, or secured to be made when the amount thereof shall be determined by a jury. *Henry v. Dubuque and Pacific R. R. Co.*, 10 Ia., 540. 1860.

982. — Under ch. 31, Acts of 1853, (Rev. 1860, ch. 55, art. 3), the payment of damages is a condition precedent to entering upon the lands taken. *Ib.*

983. — Therefore, where the company caused an assessment to be made by a sheriff's jury, and the owner of the land appealed, it was held, that an appropriation of the land by the company, before the payment of the compensation as assessed, rendered it liable as a trespasser, and that the owner was not bound to rely on the judgment, or upon an injunction as his only remedy. *Ib.*

984. — Although private property may not be taken for public use without compensation, yet the payment may follow the taking; it is not necessarily to be made before the taking. *Raleigh and Gaston R. R. Co. v. Davis*, 2 Devereux & Battle's Law (N. C.), 451. 1837.

985. — The act of 1861, giving railway

companies the right to enter on and proceed with the construction of their roads on private lands while the proceedings for condemnation are pending and before compensation is paid, upon giving security for the damages when ascertained, is not unconstitutional. *Fox v. Western Pacific R. R. Co.*, 31 Cal., 538. 1867.

986. — The land is not "taken for public use," in the sense of the word "taken" as used in the constitution, until the last act is done which is required to transfer the title or subject it to servitude. *Ib.*

987. — The legislature possesses the constitutional power to prescribe the proceedings by which such taking shall be effected, and the time when the taking shall be deemed complete. *Ib.*

988. — A railroad company has no right whatever, without the consent of the owner, to enter upon and use and occupy the land of an individual for the purpose of constructing its road, before having made the compensation to which the owner is entitled, under the constitution. And no provision of the general railroad act can be construed as purporting to give such right. *Blodgett v. Utica and Black River R. R. Co.*, 64 Barbour (N. Y.), 580. 1873.

989. — The act of 1857, providing for the taking of private property for public use without providing means by which compensation can be obtained, is unconstitutional. *Shepardson v. Milwaukee and Beloit R. R. Co.*, 6 Wis., 605. 1859.

990. — The owner of land taken for public use ought not to be subjected to a lawsuit to ascertain the value of the land taken. *Ib.*

991. Assessment of damages. Private property may be taken for public uses without the damages being assessed by jury or commissioners mutually selected by the parties, and without stipulation between the proprietor and the legislature. It is sufficient if the damages are ascertained by an impartial tribunal, although the proprietor has no voice in constituting the tribunal. *People v. Michigan Southern R. R. Co.*, 3 Mich., 496. 1855.

992. Federal constitution. The constitution of the United States, which forbids the taking of private property for public use without just compensation, does not restrain

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the legislation of a state. *Concord R. R. Co. v. Greely*, 17 N. H., 47. 1845.

993. Form of assessment. An assessment of damages in the "sum of \$150, with a wagon way and stop for cattle," as the damages sustained by the owner of the land taken, is not in conformity with the provisions of the act of 1848, nor with the provisions of the constitution of this state, requiring compensation to be made to the owner for the property so appropriated to public use. *Central Ohio R. R. Co. v. Holler*, 7 Ohio St., 220. 1857.

994. Grand Gulf R. R. Co. The provision in the charter of the G. G. R. R. Co. that, on the assessment of damages being made, the court shall convey the land to the company, and render judgment against it for the damages, is unconstitutional. Payment must first be made. The rendition of such judgment is not compensation. *Thompson v. Grand Gulf R. R. and Bank'g Co.*, 3 Howard (Miss.), 240. 1839.

995. — The court will not render a different judgment from that provided by the statute. If the remedy provided is not sufficient the court will not undertake to give one. *Ib.*

996. Lexington and Ohio R. R. Co. The provisions of the act incorporating the Lexington and Ohio R. R. Co., which authorize the taking of the lands of individuals for the use of the road, the damages being first paid, are constitutional. *O'Hara v. Lexington and Ohio R. R. Co.*, 1 Dana (Ky.), 232. 1833.

997. New Albany and Salem R. R. Co. The charter of the New Albany and Salem R. R. Co. provides, substantially, that the proprietor of land proposed to be taken by the company for the construction of its road, shall, if he claims damages for such appropriation, file with the company his claim therefor, etc.; that the company shall appoint disinterested men to ascertain and award such damages; and that if either party shall be dissatisfied, etc., such party may appeal to the proper court, where the question may be determined by a jury. *Held*, that as to persons resident in the state and not under disabilities, the provision in question is not inconsistent with § 21 of art. 1 of the constitution. *New Albany and Salem R. R. Co. v. Connelly*, 7 Ind., 32. 1855.

998. No mode of ascertaining damages provided. A law which directs the taking private property for public use, is not void because it contains no provision for compensa-

tion, or the mode of ascertaining it; the law is valid if this is done by a subsequent law. *Bonaparte v. Camden and Amboy R. R. Co.*, 1 Baldwin (U. S. C. C.), 205. 1830.

999. Ordinance of 1787. An act authorizing the taking of private property without the consent of the owner, compensation being made, is not in conflict with the ordinance of 1787, or the constitution of the United States. *Swan v. Williams*, 2 Mich., 427. 1852.

1000. Proceedings. Though the constitution secures the right of the citizen to a just compensation for his property before it shall be taken for public use, yet the legislature has the right to prescribe the mode in which that compensation shall be ascertained and determined. *Henderson and Nashville R. R. Co. v. Dickerson*, 17 B. Monroe (Ky.), 173. 1856.

1001. Railways are a public use. A railroad is in general such a public use as affords just ground for the taking of private property and appropriating it to that use. *Concord R. R. Co. v. Greely*, 17 N. H., 47, 1845; *San Francisco, Alameda and Stockton R. R. Co. v. Caldwell*, 31 Cal., 367, 1866; *Contra, Costa R. R. Co. v. Moss*, 23 Cal., 324, 1863; *Louisville, Cincinnati and Charleston R. R. Co. v. Chappell*, Rice (So. Car.), 383, 1838; *Baltimore and Ohio R. R. Co. v. Van Ness*, 4 Cranch (U. S. C. C.), 595, 1835; *Aldridge v. Tuscumbia, Courtland and Decatur R. R. Co.*, 2 Stewart and Porter (Ala.), 199, 1832; *Davis v. Same*, 4 ib., 421, 1833; *Beckman v. Saratoga and Schenectady R. R. Co.*, 3 Paige's Ch. (N. Y.), 45, 1831; *Bloodgood v. Mohawk and Hudson R. R. Co.*, 14 Wendell (N. Y.), 52, 1835; *Same v. Same*, 18 ib., 9, 1837; *Buffalo and New York R. R. Co. v. Brainard*, 9 N. Y., 100, 1853; *Weir v. St. Paul, Stillwater, etc., R. R. Co.*, 18 Minn., 155, 1872; *Buffalo Bayou, Brazos, etc., R. R. Co. v. Ferris*, 26 Tex., 588, 1863; *Whiteman v. Wilmington and Susquehanna R. R. Co.*, 2 Harrington (Del.), 514, 1839; *Bradley v. New York and New Haven R. R. Co.*, 21 Conn., 294, 1851; *Bonaparte v. Camden and Amboy R. R. Co.*, 1 Baldwin (U. S. C. C.), 205, 1830; *Swan v. Williams*, 2 Mich., 427, 1852.

1002. Somerville and Easton R. R. Co. The act incorporating the Somerville and Easton R. R. Co. does not provide for taking property of private individuals without compensation. *Doughty v. Somerville and Easton R. R. Co.*, 3 Halstead's Ch. (N. J.), 51. 1848.

License.

1003. Statute. The statutes of Kansas authorizing real estate to be appropriated to the use of a railroad company for a right of way, so far as they apply to this case, do not contravene the provisions of § 4, article 12 of the constitution, and are not unconstitutional or void. *Hunt v. Smith*, 9 Kan., 137. 1872.

1004.—Ch. 175, laws of 1861, declares that "any person owning or interested in any land upon which the track of any railroad shall have been constructed, or which shall have been appropriated by any railroad company without compensation having been made therefor, shall have the right to have commissioners appointed," etc.; and that "no injunction shall be granted by any court to prevent the use and occupancy of such land by any railway company," until the amount of damages "shall have first been liquidated or final judgment rendered therefor. *Held*, that this statute must be regarded as intended to apply only to cases where land has actually been occupied by the company with its track constructed, or with depots or other structures erected thereon and used by the company, and where this has been done with either the express or implied consent of the owner. That if such law was intended to apply where the company entered upon land by force it would be invalid. *Bohlman v. Green Bay and Lake Pepin R. R. Co.*, 30 Wis., 105. 1872.

1005.—The mere survey and location of a road, without objection by the land owner, does not give the company the right to enter upon said land and permanently occupy it under said act. *Ib.*

1006. Statute unconstitutional in part. A provision in a statute that when an appraisalment is had of land previously taken by a railroad company, it shall determine the value at the time of taking is valid, although connected with a provision allowing the company to hold possession of the land against the owner's will, before making compensation—which is void. *Kennedy v. Milwaukee and St. Paul R. R. Co.*, 22 Wis., 581. 1868.

XVII. LICENSE.

1007. Compensation. The owner of the land is not deprived of his right to compensation by permitting the railroad company to enter under a promise that compensation

should thereafter be assessed and paid. *Evansville, Henderson and Nashville R. R. Co. v. Grady*, 6 Bush (Ky.), 144. 1869.

1008. Parol license. A railroad company claimed the right to construct its road, without first making compensation or giving security to the land owner, alleging that he had given license to do so, "provided the road would go on the west side of his house—against the hillside, and high enough to save his water power." The height of the grade is a condition of the right to enter, and construct. *Unangst's Appeal*, 55 Penn. St., 128. 1867.

1009.—The fact that the company had located its route as designated, was not a waiver of the right of compensation, paid or secured before entry, unless the condition as to grade was complied with. *Ib.*

1010.—The company forfeits its license when it violates the condition on which it was given, and will be restrained until it does equity. *Ib.*

1011.—The company, relying on a waiver, must come into court with full, distinct and unequivocal proof of such waiver. *Ib.*

1012.—A parol license under which a railway company has constructed its road is revocable, and cannot be pleaded as defense in an action by the owner to recover the land. *Eggleston v. New York and Harlem R. R. Co.*, 35 Barbour (N. Y.), 162. 1859.

1013.—A parol license from the owner of lands, given to a railway company permitting it to enter upon his lands and construct its road, is not within the statute of frauds, and is a good defense to an action of trespass against the railway company for an entry upon the land. *New Orleans, Jackson and Great Northern R. R. Co. v. Moye*, 39 Miss., 374. 1860.

1014.—Such license is revocable at pleasure of the owner, unless its revocation would operate as a fraud upon the rights of the party to whom it was granted. *Ib. Hetfield v. Central R. R. Co.*, 5 Dutcher (N. J.), 571. 1862.

1015.—License to build a railway upon one's land would excuse any acts properly done under the license while the same was in force, but such license might be revoked at pleasure, as to everything in the future. *Blaisdell v. Portsmouth, Great Falls and Conway R. R. Co.*, 51 N. H., 483. 1871.

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1016. — The decease of either party to such license, or the conveyance by either of the rights affected by the license, operates as a revocation. *Ib.*

1017. — Possession held under a license cannot be adverse. *Ib.*

1018. Stone. Stone excavated in constructing a branch railroad through the land of A., under a permissive license from him to construct and use the track thereon, and to hold the same so long as it shall be used for railroad purposes, remains the property of the land owner, and, if not used in the construction of the branch track, cannot be removed and devoted to other purposes without his permission. *Chapin v. Sullivan R. R. Co.*, 39 N. H., 564. 1859.

XVIII. CONTRACT.

1019. Fence. — In proceedings to appropriate land for right of way, an agreement was entered upon the record that the company, in consideration of the withdrawal of certain claims for damages, agreed to erect and maintain certain fences and crossings. The damages were assessed upon the basis of this agreement. In an action against the assignee of the company by the assignee of the land owner for damages on account of the failure of the company to erect said fences and crossings; *held*, that the agreement was a legitimate part of the record, and not within the statute of frauds; that such agreement runs with the land so as to be binding on assignees and grantees; that the measure of damages for the breach of such contract is the amount of injury to the use and enjoyment of the adjoining land occasioned by the want of such fences and crossings during the time the right of way was owned by the defendant. *Huston v. Cincinnati and Zanesville R. R. Co.*, 21 Ohio St., 235. 1871.

1020. River banks. Where a right of way to the Mississippi river was granted to a railway company, with a lease of one acre on the bank for a depot, and the bank subsequently caved in, destroying a part of the depot grounds, it was held that the contract was made with reference to such contingency, and the company was still entitled to one acre. *C. C.*, 1950, 1952. *Smith v. Buhler*, 11 La. An., 98. 1856.

1021. Several contract. The instrument sued upon was as follows: The railroad company acknowledged itself bound unto certain persons named, nine in number, "according to their relative and respective, several interests, in the penal sum of three thousand dollars, on this express condition, that the said railroad company shall, on the assessment of damages to be made to secure the right of way for said railroad, pay to the obligees, relatively and respectively, damages which may be assessed as aforesaid, then this bond to be void," etc. The instrument was held to be a several one, upon which each one of the obligees might sue. *St. Louis, Alton and Rock Island R. R. Co. v. Coultas*, 33 Ill., 188. 1864.

1022. — No one of the parties has a right to recover upon it more than his relative and respective share of the penalty. *Ib.*

XIX. SURVEYS.

1023. Entry to make surveys. It is competent for the legislature to authorize a railway company to enter upon private lands for the purpose of making surveys without payment of compensation. *Bloodgood v. Mohawk and Hudson R. R. Co.*, 14 Wendell (N. Y.), 52, 1835; see *Same v. Same*, 18 ib., 9, 1837; *Bona-parte v. Camden and Amboy R. R. Co.*, 1 Baldwin (U. S. C. C.), 205; 1830.

1024. Record of survey. Where a land owner agrees with a railroad company upon compensation for land taken in locating the road, and permits the company to take possession of the land and construct the road thereon, he cannot afterwards take advantage of the omission of the company to have a certificate of the survey recorded in the town clerk's office in the town where the land lies, as required by the charter; and especially when the land owner was president of the company. *Troy and Boston R. R. Co. v. Potter*, 42 Vt., 265. 1909.

XX. INJUNCTIONS.

1025. Alteration of line. Where a railroad company altered the location of its road, and placed the track upon the land of the plaintiff at his request, and upon his promise to give the right of way, he cannot, after the road is built, have an injunction to restrain the

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company from using the track across his land until compensation is made, although the facts might not be sufficient to justify a decree against him for a specific performance of his promise. *Pettibone v. La Crosse and Milwaukee R. R. Co.*, 14 Wis., 443. 1861.

1026. — The granting or refusing of injunctions rests in the sound discretion of the court. *Id.*

1027. Assessment enjoined till question of right is determined. Where a railway company, claiming the right of way over lands, applies to the circuit judge for the impaneling of a jury to assess the damages, and the answer to the petition denies the right of the company to take the lands, and the circuit judge is proceeding to have the damages assessed, without first determining the question of the right, prohibition will not lie from the supreme court to restrain him from so doing. *State v. Columbia and Augusta R. R. Co.*, 1 So. Car. (N. S.), 46. 1868.

1028. — Where the inferior court has jurisdiction of the subject matter of the proceeding, it cannot be enjoined from acting. *Id.*

1029. Compensation not made. Where land is taken and appropriated for right of way for six months without compensation, an injunction will be issued under the act of May 10, 1858, to restrain the use of the land until compensation is made. *Davis v. La Crosse and Milwaukee R. R. Co.*, 12 Wis., 16. 1860.

1030. — A railway company can be enjoined from using the right of way until compensation is first made. *Stewart v. Raymond R. R. Co.*, 7 Smedes & Marshall (Miss.), 568, 1846; *Richards v. Des Moines Valley R. R. Co.*, 18 Ia., 259, 1865.

1031. — If provision is not made by the act for paying the compensation allowed for the land, the party may be restrained from occupying by injunction, until payment is made, but the condemnation will not be invalid. *Shute v. Chicago and Milwaukee R. R. Co.*, 26 Ill., 436. 1861.

1032. — Where land was condemned for the use of a railway company and possession was taken by the company, and the road constructed over the land, the complainant having forborne commencing proceedings until after the improvements were erected, it was held, that an injunction would not issue to restrain the company from running over the land; but

a decree was entered directing compensation to be paid out of the revenues of the road. *Hamilton v. Annapolis and Elk Ridge R. R. Co.*, 1 Johnson's Ch. (Md.), 107. 1847.

1033. — Under R. S., ch. 51, § 9, the assignee of a judgment for damages for right of way, cannot maintain a suit for injunction against the use and occupation of the land, he having no interest in the land. *Illsley v. Portland and Rochester R. R. Co.*, 56 Me., 531. 1869.

1034. Damages. In estimating the damages sustained by a complainant for the destruction of a lane on his land by the embankment of a railroad company, in a case where relief is sought in the premises by injunction against the company on the ground of estoppel, or because compensation has not been made to the complainant in the award under the company's charter, no damages are to be assessed except such as necessarily flow from the particular injury. *Carpenter v. Easton and Amboy R. R. Co.*, 9 C. E. Green's Ch. (N. J.), 408. 1874.

1035. Irregularity. Where a railroad company has irregularly taken lands, but has the capacity to acquire title, this court will not, where the advantage to the complainants would be small, and the injury to the company incalculably great, interpose and stop the running of the cars on such road until the statutory method of acquiring title can be executed. *Erie R. R. Co. v. Delaware, Lackawanna, etc., R. R. Co.*, 6 C. E. Green's Ch. (N. J.), 283. 1871.

1036. Judgment. Where the plaintiff recovered judgment against a railway company for damages for taking his land, and afterwards brought an action to restrain the company from the further use of the land until the judgment was paid, and in this suit the defendant was defaulted and the injunction issued: held, on an appeal that this order would not be reversed, merely for the reason that the judgment on which it was founded was afterwards reversed for want of jurisdiction. *Sturtevant v. Milwaukee, Watertown, etc. R. R. Co.*, 11 Wis., 63. 1860.

1037. — Where the complaint charged the existence of a judgment, and judgment is thereon entered by default, such judgment is as much an estoppel upon the defendant to deny the existence of the previous judgment,

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as if he had confessed by plea that such judgment existed. *Ib.*

1038. License. Where a land owner, with a correct understanding of the matter, has given permission, verbally, that a road may be constructed upon his land, or some specified part of it, a court of equity should not interpose to restrain the grantee from using the privilege so conceded, merely because the grantor, having changed his mind, wishes to revoke this grant. The trespass could be justified under a license. *Lexington and Ohio R. R. Co. v. Ormsby*, 7 Dana (Ky.), 276. 1838.

1039. Consent of land owner. An injunction to restrain the use of a right of way until compensation has been made, will not issue under ch. 80, Laws of 1858, where the lands had been taken with the consent of the owner upon a promise to pay for the same, which promise has not been fulfilled. *Vilas v. Milwaukee and Mississippi R. R. Co.*, 15 Wis., 233. 1862.

1040. — Where a party owning lands entered into an agreement with a railway company by which the company was permitted to enter on his lands and build its track, and it was agreed that the damages should be assessed by certain persons within sixty days, and it was stipulated that if payment was not made within a certain time the land and fixtures should become the property of the party the same as if this agreement had not been made, and "said company had without authority, and in its own wrong, entered upon such land and made said road through the same." The estimate was made, but the payment was not made within the time, and an injunction was asked restraining the company from using the land. *Held*, that an injunction was properly refused and that the party should be left to his remedy at law. *Coe v. Columbus, Piqua and Indiana R. R. Co.*, 10 Ohio St., 372. 1859.

1041. Pleadings. Bill was filed by the owner of land against the New Albany and Salem R. R. Co., to enjoin the company from constructing its road through his land, on the ground that it had not assessed or tendered to him his damages, etc. The bill did not aver that the plaintiff was not called upon by an agent of the company for a release of the right of way, before the commencement of operations by the company upon the line of the road. *Held*,

that it must therefore be presumed that the complainant was thus called upon, pursuant to the requirement of the charter. *New Albany and Salem R. R. Co. v. Connelly*, 7 Ind., 32. 1855.

1042. To prevent damages not included in assessment. Where at the time of making an award for damages for lands taken by a railroad company, the representatives of the company stated to the commissioners that they would cross certain low lands by an iron bridge resting upon posts, and would protect and keep clear a lane — the only convenient means of communication between different parts of a farm — but subsequently the company determined to construct a high embankment, and commenced it, intending to fill in and cut off the lane entirely, it clearly appearing that the commissioners did not consider the embankment in the estimate of damages, equity will restrain the company from filling up the lane, until compensation is made to the owner of the lands. *Carpenter v. Easton and Amboy R. R. Co.*, 9 C. E. Green's Ch. (N. J.), 249. 1873.

1043. Trespass. An injunction should not be granted to restrain a railway company from a trespass by entering upon land, where it appears that the complainant has an adequate remedy at law by an action for damages. *Chesapeake and Ohio R. R. Co. v. Patton*, 5 W. Va., 234. 1872.

XXI. TRESPASS.

1044. Administrator. The right to recover damages for a trespass committed on realty in the lifetime of the intestate survives to his administrator. *New Orleans, Jackson and Great Northern R. R. Co. v. Moye*, 39 Miss., 374. 1860.

1045. Ejectment. If a railroad company enter upon land unlawfully, without a legal appropriation and assessment of damages, ejectment is the proper remedy, and the question is title, not charge or encumbrance for the damages. *McClinton v. Pittsburgh, Fort Wayne and Chicago R. R. Co.*, 66 Penn. St., 404. 1870.

1046. — When the commonwealth exercises the power of eminent domain, it must provide for the means of payment before tak-

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ing the property; a corporation or individual must pay or secure its price. *Ib.*

1047. — Where a railway company takes possession without lawful appropriation, it is not in possession of an easement, but of the land itself. *Ib.*

1048. — The owner may proceed under the statute, if he desire to have the damages assessed. *Ib.*

1049. — Compensation being made, the title of the owner will be vested in the company, leaving it liable for the prior trespass. *Ib.*

1050. — The owner's right to damages for the trespass is a vested right of which he cannot be deprived. *Ib.*

1051. — The petition is not to recover past damages, but compensation for a right to be vested in the company. *Ib.*

1052. — The court may stay execution for possession until the other proceedings are finished and compensation paid. *Ib.*

1053. — The statute of limitations does not apply to a petition under such circumstances. *Ib.*

1054. Entry before payment. Any entry before payment or tender of payment of damages, after the assessment, is a trespass for which the company may be sued at law. *Memphis and Charleston R. R. Co. v. Payne*, 37 Miss., 700, 1859; *Graham v. Columbus and Indianapolis Central R. R. Co.*, 27 Ind., 260, 1866; *Doe ex dem. v. Georgia R. R. Co.*, 1 Ga., 524, 1846.

1055. — In Wisconsin, a railway company or person acting under it, entering upon land and permanently occupying it as a railroad, without making compensation therefor, or having the amount of damages ascertained and tendering the amount when so ascertained, is liable for trespass for the actual damages, and not merely for nominal damages. *Loop v. Chamberlain*, 20 Wis., 135, 1865.

1056. — The charter not permitting the land owner to take the initiative to have his damages assessed, the company was bound to do so. *Ib.*

1057. — An omission, on the part of the owner of the land, to call on the county commissioners to assess his compensation, will not preclude him from maintaining an action of trespass *quare clausum* against the company, after it has taken his land, without mak-

ing compensation. *Hall v. Pickering*, 40 Me., 548, 1855.

1058. Judgment. Where a suit is brought to recover compensation for the damages done in taking the right of way, a judgment rendered in such action for damages as a trespass is erroneous. *Davis v. La Crosse and Milwaukee R. R. Co.*, 12 Wis., 16, 1860.

1059. Payment. If the condemnation price is paid, when demanded, the parties entering upon the right of way will not be trespassers *ab initio*. *Johnson v. Joliet and Chicago R. R. Co.*, 23 Ill., 202, 1859.

1060. Pleading. Suit was brought against a railroad company for entering upon and constructing its road through the plaintiff's land. The complaint alleged the nature and locality of the injury to be, the running diagonally through the land, occupying about seven acres of it, and excavating and heaping up dirt upon it. On the trial, the plaintiffs were permitted to prove the cost of fencing the road through their land, and the amount of injury done to a crop of wheat growing thereon, by the construction of the road. *Held*, that this evidence should have been excluded, because the damages proved did not result from the injuries specified in the complaint, nor from anything necessarily incident to them. *Indiana Central R. R. Co. v. Hunter*, 8 Ind., 74, 1856; *Graham v. Evansville, Indianapolis and Cleveland R. R. Co.*, *ib.*, 276.

1061. — Where a petition states only that a railroad company, in locating and constructing its road on and through the plaintiff's land, *appropriated* about two acres of the land to its own use, and located its road through the land in a diagonal manner so as to greatly injure the same, and committed other acts and trespasses upon the land to the plaintiff's damage, *held* the petition does not state facts sufficient to constitute a cause of action. The defect being not merely a want of facts necessary to constitute a perfect statement of the cause of action, but a want of facts necessary to constitute a cause of action, such defect is not cured by verdict. *Cleveland and Pittsburgh R. R. Co. v. Stackhouse*, 10 Ohio St., 567, 1860.

1062. — A complaint in an action of trespass against a railroad company, which alleges that the company entered on the lands of plaintiff and constructed a road over the same, and ever since has used the land occupied by

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the road, is a good cause for action in trespass. *Pomeroy v. Milwaukee and Chicago R. R. Co.*, 16 Wis., 640. 1863.

1063. — It is not necessary to aver that the entry was made without his consent. *Ib.*

1064. Statute. Where a railroad company has had the right of way condemned and the damages assessed under the statute, it has power to construct its road through the land thus condemned, and to do all things that may be necessary and proper for that purpose; and, to the extent of the powers and rights thus acquired, neither the company nor the contractors can be held liable as trespassers. *Clark v. Hannibal and St. Joseph R. R. Co.*, 36 Mo., 202. 1865.

1065. Temporary taking. Where private property is temporarily taken for public use, without compensation as an incipient proceeding to acquire title an action of *quære clausum* will lie unless compensation is tendered within a reasonable time. *Cushman v. Smith*, 34 Maine, 247. 1852.

EMPLOYÉS.

See CONSTITUTIONAL LAW; DAMAGES; INJURY TO EMPLOYEES; INJURIES CAUSING DEATH; MASTER AND SERVANT.

ENGINEER.

See CONTRACT.

1. Agent. An engineer of a railway company, as such, has no authority to pledge the company to pay the indebtedness of a contractor to one of the employés of such contractor. *Powrie v. Kansas Pacific R. R. Co.*, 1 Col., 529. 1872.

EQUITY.

See VISITORIAL POWERS.

1. Adequate law remedy. A bill in equity will be dismissed on demurrer if it appears that the complainant has an adequate remedy at law. *Atlanta and West Pt. R. R. Co. v. Hop-*

son, 33 Ga., 116, 1861; *Memphis and Little Rock R. R. Co. v. Woodruff*, 26 Ark., 649, 1871.

2. Arbitration — mistake. Where the question of assessment of damages for the construction of a railway through a farm was submitted to arbitration, and the damages awarded were awarded without reference to the right of the land owner to have a crossing made by the company, and the land owner made a deed for the right of way so as to carry out the award, and nothing was said in the deed about the crossing, the company's agent assuring the grantor that it was not necessary; *held*, that equity would reform such deed, the mistake being mutual, and reserve to the land owner in the deed his legal rights in relation to such crossing. *Green v. Morris and Essex R. R. Co.*, 1 Beasley's Ch. (N. J.), 165. 1858.

3. Cancellation of instrument. Where any kind of an instrument binding the makers for the payment of money, has been discharged, and evidence of such discharge has been lost, a court of equity will order the instrument canceled. *Garrett v. Mississippi and Alabama R. R. Co.*, 1 Freeman's Ch. (Miss.), 70. 1843.

4. Committee — interest. The defendant being a railroad corporation, remonstrated against the acceptance of the report of H. as a committee in a bill in chancery, because while H. was acting as such committee his wife was a shareholder in an incorporated bank, which bank had stock in said railroad as security for a loan of money. *Held*, that H. was not disqualified from acting as such committee, on the ground that he was a party to such bill, but was disqualified, as being interested in the event of the suit, if the objection had been taken at the proper time. *Windham Cotton Manufacturing Co. v. Hartford, Providence and Fishkill R. R. Co.*, 23 Conn., 373. 1854.

5. Commonwealth. The commonwealth cannot be made a defendant in a suit in equity. *Williamsport and Elmira R. R. Co. v. The Commonwealth*, 33 Penn. St., 288. 1859.

6. Federal courts. The act of Feb. 28, 1839 (5 Stat. at Large, 331), does not enable a circuit court to proceed in equity, in the absence of a party whose interests must necessarily be affected by any decree in favor of the complainants. *Northern Indiana R. R. Co. v. Michigan Central R. R. Co.*, 15 Howard, 233. 1853.

Miscellaneous.

7. **Forfeiture.** Equity will not interfere to enforce a forfeiture, but, where such relief is sought, will leave the party complaining to his remedy elsewhere. *White v. Port Huron and Milwaukee R. R. Co.*, 13 Mich., 356. 1865.

8. **Jurisdiction.** The equity powers of this court are limited to those conferred and enumerated by the statute. *York and Cumberland R. R. Co. v. Myers*, 41 Me., 109. 1856,

9. **Law case brought in equity by mistake.** Where a law case has been brought in equity, and tried as such, the supreme court will, on appeal, try it according to the rules of practice applicable to chancery causes. *Richmond v. Dubuque and Sioux City R. R. Co.*, 33 Ia., 422. 1871.

10. **Motion to dismiss.** On a motion to dismiss a bill for want of equity, the allegations, whether in the bill, or of the exhibits, must be taken as absolutely true, unless they contradict each other, or are so made as to impair their own force. *Cox v. Mobile and Girard R. R. Co.*, 44 Ala., N. S., 611. 1870.

11. **Practice.** A complainant cannot dismiss his own bill, as to part of the relief prayed, and proceed with the residue; he must apply to amend. *Camden and Amboy R. R. Co. v. Stewart*, 4 C. E. Green's Ch. (N. J.), 69. 1868.

12. — The practice in the courts of equity of the United States, does not require that an order be made, limiting the time within which the decree rendered in the cause shall be performed, before a party may be proceeded against for nonperformance of its directions. *Souter v. La Crosse R. R. Co.*, 1 Woolworth (U. S. C. C.), 80. 1865.

13. — Where the parties in interest to a decree in chancery remain unchanged, and no new rights have arisen, a defendant interested in having the decree executed, should proceed by petition for that purpose. But when a third person has acquired an interest in the decree, a bill is necessary to bring him before the court, that his rights may be passed upon by the court as in other cases. *Griggs v. Detroit and Milwaukee R. R. Co.*, 10 Mich., 117. 1862.

14. **Rehearing.** There can be no rehearing upon a question raised in a cross bill and answer, which was raised and controverted in the original bill and adjudicated under the decree in the same. *Barker v. Belknap's*

Estate and Vermont Central R. R. Co., 39 Vt., 168. 1866.

15. **Reformation of contract.** A court of equity will not reform a contract by the addition of new provisions, which, it is claimed, were embraced in the understanding between the parties, when such contract was made, where there is no allegation of fraud or mistake in drafting it. *White v. Port Huron and Milwaukee R. R. Co.*, 13 Mich., 356. 1865.

16. **Sale—consideration.** Although as a general rule a sale will not be set aside on the ground of inadequacy of price, it will nevertheless, where the transaction discloses such an unconscionableness as shocks the moral sense and outrages conscience. *Hannibal and St. Joseph R. R. Co. v. Brown*, 43 Mo., 294. 1869.

ESCROW.

See MORTGAGE.

ESTATES OF DECEDENTS.

See INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS CROSSING THE TRACK.

1. **Action by executor.** An executor or administrator has no right to bring an action to remove a cloud from the real estate of a decedent unless he has first obtained a license from the probate court to sell. *Paine v. St. Paul and Pacific R. R. Co.*, 14 Minn., 65. 1869.

ESTOPPEL.

See CONVEYANCE; EMINENT DOMAIN.

1. **Agency.** Evidence of frequent sales by one person of the property of another, which were known and not objected to, is competent as tending to show that they were made by his permission; and his knowledge of such sales may, in the absence of direct evidence, be inferred from their frequency and amount, coupled with proof of ample means of knowl-

By Judgment — Pleading.

edge. *Bragg v. Boston and Worcester R. R. Co.*, 9 Allen (Mass.), 54. 1864.

2. By judgment. A judgment is conclusive as an estoppel only between the same parties, as to the same subject matter, and where the parties are mutually bound. *Myers v. Johnson County*, 14 Ia., 47. 1862.

3. Contract. Where parties have mutually recognized a contract as in force, each will thereby be estopped from denying its binding obligation on both. *Richmond v. Dubuque and Sioux City R. R. Co.*, 33 Ia., 422. 1871.

4. — After a company has organized and acted as a corporation, and entered into a contract on which it is sued as a corporation, the company and its members are estopped to deny their corporate existence. *Callender v. Painesville and Hudson R. R. Co.*, 11 Ohio St., 516. 1860.

5. Corporate existence. If in an action of assumpsit against a corporation, the defendant insist that the writing, on which the action is founded, bears the corporate seal, and defeats the action upon the ground that it should have been an action of covenant, the defendant is estopped from denying, on the trial of an action of covenant, that the paper is the deed of the corporation. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Howard*, 13 Howard, 307. 1851.

6. Equitable. One who bought land at a judgment sale in favor of A., afterwards took an assignment of a judgment against the same debtor in favor of B., which included the amount of A.'s judgment; and, having successfully resisted an application to the court, by a receiver of said debtor's property, to be allowed to discharge the B. judgment by paying the amount thereof, less that of the A. judgment, he was paid the B. judgment in full. *Held*, that he was equitably estopped from claiming the land under the A. judgment. *Mariner v. Milwaukee and St. Paul R. R. Co.*, 28 Wis., 84. 1870.

7. Former adjudication. Where the plaintiff had, in a former action, recovered damages of the defendant for injuries to his land caused by flooding the same, the same causes continuing, and the same damages accruing to the plaintiff as a result; in a subsequent action to recover for subsequent damages, the defendant will be estopped from denying damages as a result from the continuing cause of such dam-

age. *Plate v. New York Central R. R. Co.*, 37 N. Y., 472. 1868.

8. — An agreement was entered into between the parties, by which the plaintiff was to work for the defendant for a year, commencing January 1, at \$75 per month. A few months after, the plaintiff was paid in full to the day of payment, and was, at his own request, and with the consent of the defendant, discharged. Afterwards he tendered his services to the defendant, and repeatedly did so, until the end of the year. In November he sued the defendant for two month's wages, viz, for September and October. The defendant putting in no answer, judgment was taken against it by default. The present action was brought, upon the same contract, to recover wages for the months of November and December. *Held*, that the defendant was not estopped by the record of the recovery in the former action, from showing that the agreement between the parties had been vacated by mutual consent. *Van Alstyne v. Indiana, Pittsburgh and Cleveland R. R. Co.*, 34 Barbour (N. Y.), 28, 1861; see *Same v. Same*, 21 Howard's Pr. (N. Y.), 175, 1861.

9. Pleading. If a party have not opportunity to show an estoppel by pleading, he may exhibit the matter thereof in evidence, and the court and jury are bound thereby. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Howard*, 13 Howard, 307. 1851.

10. — judicial sale. Suit by A. against the T. R. R. Co., for the assessment of damages on account of the taking by the company for the use of its road, of a lot in B., belonging to A. The sixth paragraph of the answer alleged that in the year 1852, one C. being in possession of the lot, and claiming the ownership thereof, with the full knowledge of A., died, leaving a widow and minor heirs; that one D. was appointed by the proper court guardian of said heirs, who filed his petition in the court of common pleas for the sale of the interest of said heirs in the lot in question, procured an order of sale, sold the lot to defendant at its full appraised value, reported the sale to the court, which was approved; that the defendant paid the purchase money in full; that a deed was ordered, executed and approved by the court; that D. afterwards made a final settlement of his said trust, and obtained a discharge therefrom. That afterwards

Acceptance of Goods — Banking; Account Books.

A. (who was the grandfather of said minor children), having knowledge of the facts, and for the purpose of receiving the full proceeds of said sale for said children, made a voluntary application for their guardianship, and on the day of his appointment brought suit, as such guardian, against D., on his bond, setting out the sale and receipt by D. of the purchase money, alleging the failure to pay over the full amount so received, and asking a judgment for \$1,500, which the company insisted was an affirmation of the judicial sale, and estopped A. from maintaining his suit. *Held*, that the said paragraph was not good as a plea in estoppel, because it did not show that the T. R. R. Co. purchased the lot, or paid the consideration therefor, on the faith of some act or statement of A., or of his silence under circumstances that required him to speak and disclose his title, or any act of said A. subsequent to such purchase, which amounted to a ratification of the sale made by D. *Terre Haute, Alton and St. Louis R. R. Co. v. Norman*, 22 Ind., 63. 1864.

11. Stockholder — assessment. A stockholder who has paid his first assessment is not thereby estopped from setting up his defense to the second. *Somerset and Kennebec R. R. Co. v. Cushing*, 45 Me., 524. 1858.

EVIDENCE.

See BAGGAGE; BY-LAWS; CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; CONVEYANCE; EMBEZZLEMENT; EMINENT DOMAIN; FRAUD; HUSBAND AND WIFE; INDICTMENT; INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS CROSSING THE TRACK; PATENTS; STATUTES; STATUTES OF FRAUDS; SUBSCRIPTIONS BY CITIES AND TOWNS; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY INDIVIDUALS; TAXATION.

[Matters of evidence will be found distributed through this Digest generally, under the various other titles.]

1. Acceptance of goods. In an action for the sale and delivery of goods, it is proper, upon the question of acceptance, to show what was done and what was not done, but the agent by whom the acceptance was alleged to have been made could not be asked by the defendant whether he had accepted them or

not. *Brewer v. Housatonic R. R. Co.*, 107 Mass., 277. 1871.

2. Account; statute. The provisions of the act of 1819, ch. 25, § 1, authorizing a summary mode of proving and recovering accounts and claims from another state or county, only embrace cases where the demand arises out of dealings between the parties which are properly matters of account. The remedy is not extended by said act to matters of tort. *Western and Atlantic R. R. Co. v. Mead*, 4 Sneed (Tenn.), 107. 1856.

3. Agency. A person in the employ of a railway company as station agent, in a suit for extra services, testified, under objection, as to what one Christie, another agent of the company, had told him would be done in case he performed certain duties. At this stage of the case there was no evidence that the agency of said Christie extended to the said subject matter. *Held*, that the testimony was incompetent. *Grand Trunk R. R. Co. v. Nichol*, 18 Mich., 170. 1869.

4. — A contract, oral or written, made with the superintendent of a railway company, cannot be put in evidence against the company, without showing that the party executing it was superintendent, and as such had authority to enter into the contract. *Chapman v. Chicago and Northwestern R. R. Co.*, 26 Wis., 295. 1870.

5. Alteration of instrument. Where a material alteration clearly appears to have been made upon a negotiable instrument, it is presumed to have been made after execution; but this rule does not apply where it is merely probable that an alteration has been made. Whether the same rule applies to instruments not negotiable, *quære*? *Ellison v. Mobile and Ohio R. R. Co.*, 36 Miss., 572. 1858.

6. Banking; account books. A banking company is not concluded by an entry upon its books of a credit to the principal debtor. It may be shown that the entry was erroneous. *Boston and Maine R. R. Co. v. Oliver*, 32 N. H., 173. 1855.

7. — Where an account rendered by a bank is offered in evidence against it, it is competent to prove it by showing that it has been correctly copied, or by proving the handwriting to be that of an officer of the bank. *Forniquet v. West Feliciana R. R. Co.*, 6 How. (Miss.), 116. 1842.

Books and Documents — Conflicting Evidence.

8. Bills of exceptions. The bill of exceptions must show the reason for objections to the admission of evidence. *Weston and Plattsburg R. R. Co. v. Cox*, 32 Mo., 456. 1862.

9. Books and documents — abstracts. When books and documents introduced in evidence at a trial are multifarious and voluminous, and of such a character to render it difficult for the jury to comprehend material facts, without schedules containing abstracts thereof, it is within the discretion of the presiding judge to admit such schedules, verified by the testimony of the person by whom they were prepared, allowing the adverse party an opportunity to examine them before the case is committed to the jury. *Boston and Worcester R. R. Co. v. Dana*, 1 Gray (Mass.), 83. 1854.

10. — practice. After plaintiff has served his complaint, he cannot properly make application for a discovery of books and papers, until after the answer has been served. *Thompson v. Erie R. R. Co.*, 9 Abbott's Pr., N. S. (N. Y.), 280. 1870.

11. — subscriptions for stock. In a suit on a conditional subscription for stock the written subscription is admissible in evidence. *Evansville, Indianapolis and Cleveland R. R. Co. v. Tressler*, 10 Ind., 548. 1858.

12. — To authorize the admission of a copy of a railroad subscription book in evidence for the purpose of charging a stockholder, it is not sufficient to show a loss of the original and diligent search therefor; the genuineness of the signature to the original must also be established. *Corse Brothers v. Sanford*, 14 Iowa, 235. 1862.

13. — time accounts. A party who has performed labor for another, cannot, in an action to recover for such work, produce in evidence check rolls or accounts of the number of days' work performed by those in his employment, for the purpose of fixing the amount of labor done, without verifying the same by the oath of the agent who made the entries, or kept the accounts, if such agent be living. *Merrill v. Ithica and Oswego R. R. Co.*, 16 Wendell (N. Y.), 586. 1837.

14. — Charges for services done or property delivered under the supposed existence of a special contract, but which afterwards became matter of account by operation of law in consequence of a rescission of the contract, cannot be proved by the party's book; there must be

a right to charge when the service is done or the goods delivered. *Ib.*

15. Branch road. Where evidence is offered, showing that a corporation, under the direction of its president, is building a branch road, the company will be held to sanction the same, unless it be otherwise shown. *Bangor, Oldtown and Milford R. R. Co. v. Smith*, 47 Me., 35. 1859.

16. Certificate of secretary. The certificate of the secretary of a corporation under its seal, is *prima facie* evidence of the facts therein stated. Such certificate is evidence that legal notice was given to the stockholders, of a meeting of which they were entitled to be notified. *New Orleans, Jackson and Great Northern R. R. Co. v. Lea*, 12 La. An., 388. 1857.

17. Comparison by witness; fences. The qualities of an object in dispute may be shown by a comparison thereof with the known qualities of some object not in dispute; and evidence directed to such a comparison is not inadmissible as irrelevant or as tending to raise collateral issues. *Isbell v. New York and New Haven R. R. Co.*, 25 Conn., 556. 1857.

18. — A witness having testified as to the condition at a former time of a certain fence, its condition at such former time being the subject of controversy, was asked on cross-examination as to the present condition of a certain neighboring fence, for the purpose of instituting a comparison between the present condition of the one and the former condition of the other. *Held*, that such inquiry was within the foregoing rule and proper. *Ib.*

19. Conflicting evidence. In a case where the evidence was conflicting, the defendant asked the court to instruct the jury that the law of the case, on the evidence, was in favor of the defendant, and that the jury should so find; also, that if the jury believed the testimony of A. and B. (whose evidence did not agree with that of other witnesses), they must find for the defendant. *Held*, that the instructions were properly refused. *Lawrenceburgh and Upper Mississippi R. R. Co. v. Montgomery*, 7 Ind., 474. 1856.

20. — When the evidence conflicts, it is error in the court to decide the point in conflict and take it from the jury. *Brooke v. Grand Trunk R. R. Co.*, 15 Mich., 332. 1867.

Contract—Declarations and Admissions.

21. — The supreme court will not reverse a decree, on a question of the amount of damages, upon a mere doubt created by conflicting evidence. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Philadelphia and Havre de Grace Steam Towboat Co.*, 23 Howard, 209. 1859.

22. Contract. Where the evidence shows that a written contract does not contain the whole of the agreement between the parties, but that another instrument contains the terms and conditions limiting the former contract, the plaintiff cannot recover without producing both instruments. *Alabama and Tennessee Rivers R. R. Co. v. Nabors*, 37 Ala., N. S., 489. 1861.

23. — In an action for labor done for a railroad company, the defendant answered that the work was performed for a contractor and not for the company, it was held, that there was no error in admitting in evidence the contract between the company and the general contractor. *Downs v. Union Pacific R. R. Co.*, 4 Kan., 201. 1867.

24. Corporate existence. The execution of a note to a corporation by its corporate name, is an admission of the fact, and *prima facie* evidence of the existence of the charter of the company, and user under it, under the plea of *nul tiel* corporation. *Montgomery R. R. Co. v. Hurst*, 9 Ala., N. S., 513. 1846.

25. — In an action against a subscriber for the payment of an installment of stock, it was held, that the existence of a president and an engineer, acting and purporting to act for the corporation, and a charter authorizing the appointment of such officers, were sufficient to establish its organization. *Wilmington, Charlotte and Rutherford R. R. Co. v. Thompson*, 7 Jones' Law (N. C.), 387. 1860.

26. — The acceptance of a charter and the organization of a corporate body under such charter, may be proved by a witness who saw the alleged corporators in the use and exercise of such franchises. *Wilmington and Manchester R. R. Co. v. Saunders*, 3 Jones' Law (N. C.), 126. 1855.

27. Custom. Where, in attempting to show in explanation of a contract of sale, a local commercial usage that cash sales were not made for cash in hand, but that payment might be made afterwards and the transaction still be regarded as a sale for cash, the evi-

dence was uncertain as to the number of days given, and whether the time given was computed from the date of the sale or the date of delivery, and showed that the usage of giving time ceased soon after the transaction in question. Held, that the evidence was insufficient to prove the custom. *Union R. R. and T. Co. v. Yeager*, 34 Ind., 1. 1870.

28. Declarations and admissions. It seems that since parties have been made by the statute competent witnesses in their own behalf, there is no longer the necessity for giving the declarations of living parties in evidence. *Reed v. New York Central R. R. Co.*, 45 N. Y., 574. 1871.

29. — agent. The admissions of the agent with reference to matters connected with his agency, are competent evidence against the principal. *Mississippi Central R. R. Co. v. Whitehead*, 41 Miss., 223. 1866.

30. — The admissions of an agent to be admissible in evidence against his principal, must have been a part of the *res gestæ*. *Chicago, Burlington and Quincy R. R. Co. v. Riddle*, 60 Ill., 534, 1871; *Griffin v. Montgomery and West Point R. R. Co.*, 26 Ga., 111, 1858; *Atlanta and La Grange R. R. Co. v. Hodnett*, 29 ib., 461, 1859; *Wright v. Georgia R. R. Co.*, 34 ib., 330, 1866; *Covington and Lexington R. R. Co. v. Ingles*, 15 B. Monroe (Ky.), 637, 1855.

31. — The declarations of an agent respecting a transaction, made after it is past, are inadmissible as evidence against his principal. *Giles v. Western R. R. Co.*, 8 Metcalf (Mass.), 44, 1844; *Anderson v. Rome, etc., R. R. Co.*, 54 N. Y., 334, 1873; *Milwaukee and Mississippi R. R. Co. v. Finney*, 10 Wis., 388, 1860; *Lafayette and Indianapolis R. R. Co. v. Elman*, 30 Ind., 83, 1868; *Pennsylvania R. R. Co. v. Books*, 57 Penn. St., 339, 1868.

32. — The power to make admissions in behalf of a company as to events or defaults that have occurred and are past, cannot be inferred as incidental to the duties of a general agent to superintend the current dealings and business of the company. *Smith v. North Carolina R. R. Co.*, 68 N. C., 107. 1873.

33. — car driver. The declaration of the driver of a car after an accident had occurred and the car had been stopped, but before he had left it, that he could not stop the car because the brakes were out of order, is mere hearsay, and not admissible in evidence against

Declarations and Admissions.

his employer. *Luby v. Hudson River R. R. Co.*, 17 N. Y., 131. 1853.

34. — In an action against a city railroad company, to recover damages for a personal injury, occasioned by the improper conduct of the driver of the defendant's car, any expression of such driver, either before, during or immediately after, and in the heat of the occurrence, showing his then design to do an injury, and not being a declaration predicated upon an after-thought, is admissible in evidence. *Whittaker v. Eighth Avenue R. R. Co.*, 5 Robertson (N. Y.), 650. 1867.

35. — **conductor.** The declarations of a conductor, made after an accident has happened, are not admissible against the railway company. *Chicago and Northwestern R. R. Co. v. Fillmore*, 57 Ill., 265. 1870.

36. — The statements made by a conductor in reference to the engine drawing the train of which he is in charge, are admissible against the railway company for the purpose of explaining the cause of the delay of the train. Though the company is not absolutely bound by such statements, they are admissible on the general principle of agency. *Sisson v. Cleveland and Toledo R. R. Co.*, 14 Mich., 489. 1866.

37. — **director.** The plaintiff, in an action against a railroad company, for services performed, claimed that S., having made a contract with the defendant to build its extension railroad, made another contract with the plaintiff to build a certain portion of that road; that the plaintiff built the road according to his contract, but the embankments across two coves on the route settled so as to require additional work; and that the defendant, by its agents, employed the plaintiff to do that work, which was the subject of the action. In support of this claim, the plaintiff, among other evidence, called S., as a witness, to prove what D., one of the directors of the railroad company, and one of the committee for building the road, had said and done, as the agent of the company, in relation to that work. From the testimony of S., it appeared that when the additional work became necessary, D. inquired of S. what was to be done in consequence of the settling of the embankments; that S. asked him, if the company expected him, S., to do the work at the coves, where it had settled; that D. replied, that the company

did not expect him to pay the expense, — they only wanted to know his opinion as to the best mode of doing it. *Held*, that as this was said by D. while inquiring as to the best mode of making the necessary repairs, and while acting within the scope of his authority, the declarations so made by him were binding upon the defendant to the same extent as if they had been made by the defendant itself, and consequently were admissible in evidence. *Norwich and Worcester R. R. Co. v. Cahill*, 18 Conn., 484. 1847.

38. — **dying declarations.** Dying declarations of the person killed are not admissible in evidence to charge the defendant in any civil case. *Marshall v. Chicago and Great Eastern R. R. Co.*, 48 Ill., 475, 1868; *Daily v. New York and New Haven R. R. Co.*, 32 Conn., 356. 1865.

39. — The doctrine permitting dying declarations to be given in evidence, only applies to criminal cases, and has no reference to civil cases. But a dying declaration, made immediately after the happening of the fatal event, and in relation to the cause of the injury, would be given as a part of the *res gestæ*. *Brownell v. Pacific R. R. Co.*, 47 Mo., 240, 1871; *Friedman v. Railroad Co.*, 7 Philadelphia Rep. (Penn.), 203, 1870.

40. — **engine driver.** In an action against a railroad company for the killing of cattle by its engine, it was *held*, that the declarations of the engineer in charge of the engine, made subsequent to the happening of the accident, at a place distant therefrom, and at a time when the engineer was not transacting or doing any business of the company in relation thereto, were inadmissible as evidence. *Michigan Central R. R. Co., v. Gougar*, 55 Ill., 503. 1870.

41. — In an action against a railroad company for injuring plaintiff, it was held proper to admit the declarations of the engineer, by whose negligence the plaintiff was injured, made at the time of the injury as a part of the *res gestæ*. *Hanover R. R. Co. v. Coyle*, 55 Penn. St., 396. 1867.

42. — **engineer.** That on the trial of an action for injuries to a passenger caused by an accident, the declarations of the engineer of the railroad company, made while actually engaged upon the work, and in respect to its proper construction, were in substance a part of the *res gestæ*, and admissible in evidence.

Declarations and Admissions.

Brehm v. Great Western R. R. Co., 34 Barbour (N. Y.), 256. 1861.

43. — **fireman.** In an action against a railroad company by an administrator, to recover damages for the death of his decedent occasioned by the collision of a locomotive and train of cars and a wagon, in which said decedent was crossing the track of the defendant upon a public highway, it was *held*, that the declarations of a fireman employed on the locomotive at the time of the collision, made upon the arrival of said train, bearing the body of the deceased, at a station one mile from the place of the accident, the train having been stopped at the scene of the accident, and the body having been placed upon it and carried thereon to said station, "that the train was running between forty and sixty miles an hour; that he could not tell any difference between the signal and the collision; that the deceased was sitting with his back toward the train; that he did not think the deceased saw or heard the train or knew there was any train in reach of him; that the deceased never moved out of his position till he was struck; that there was no signal;" were not admissible in evidence as part of the *res gestæ*. *Bellefontaine R. R. Co. v. Hunter*, 33 Ind., 335. 1870.

44. — **husband and wife.** In an action by the husband for injury by negligence, the declaration of his wife that the defendant was free from negligence does not bind him. *Stillwell v. N. Y. Central R. R. Co.*, 34 N. Y., 29. 1865.

45. — **of person injured.** In an action for damages for personal injuries, where the injuries are claimed to have resulted in a permanent disability of the plaintiff to perform mental or physical labor, the defendant proved that, several months after the injury, the plaintiff had performed such labor. The evidence of the plaintiff in his own behalf, that, at the time this labor was being performed, he declared to a person casually present, and with whom he had no business relation, that he then felt ill, was inadmissible, either to controvert the defendant's proof or to show statements of his own out of court consistent with his testimony. *Reed v. New York Central R. R. Co.*, 45 N. Y., 574. 1871.

46. — The declarations of a person injured, made to his physician, as to the cause of such injury, are inadmissible in evidence. *Illinois Central R. R. Co. v. Sutton*, 42 Ill., 438. 1867.

47. — In an action by a husband for damages sustained from injuries inflicted upon his wife, expressions of pain and suffering, made by the wife to the physicians, when they were examining her for the purpose of learning her physical condition, are admissible as evidence. *Matteson v. New York Central R. R. Co.*, 35 N. Y., 497, 1866; see *Same v. Same*, 62 Barbour (N. Y.), 364, 1862.

48. — So, likewise, declarations as to her health, made by her to a neighbor, shortly after the injury, are admissible, especially when called out by the defendant on cross-examination. *Ib.*

49. — **partnership — declarations.** In an action by two to recover the value of a lot of goods, where the question arises whether the ownership is in the plaintiffs jointly or whether they belong to one of them, individually, if the plaintiffs are allowed to prove their own declarations as to their partnership, it is competent for the defendant to give in evidence the record of a suit in which one of the plaintiffs had sued for the recovery of the same goods. *Chicago and Alton R. R. Co. v. Mahan*, 42 Ill., 158. 1866.

50. — **party.** The admissions of a defendant, made upon the hypothesis that information given him by plaintiff was true, are admissible in evidence against him, in connection with proof of the truth of such information. Where such admissions are not evidence against other defendants, they should ask a special instruction to that effect. *Chapman v. Chicago and Northwestern R. R. Co.*, 26 Wis., 295. 1870.

51. — **interested party.** The admissions of the father of the person alleged to be injured and bringing suit for it, made before her death, are not admissible against her administrator, unless it be shown that the father is the real party in interest for whose benefit the suit is prosecuted. *Taylor v. Grand Trunk R. R. Co.*, 48 N. H., 304. 1869.

52. — If this be shown, the admissions would be competent, although when they were made, the father had no interest. *Ib.*

53. — But the mere fact that the estate of the daughter would descend to the father, subject to the claims upon it, would not make him the party to it so as to render his admissions competent. *Ib.*

54. — In a suit on a bond, statements of

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the principal at the date of its execution, in the absence of the plaintiff or his agent are inadmissible. *North Missouri R. R. Co. v. Wheatley*, 49 Mo., 138. 1871.

55. — president. The admissions of a party may always be given in evidence against him. The president of a railway company may make admissions which will be evidence against the company. *Charleston and Savannah R. R. Co. v. Blake*, 12 Richardson's Law (So. Car.), 634, 1860; *Chicago, Burlington and Quincy R. R. Co. v. Coleman*, 18 Ill., 297, 1857.

56. — statements of sick person. The admission of the representations of a sick person should be confined to such expressions as furnish evidence of the present condition of the patient, excluding carefully everything in the nature of a narrative of what is past. *Taylor v. Grand Trunk R. R. Co.*, 48 N. H., 304. 1869.

57. — The representations made by a sick person of the true nature, symptoms and effects of the malady under which he is laboring at the time, are received as original evidence. If made to a medical attendant, they are of greater weight, but are not rejected when made to another. *Perkins v. Concord R. R. Co.*, 44 N. H., 223. 1862.

58. — superintendent. The superintendent's admissions, as to the conduct of an engineer, are not admissible in evidence. The board of directors alone have power to make admissions which will bind the company. *Hill v. New Orleans, Opelousas and Great Western R. R. Co.*, 11 La. An., 292, 1856; *The Same Co. v. Williams* 16 La. An., 315, 1861.

59. — third persons. The admission of a letter as evidence against objection in a suit against a corporation, which contains the mere statement of a third person, and not the declaration of an officer or agent of the corporation, made in the discharge of the duties of his office or agency, is illegal. *Alabama and Mississippi Rivers R. R. Co. v. Johnson*, 42 Ala., 242. 1868.

60. Deed. The description of the grantor in a deed as residing out of the commonwealth, and proof of that fact, is not of itself sufficient evidence that the deed was in fact executed abroad, so as to admit secondary evidence of its execution, without accounting for the absence of the subscribing witnesses.

Tyng v. Boston and Maine R. R. Co., 12 Cushing (Mass.), 277. 1853.

61. — recitals. The acceptance of a deed by a grantee makes its recitals evidence against him; but not as against *bona fide* purchasers from him, without notice. *Schuylkill and Dauphin R. R. Co. v. McCreary*, 58 Penn. St., 304. 1868.

62. Depositions. A copy of a bill of lading was annexed to the deposition of a witness, and no objection was made to the copy, either at the examination or by motion to suppress afterwards; it was accordingly held, that the objection that the original was not produced, or its loss shown, came too late at the trial. Formal objection must be raised on the examination or by notice to suppress the deposition. *York Co. v. Illinois Central R. R. Co.*, 3 Wallace, 107. 1865.

63. — To read the deposition of a deceased witness, taken in a former cause, it is not necessary that the parties should be identical. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Howard*, 13 Howard, 307. 1851.

64. — The separate certificate of the governor that the justice of the peace before whom certain testimony was taken on commission, was an officer at the time, is insufficient to authenticate the evidence. *Edmonson v. Mississippi and Alabama R. R. Co.*, 13 La. (O. S.), 282. 1838.

65. Diagram. Where a diagram of a locality is offered in evidence and rejected, it must be set out in a bill of exceptions, in order to reserve the question on the ruling. *Indianapolis, etc. R. R. Co. v. Irish*, 40 Ind., 277. 1872.

66. Employés — qualifications. It is competent, in an action for damages caused by the careless running of a train, to show that the general character of the engineer was that of a reckless, intemperate and untrustworthy agent. *Vicksburg and Jackson R. R. Co. v. Patton*, 31 Miss., 156. 1856.

67. — The general reputation of an employé for habits of intoxication may be proven for the purpose of showing that such habit might have become known to the company upon proper inquiry. *Gilman v. Eastern R. R. Co.*, 13 Allen (Mass.), 433. 1866.

68. — The plaintiff having attempted to prove that the flagman employed by the company was a careless and intemperate person, the defendant has a right to show to the con-

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trary by persons who have seen his conduct, and such facts need not be proved by experts. *Gahagan v. Boston and Lowell R. R. Co.*, 1 Allen (Mass.), 187. 1861.

69. — The defendant having introduced evidence tending to show that an engineer was of average skill, plaintiff was properly allowed to prove that, on some occasions, he had run his train beyond the station. *Detroit and Milwaukee R. R. Co. v. Van Steinburg*, 17 Mich., 99. 1868.

70. **Error without prejudice.** A cause will not be reversed because improper evidence was admitted, when the record shows affirmatively that such evidence was not considered by the court. *Amesden v. Dubuque and Sioux City R. R. Co.*, 13 Iowa, 132, 1862.

71. **Examination of witnesses.** The recalling of a witness for the purpose of correcting his testimony, is a matter within the discretion of the court, and will not be reviewed on error. *Michigan Central R. R. Co. v. Anderson*. 20 Mich., 244, 1870.

72. A party has no right to cross examine a witness except as to facts and circumstances connected with the matters stated in his direct examination. *Philadelphia and Trenton R. R. Co. v. Stimpson*. 14 Peters, 457, 1840; *Indianapolis, Bloomington, etc., R. R. Co. v. Ferguson*, 42 Ind., 243, 1873.

73. — The question being as to the condition of a railroad track at the time of an accident, and the plaintiff having shown by a witness its condition both *before* and *after* the accident, it became material for the defendant to contradict the testimony of said witness, and the defendant introduced one witness who testified only to the condition of the track *after* the accident. *Held*, that it was competent for plaintiff to show upon cross examination of one of defendant's witnesses that there was a person within the knowledge and reach of defendant, who was with the plaintiff's witness on *both* occasions when he saw the track, and by whom the defendant could contradict the testimony of the plaintiff's witness, if it were false, and to argue from the neglect of defendant to call said person as a witness, that said testimony was true. *Beattie v. Grand Trunk R. R. Co.*, 41 Vt., 275, 1868.

74. **Expectancy of life — experts.** Six months' experience as a life insurance agent will not qualify a witness to testify as to an ex-

pectation of life at a certain age. *Donaldson v. Mississippi and Missouri R. R. Co.*, 18 Iowa, 280, 1865.

75. — **Carlyle tables.** The Carlyle tables are admissible to show the expectancy of human life. *McDonald v. Chicago and Northwestern R. R. Co.*, 26 Iowa, 124, 1868; *Donaldson v. Mississippi and Missouri R. R. Co.*, 18 Iowa, 280, 1865.

76. — **tables.** It is competent to prove the probable period of the natural life of the deceased by reference to a recognized American life table. *Louisville, Cincinnati and Lexington R. R. Co. v. Mahony's Adm'r*, 7 Bush. (Ky.), 235, 1870.

77. **Experts.** When the experience of a witness is of such a nature that it may be presumed to be within that of all men of common education moving within the ordinary walks of life, the evidence of opinion is improper. *Gavisk v. Pacific R. R. Co.*, 49 Mo., 274, 1872.

78. — **defect in railway.** It is no objection to a witness, offered to prove the defective construction of a railway, that he is not a professional engineer. His testimony should be left to the jury for what it is worth. *Langfitt v. Clinton and Port Hudson R. R. Co.*, 2 Robinson (La.), 217. 1842.

79. — **locomotive.** No one but an expert will be permitted to testify as to the capacity of a locomotive from its appearance. *Sisson v. Cleveland and Toledo R. R. Co.*, 14 Mich., 489. 1866.

80. — **medical experts.** A person not a physician may testify, whether it was necessary for a party to receive medical assistance, and the length of time such assistance was necessary. *Chicago, Burlington and Quincy R. R. Co. v. George*, 19 Ill., 510, 1858.

81. A physician may testify as a medical expert, although he is not a graduate in his profession. *New Orleans, Jackson and Great Northern R. R. Co. v. Allbritton*, 38 Miss., 242. 1859.

82. — A medical expert may give his opinion upon a supposititious statement made to him, as illustrative of the case on trial. *Perkins v. Concord R. R. Co.*, 44 N. H., 223. 1862.

83. — The extent to which the opinion of medical experts may be introduced in evidence, considered. *Beckwith v. New York Central R. R. Co.*, 64 Barbour (N. Y.), 299, 1865.

84. — **patents.** In a suit for violation of a

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patent right, the court may call for the opinion of experts as to how the patent should be construed, but it cannot be compelled to receive such evidence. *Winans v. New York and Erie R. R. Co.*, 21 Howard, 88. 1858.

85. — speed. Testimony concerning the speed of a passing train of cars may be given by any one having a knowledge of time and distance. It is not a question of science, but of observation. *Detroit and Milwaukee R. R. Co. v. Van Steinburg*, 17 Mich., 99. 1868.

86. Failure to explain. It is proper for the court to charge the jury, where the evidence is circumstantial; and some of the circumstances might be explained by the defendant and he does not avail himself of his right to testify, that his failure to take the stand and exculpate himself, shall be considered against him. *Greenville and Columbia R. R. Co. v. Partlow*, 14 Richardson's Law (So. Car.), 237. 1867.

87. Family record. To render an entry of births and deaths in a family bible or record admissible in evidence, the entry must have been made by a deceased parent. *Greenleaf v. Dubuque and Sioux City R. R. Co.*, 30 Ia., 301. 1870.

88. — Where such record is admissible, a copy will not be sufficient unless the absence of the original is accounted for. *Ib.*

89. General issue; carriages. In an action for damages done to plaintiff's carriage by the omnibus of defendant, the latter may, under the general issue, prove that the omnibus had been leased to a third person at the time of the accident. *Hart v. New Orleans and Carrollton R. R. Co.*, 4 La. An., 261. 1849.

90. Impeaching evidence. Where depositions are taken under the statute in the absence of the adverse party, it is competent for such party to prove contradictory statements made by the witness without previously interrogating him as to such statements. *Hazard v. New York, Boston and Providence R. R. Co.*, 2 R. I., 62. 1851.

91. Incompetent evidence. It is generally true, that if incompetent evidence be received without objection, it must go to the jury; but two things must occur: 1. That the party against whom the testimony is offered, might, when offered, have objected to it; and 2, that when received, it makes a case on which the jury may legally find for the plaintiff. *Nes-*

bitt v. Louisville, Cincinnati and Charleston R. R. Co., 2 Spears (So. Car.), 697. 1844.

92. — Where a plaintiff, claiming compensation for extra services, rested his claim altogether on a *quantum meruit*, and undertook to show, by parol evidence, that he was entitled to recover; but as his last piece of evidence presented a written contract between himself and the defendant, the latter had the right to read the contract and say that the evidence offered is inconsistent with it and therefore incompetent. And to the granting of a nonsuit under such circumstances, it is no objection that parol proof to explain, vary or contradict the written contract, was received without objection. *Ib.*

93. Injured limbs may be exhibited. In an action to recover damages for a personal injury, there is no valid objection to the exhibition of the injured limb, by the plaintiff, to the surgeon called to describe the injury. *Mulhado v. Brooklyn City R. R. Co.*, 30 N. Y., 370. 1864.

94. Interest of witness. One who, if the plaintiff succeeds, may be liable to the defendants for negligence, is a competent witness for the plaintiff. *Cincinnati, Hamilton and Dayton R. R. Co. v. Spratt*, 2 Duvall (Ky.), 4. 1865.

95. — The preliminary question, whether a witness is interested or not, is usually decided by the court. But the court may, in their discretion, submit the question to the jury. *Dearborn v. Boston, Concord and Montreal R. R. Co.*, 24 N. H., 179. 1851.

96. — assignor of chose in action. By § 399 of the Code, the right to examine the assignor of a thing in action, as a witness, is made to depend on the power of the party against whom he is offered, to procure the testimony of the other party to the contract. *Benham v. New York Central R. R. Co.*, 13 Howard's Pr. (N. Y.), 198. 1854.

97. — creditor of party. It is no objection to a witness, offered by an insolvent company in support of a money claim, that he is a creditor of the company, and that a recovery would increase the fund out of which he is to be paid. *Delaware and Atlantic R. R. Co. v. Irick*, 3 Zabriske (N. J.), 321. 1852.

98. — employé. The engineer in charge of a colliding train is not a competent witness for the company in an action against it for dam-

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ages, unless he has a release from the company. *Catawissa R. R. Co., v. Armstrong*, 49 Penn. St., 186. 1865.

99. — An engineer is not a competent witness in behalf of the company, where he is liable to the company for any judgment that may be obtained against it in an action for damages for injuries to domestic animals. *Chicago and Rock Island R. R. Co. v. Hutchins*, 34 Ill., 108. 1864.

100. — In an action against a railroad company to recover damages for the death of a person caused by the alleged negligence of an employé of the company, such employé is a competent witness for the company, under the act of 1867. *Illinois Central R. R. Co. v. Welton*, 52 Ill., 290. 1869.

101. — In an action against a railroad company for damages resulting from the washing away of a culvert, the engineer who planned and superintended its erection is not a competent witness for the company until he has been released. *Galena and Chicago Union R. R. Co. v. Welch*, 24 Ill., 31. 1860.

102. — husband and wife. A married woman is a competent witness in a suit in favor of an estate in which she is interested as one of the heirs, where her husband has given lands in behalf of the estate for its prosecution, if she is offered on the part of the estate, and there is nothing showing that her testimony would violate any confidence between her and her husband. *Rutland and Burlington R. R. Co. v. Lincoln's Estate*, 29 Vt., 206. 1857.

103. — In a suit, by husband and wife, for the loss of merchandise of the wife before marriage, she is not a competent witness for the plaintiff, nor is her competency affected by the statute which removes the objection of interest. *Smith v. Boston and Maine R. R. Co.*, 44 N. H., 325. 1862.

104. — After the entry of a suit by a minor by her next friend, she died, and her administrator was admitted as the party to prosecute the suit; it was held, that the wife of such next friend was a competent witness for the plaintiff. *Taylor v. Grand Trunk R. R. Co.*, 48 N. H., 304. 1865.

105. — officers of company. The secretary of the company, although a stockholder, is a competent witness to identify the books of organization and records of the company; but

for general purposes stockholders cannot be called as witnesses for the corporation. *Peake v. Wabash R. R. Co.*, 18 Ill., 88. 1856.

106. — parties. A party to the suit who has no interest in its event may be examined as a witness. *Central R. R. Co. v. Hines*, 19 Ga., 203. 1856.

107. — In a suit against a railroad company, the plaintiff is a competent witness for himself under the act of Feb. 14, 1867. *Alabama and Florida R. R. Co. v. Watson*, 42 Ala., 74. 1868.

108. — Where, in a suit for the foreclosure of a mortgage, a vendee of the property subject to the mortgage is made a party, he is not a competent witness for the mortgagor, to establish a defense involving the liability of the property in his hands to the mortgage debt. *Indianapolis and Cincinnati R. R. Co. v. Waggoner*, 16 Ind., 367. 1861.

109. — The fact that the defendant is a corporation, and therefore cannot be examined as a witness in his own behalf, will not prevent the plaintiff from being examined as a witness. *Field v. New York Central R. R. Co.*, 29 Barbour (N. Y.), 176. 1859.

110. — A party to an action may be examined as a witness in its own behalf without notice to the adverse party, although the latter is a corporation. Ch. 176, Laws of 1868. *Dela-matyr v. Milwaukee and Prairie du Chien R. R. Co.*, 24 Wis., 578. 1869.

111. — In a proceeding to appropriate land for the use of a railroad company, the owner of the land proposed to be appropriated, is a competent witness to testify in his own behalf, provided the proceedings have been instituted since the case took effect. *Atlantic and Great Western R. R. Co. v. Campbell*, 4 Ohio St., 583. 1855.

112. — Under the provisions of the act approved February 14, 1867 (session acts, 1866-67, p. 435), the plaintiff is competent to testify for himself, although the action is against a corporation; and although it was commenced before the passage of that act. *Montgomery and West Pt. R. R. Co. v. Edmonds*, 41 Ala., N. S., 667. 1868.

113. — In appeal cases from a justice's court, where the amount in controversy exceeds \$20, the statute authorizing either party to be a witness in his own behalf (Code, § 2779) has no application to suits by or against cor

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porations aggregate. *Alabama and Tennessee Rivers R. R. Co. v. Oaks*, 37 Ala., N. S., 694. 1861.

114. — The statute authorizing the plaintiff to establish the correctness of his demand by his own oath, where the amount in controversy does not exceed \$300, does not apply to actions against corporations aggregate. *Yonge v. Mobile and Ohio R. R. Co.*, 31 Ala., N. S., 422. 1858.

115. — By § 675 of the civil code, officers or inhabitants of counties, cities or towns, officers, members or trustees of corporations or religious societies, although parties to the actions, are made competent to testify as witnesses in behalf of such county, town, city, corporation or religious society. Railroad corporations are embraced. *Corington and Lexington R. R. Co. v. Ingles*, 15 B. Monroe (Ky.), 637. 1855.

116. — release. Where a witness is interested and a release will make him competent such release must be given, and a bond of indemnity from a third party will not answer the purpose. *Josey v. Wilmington and Manchester R. R. Co.*, 11 Richardson's Law (So. Car.), 399. 1858.

117. — A release, not under seal, is sufficient to make a witness competent who was liable over to the defendant, in case the plaintiff should recover. *Boland v. Greenville and Columbia R. R. Co.*, 12 Richardson's Law (So. Car.), 368. 1859.

118. — remainderman. The owner of a life estate is capable of taking by release from a remainderman, so as to qualify the latter as a witness in his behalf in a suit for injury to the property. *Clark v. Southern Pacific R. R. Co.*, 27 Tex., 100. 1863.

119. — Stockholders. The stockholders of a corporation are not competent witnesses in its favor, but if they are called by the opposite party they may be permitted to testify in behalf of the corporation. *Hart v. New Orleans and Carrollton R. R. Co.*, 1 Robinson (La.), 178. 1841.

120. — In a suit by the Maryland and Delaware R. R. Co., a corporation created by the act of 1854, ch. 274, amended by the act of 1856, ch. 50, against an executor to recover the amount of an alleged subscription by his testator, to the capital stock of the company, it was held, that stockholders in the company

were not parties to the contract, or to the suit within the letter or spirit of § 2 of the act of 1868, ch. 116, and were therefore competent witnesses for the plaintiff. *Downes v. Maryland and Delaware R. R. Co.*, 37 Md., 100. 1872.

121. — It is no sufficient ground for excluding a witness from testifying for a corporation that he may be liable for the debts of the corporation, on account of his having been a stockholder therein, under the statute giving a remedy to the creditors of the corporation in certain specified cases against the stockholders personally. *White Mountain R. R. Co. v. Eastman*, 34 N. H., 124. 1856.

122. — Section 12, ch. 188, of the Revised Statutes, provides that members of public corporations shall be competent witnesses in cases affecting the interests of such corporations; and the act of December 25, 1844, § 3, provides that all railroad corporations which shall be unable to purchase the lands for their roads of the owners on the respective routes, at rates to be agreed upon, shall be public corporations. Held, that railroad corporations were not such public corporations, within the meaning of the Revised Statutes, that the stockholders could be witnesses for the corporations. *Dearborn v. Boston, Concord and Montreal R. R. Co.*, 24 N. H., 179. 1851.

123. — In a suit against a railroad company by its corporate name, a stockholder, as such, is not, within the meaning of § 238, p. 80, 2 R. S., 1852, a party to the action. *Newcastle and Richmond R. R. Co. v. Brumback*, 5 Ind., 543. 1854.

124. — A stockholder is, under the statutes, a competent witness for the corporation in which he holds stock. *New York and Erie R. R. Co. v. Cook*, 2 Sandford, (N. Y.), 732. 1850.

125. — A stockholder in a corporation has no such interest as to prevent him from testifying to his official acts in such company. *York and Cumberland R. R. Co. v. Pratt*, 40 Maine, 447, 1855; *New Albany and Salem R. R. Co. v. Gillespy*, 7 Ind., 245, 1855.

126. — A stockholder is not competent to testify in behalf of the corporation. *Philadelphia and West Chester R. R. Co. v. Hickman*, 28 Penn. St., 318, 1857; *Alabama and Mississippi R. R. Co. v. Sanford*, 36 Ala. N. S., 703. 1860.

127. — Stockholders should assign their

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stock, in order to become witnesses in behalf of a corporation. *Thrasher v. Pike County R. R. Co.*, 25 Ill., 393. 1861.

128. Issues. In an action of assumpsit by a bank upon a promissory note payable to itself, it is not competent for the court, at the instance of the defendant, to inquire into the organization of the bank. *Smith v. Mississippi and Alabama R. R. Co.*, 6 Smedes & Marshal (Miss.), 179. 1846.

129. Judicial notice. This court cannot take judicial notice of the existence of railroads. *Logansport, Peoria and Burlington R. R. Co., v. Caldwell*, 38 Ill., 280. 1865.

130. — The courts of the United States will take judicial notice of the public laws of the several states; and in Indiana, of the private statutes also. *Junction R. R. Co. v. Bank of Ashland*, 12 Wallace, 226. 1870.

131. Land office certificates. A certificate by the register of the land office in Wisconsin, that a certain tract of land was "entered at G. in the name of H., as appears from the books of records heretofore," and that the same has been patented; and that the register had "examined and compared the foregoing" with the records in his office and found the same to be a correct transcript therefrom, is not such a certificate as is described in § 103 or § 104, ch. 137, R. S., and not entitled to be admitted in evidence. *Farrand v. Chicago and Northwestern R. R. Co.*, 21 Wis., 435. 1867.

132. Leading questions. A witness for defendant, upon cross examination, was asked whether a subscription in controversy was not first made "for the purpose of securing the location on the Brodhead survey." Held, that the question was not leading. *Vawter v. Ohio and Mississippi R. R. Co.*, 14 Ind., 174. 1860.

133. Letters. A letter written by the land owner in reply to a demand on him by the railway company for a right of way, is competent evidence as *res gestæ* for the land owner when the question of the value of the land is submitted to the jury. *Charleston and Savannah R. R. Co. v. Blake*, 12 Richardson's Law (So. Car.), 624. 1860.

134. — A contract of lease was shown by a letter from the lessor and an indorsement thereon by one of the lessees. The lessor then offered to prove the terms of the lease by parol evidence. The agreement appearing to be in writing, parol testimony was held inad-

missible to vary or modify its terms. *Mallory v. Tioga R. R. Co.*, 3 Keyes (N. Y.), 354, 1867; *Same v. Same*, 36 Howard's Pr. (N. Y.), 202, 1867; *Same v. Same*, 5 Abbott's Pr., N. S. (N. Y.), 420, 1867.

135. — The contents of a letter from the plaintiff to the defendant, is only evidence to prove a demand, or to show the pertinency, or explain the meaning of any reply which the defendant may have made to it. *Higgins v. North Carolina R. R. Co.*, 7 Jones' Law (N. C.), 470. 1860.

136. — A letter, addressed to a railroad company, claiming damages of it, and read at a meeting of its stockholders, who thereupon voted to lay it on the table, is inadmissible in evidence against the corporation. *Robinson v. Fitchburg and Worcester R. R. Co.*, 7 Gray (Mass.), 92. 1856.

137. Map of town plat. The map of a town plat is evidence to show the intent of the land owner to dedicate property to the public, in an action for killing stock by a railway train. *Chicago, Burlington and Quincy R. R. Co. v. Banker*, 44 Ill., 26. 1867.

138. Market price; newspaper reports. Evidence of the state of the markets, as derived from the market reports in the newspapers is competent. Such reports are more reliable and satisfactory than the evidence of individual sales. *Sisson v. Cleveland and Toledo R. R. Co.*, 14 Mich., 489. 1866.

139. Memorandum. To corroborate the conductor on a railroad in respect to the time of the arrival of his train at a station, evidence is admissible that he made a contemporaneous memorandum, in compliance with a regulation requiring it; and the time table regulating the running, stoppage, etc., of such train may also be proved. *Barker v. New York Central R. R. Co.*, 24 N. Y., 599. 1862.

140. Negotiations for a settlement. Evidence of negotiations with the defendant for a settlement are competent in explanation of delay in bringing suit. *Downs v. New York Central R. R. Co.*, 47 N. Y., 83. 1871.

141. Newspaper accounts of an accident. Defendant's counsel offered, in evidence, a newspaper account of the transaction, prepared from accounts received on the day and at the place of the accident. The author was examined as a witness, and testified that he talked with plaintiff and others about it, and

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supposed he learned from them, but had no distinct recollection of what was said, and could not tell from whom, principally, he received his information. *Held*, that the article was not admissible in evidence. *Downs v. New York Central R. R. Co.*, 47 N. Y., 83. 1871.

142. Notes of counsel. The notes of counsel on a former trial of the cause, between the same parties, may be read in evidence where he testifies that "they contain the whole of the substance of the examination in chief, but that the cross examination was not so full," and that "he took down all that was material of the cross examination." *Philadelphia and Reading R. R. Co. v. Spearen*, 47 Penn. St., 300. 1864.

143. Objections to evidence. Objections to the admission of testimony are not available in error, unless the grounds thereof were pointed out to the court below. *Jeffersonville R. R. Co. v. Butler*, 9 Ind., 205. 1857.

144. — An objection to evidence must be specific: hence an objection to the introduction of a deed made by a Chickasaw Indian, "that it was not made and certified according to the requirements of the treaty with the Chickasaw Indians," is bad: the objection should point out wherein the deed is not in accordance with the treaty. *New Orleans, Jackson and Great Northern R. R. Co. v. Moye*, 39 Miss., 574. 1860.

145. — Where parol testimony is received without objection, proving that the plaintiffs had been appointed engineers of the company by a written resolution of the board of directors, it was held, that the evidence would not subsequently be ruled out on motion. *Langfitt v. Clinton and Port Hudson R. R. Co.*, 2 Robinson (La.), 217. 1842.

146. — Where the record shows that an objection to evidence was sustained in the court below, but does not show the ground of the objection, it will be presumed that the ruling of the court was proper. *Hoben v. Burlington and Missouri River R. R. Co.*, 20 Iowa, 532. 1866.

147. Offers to compromise. Confidential overtures of pacification, or offers, or propositions between litigating parties, expressly stated to be made confidentially, or without prejudice, are excluded as evidence, on the ground of public policy. But the admission

of any independent fact is received, though made during a treaty of compromise. *Perkins v. Concord R. R. Co.*, 44 N. H., 223. 1862.

148. Opinions of witness. In questions relative to distances, and the dimensions and quantities of things, a witness cannot testify without an implied expression of opinion, and no objection can be sustained on that account. *Hackett v. B. C. and M. R. R. Co.*, 35 N. H., 390. 1857.

149. — The testimony of a witness that, from his knowledge of the country, a railroad could have been built cheaper upon one route than upon another, is too vague to influence a jury. *Andrews v. Ohio and Mississippi R. R. Co.*, 14 Ind., 169. 1860.

150. — In an action to recover damages for personal injuries, a question put to the attendant of the plaintiff, as to how far the plaintiff was able to help herself, and at what point she required assistance to do what was necessary to be done, called for facts, and not mere opinion, and was not objectionable. *Sloan v. New York Central R. R. Co.*, 45 N. Y., 125. 1871.

151. — A witness will not be permitted to give his opinion and conclusions from the facts proved. He will not be permitted to state that the practice of running street cars without drivers induced children to get upon the platform. *Largan v. Central R. R. Co.*, 40 Cal., 272. 1870.

152. Order during trial. The order of introducing evidence is in the discretion of the circuit court. *Philadelphia and Trenton R. R. Co. v. Simpson*, 14 Peters., 457, 1840; see also *Chicago and Iowa R. R. Co. v. Duggan*, 60 Ill., 137. 1871.

153. — The supreme court will not reverse a cause on account of the order in which testimony has been introduced, unless there is a manifest abuse of discretion by the court below. *Donaldson v. Mississippi and Missouri R. R. Co.*, 18 Iowa, 280. 1865.

154. Ordinances. In an action against a railroad company, for an injury caused by negligence in running its cars, a copy of a city ordinance limiting the speed of trains need not be filed with the complaint, to authorize its introduction in evidence; an averment of its existence is sufficient. *Madison and Indianapolis R. R. Co. v. Taffe*, 37 Ind., 361. 1871.

Parol Evidence—Railroad Ties.

155. Ownership of railroad. The possession and use of a railroad raises a presumption of ownership against the occupant. *Illinois Central R. R. Co. v. Mills*, 42 Ill., 407. 1866.

156.—In this case, the jury were held to have the right, under the circumstances, to infer that the defendant was operating the railroad upon which certain stock was killed. *Toledo, Peoria and Warsaw R. R. Co. v. Arnold*, 49 Ill., 178. 1868.

157. Parol evidence. Parol evidence bearing on written papers should not be permitted to be introduced without the production of those papers to see if it will touch on the rule as to contradicting or varying written evidence. *Philadelphia and Trenton R. R. Co. v. Simpson*, 14 Peters., 448. 1840.

158.—Evidence of a contemporaneous parol agreement is not admissible to vary the terms of a written contract. *Cedar Rapids and Missouri River R. R. Co. v. Boone County*, 34 Ia., 45. 1871.

159.—Where twenty-one out of thirty-seven stockholders of a railroad company signed and delivered a bond for the payment of \$35,000 to three of their own number, and it appeared upon its face that the bond was to bind those who should sign it, it was *held*, that parol proof could not be admitted to show that it was not to be binding on any until all the stockholders had signed it. *Black v. Shreve*, 2 Beasley's Ch. (N. J.), 455. 1860.

160.—The plaintiffs contracted, in writing, with the Taunton Locomotive Manufacturing Company, for twelve locomotives, to be delivered at certain specified times. On the same day the defendant, president of said locomotive company, subscribed for seventy shares in the plaintiff's company, "payable in cash on the delivery of the last engine of twelve," from the locomotive company. *Held*, that parol evidence was admissible to prove that these two contracts were parts of the same transaction; and if so, that the subscription was not payable until the last engine mentioned in the contract had been delivered. Delivery of any other twelve engines would not be sufficient. (U. S. Cir. Ct.) *Rutland and Burlington R. R. Co. v. Crocker*, 29 Vt., 540. 1857.

161.—Parol evidence is admissible to give effect to a written instrument, by apply-

ing it to the subject matter, by proving the circumstances under which it was made, whenever, without the aid of such evidence, the application could not be made in the particular case. *Evansville, Indianapolis and Cleveland R. R. Co. v. Shearer*, 10 Ind., 244. 1858.

162.—Parol evidence, which does not contradict anything in the written proceedings of a corporation, is admissible to explain omissions in its proceedings. *Vicksburg, Shreveport and Texas R. R. Co. v. Ouachita Parish* 11 La. An., 649. 1856.

163.—Oral testimony is admissible to show two mutually dependent contracts: one verbal and one written. *Williams v. Hagar* 50 Me., 9. 1861.

164.—A patent ambiguity in a written contract cannot be explained by parol evidence. *Blossburg and Corning R. R. Co. v. Tioga R. R. Co.*, 1 Keyes (N. Y.), 486. 1864.

165. Party may contradict his witness. The plaintiff, in an action to recover the value of personal property, may testify that he was the owner of it, although one of his witnesses has testified to facts tending to show ownership in another person. *Whitney v. Eastern R. R. Co.*, 9 Allen (Mass.), 364. 1864.

166. Payment. Evidence to explain under what circumstances a draft on one officer of a railroad company was accepted by another officer of the same company, and delivered to the plaintiff having an account against the company, is admissible, there being an averment in the complaint that the draft was not delivered or received as payment. Such evidence does not contradict the tenor of the draft. *Chicago, Cincinnati and Louisville R. R. Co. v. West*, 37 Ind., 211. 1871.

167. Railroad ties. On the trial of an action for the price of cross ties furnished to a railroad company, the defense being that the ties were not of good quality, one witness called by the plaintiff to prove the quality of the ties, stated that he had been road master of another railroad, and as such it had been his duty to inspect and receive ties, and another witness, called for the same purpose, stated that he had made and sold cross ties to the defendant. *Held*, that the witnesses had sufficient knowledge of the subject to make them competent witnesses as to the qualities of the ties. *Jeffersonville R. R. Co. v. Lanham*, 27 Ind., 171. 1866.

Receipts.

168. Receipt. Where a receipt is given for goods and afterwards lost, not only can the contents of the receipt be proved, but the delivery of the goods can be proved by any other competent evidence. *Smith v. Mississippi and Alabama R. R. Co.*, 6 Smedes & Marshall (Miss.), 179. 1846.

169. — The signing of a receipt by a third party without examination, describing the packages shipped as in good order on their reshipment, furnishes no evidence of the condition of the goods at that time. *Hunt v. Michigan Southern and Northern Indiana R. Co.*, 37 N. Y., 162, 1867; *Same v. Same*, 35 Howard's Pr. (N. Y.), 287. 1867.

170. — Where a party seeks to recover as against his own receipt, he should make out his case clearly. *Chapman v. Railroad Co.*, 7 Philadelphia Rep. (Penn.), 204. 1870.

171. Records. The books of a corporation are evidence between its members, but not against strangers. *Chase v. Sycamore and Courtland R. R. Co.*, 38 Ill., 215. 1865.

172. — Corporation books, although not generally evidence against a stranger, are so against a corporation, present and assenting to the entries made in them. *Graff v. Pittsburg and Steubenville R. R. Co.*, 31 Penn. St., 499. 1858.

173. — It is not error to pronounce upon the effect of evidence, where it is such that it would be the duty of the judge to set aside the verdict, if rendered against it. *Id.*

174. — The books of a corporation are admissible for the purpose of showing the regularity of its proceedings. *Ryder v. Alton and Sangamon R. R. Co.*, 13 Ill., 516. 1851.

175. — Corporation books are evidence of the acts and proceedings of the corporation, when it appears that they are kept as such by the proper officer, or some person authorized to make entries in his necessary absence. *St. Louis and Cedar Rapids R. R. Co. v. Eakins*, 30 Iowa, 279. 1870.

176. — The records or minutes of the corporation, when regularly kept, are evidence, though not conclusive, of the corporate proceedings. *Woonsocket Union R. R. Co. v. Sherman*, 8 R. I., 564. 1867.

177. — The circumstances considered under which the president of the corporation will be attached for refusal to produce the books and papers of the corporation. *Erie R. R. Co. v. Heath*, 8 Blatchford (U. S. C. C.), 413. 1871.

178. — Where the book of a corporation is produced as evidence in response to a notice requiring it, and portions read from it upon the trial, the corporation may read any other portions of it which relate to the same subject matter. *Vischer v. Talbotton Branch R. R. Co.*, 34 Ga., 536, 1866.

179. — The record book of a corporation recited that a meeting of the stockholders for the purpose of organization was held, pursuant to notice given by the persons who by the charter were authorized to call such a meeting when \$500,000 of the capital stock had been subscribed: *held*, that the record was evidence of the fact recited, and also presumptive evidence of the fact that the requisite amount of capital had been previously subscribed, and was, unless rebutted by other evidence, sufficient proof. *Lane v. Brainerd*, 30 Conn., 565. 1862.

180. — criminal cases. Entries in the course of business, upon the books of a railroad company by one, at the time an agent of the company, and still living, but absent from the state, are not competent evidence of the facts therein set forth, upon the trial of a third person for crime. *State v. Thomas*, 64 N. C., 74. 1870.

181. — how introduced. Upon the introduction of a record in evidence, it is usually read to the jury by the witness having it in charge, or by an attorney in the cause. It need not be handed to each juror, unless inspection for a particular purpose is necessary. *Thornburgh v. Danville and Newcastle R. R. Co.*, 14 Ind., 499. 1860.

182. — judgment and decree. A judgment in a case to which the defendants were not parties or privies is not admissible in evidence. *Mestier v. New Orleans, Opelousas and G. W. R. R. Co.*, 16 La. An., 354. 1861.

183. — The introduction of another suit in evidence does not, in general, make the testimony on which the judgment was rendered, evidence in the new suit. *Id.*

184. — Where the decree of the High Court of Appeals was properly copied in the records of a county court, as a part of the record in a cause, and a copy of the whole proceedings in the county court is offered in evidence, it cannot be objected that it is a copy of a copy. It becomes an original for the purpose of making out a transcript of the

Application of Payments — Caveat Emptor.

cause. *West Feliciana R. R. Co. v. Thornton*, 12 La. An., 736. 1857.

185. — An exemplification of a record of a judgment and a sheriff's sale under it, not containing the *fi. fa.*, and the levy and inquisition was certified to be as full and entire as it remained upon the records. *Held*, to be admissible in evidence. *Schuylkill and Dauphin R. R. Co. v. McCreary*, 58 Penn. St., 304. 1868.

186. — Parol evidence is inadmissible to vary or alter the language of a decree which is plain and unambiguous. *Ney v. Dubuque and Sioux City R. R. Co.*, 20 Ia., 347. 1866.

187. — **parol evidence.** Where the court has ordered the production of certain minutes of the board of directors, and the party in whose behalf the order was made has, in addition, given written notice to the company to produce, and has demanded of the secretary, a sworn copy, if they are not produced, or the sworn copy furnished, oral evidence may be given of their contents. *Indianapolis and Cincinnati R. R. Co. v. Jewett*, 16 Ind., 273. 1861.

188. **Regulations of company.** Evidence is admissible of the regulations of the corporation, and of the custom of its agents, in respect to giving notice to passengers of the necessity of changing cars in order to reach a given station. *Barker v. New York Central R. R. Co.*, 24 N. Y., 599. 1862.

189. **Res gestæ.** Evidence of the arrest, by a policeman, of the driver of a car which had run against and injured a woman, is not admissible in an action against the driver's employer for negligence in causing the injury. *Luby v. Hudson River R. R. Co.*, 17 N. Y., 131. 1858.

190. **Seal.** Evidence that a corporation, through its counsel, treated a paper as its deed through the course of a trial, is admissible, against the corporation, to prove that the seal attached to the paper is the seal of the corporation. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Howard*, 13 Howard, 307. 1851.

191. — **Proof of signatures of the officers of a corporation to a release purporting to have been executed by the corporation, is prima facie evidence of the execution and seal.** *Josey v. Wilmington and Manchester R. R. Co.*, 12 Richardson's Law (So. Car.), 134. 1859.

192. **Statute.** Where a statute of another state constitutes a part of the organization of a corporation suing in Indiana, it is not necessary to its introduction in evidence by the plaintiff that it should have been pleaded. *Paine v. Lake Erie and Louisville R. R. Co.*, 31 Ind., 283. 1869.

193. **Striking out evidence.** If improper evidence tending to inflame damages has been given, and it has not been struck out at or before the close of the testimony, so that counsel shall not be allowed to refer to it in their address to the jury, it is too late to cure it by directing the jury in the charge to disregard it. *Pennsylvania R. R. Co. v. Butler*, 57 Penn. St., 335. 1863.

194. **Stock subscription.** Parol evidence of a subscription to stock cannot be admitted until there is a sufficient excuse for the absence of the original. *Cincinnati, Peru and Chicago R. R. Co. v. Cochran*, 17 Ind., 516, 1861; *Same v. Emrick*, 19 ib., 289, 1862.

195. — A verbal promise to give time on a subscription to stock, upon the faith of which promise the subscription is made, cannot be introduced in evidence. A contemporaneous parol agreement cannot be shown to vary the terms of a written contract. *Thigpen v. Mississippi Central R. R. Co.*, 32 Miss., 347. 1856.

EXECUTIONS.

See MORTGAGE.

1. **Application of payments.** The enrollment act of 1844, § 9, which directs the sheriff to apply the proceeds of sales upon the oldest enrolled judgment, does not apply to voluntary payments made by the debtor. *Mississippi Central R. R. Co. v. Harkness*, 32 Miss., 203. 1856.

2. **Bonds.** Railroad trust or mortgage bonds held by the company, or its agents, for the use of the company, before delivery, are not subject to execution as property of the company; nor can they be subjected to sale by proceedings in aid of execution. *Means v. Cincinnati and Chicago R. R. Co.*, 2 Disney (Ohio), 465. 1859.

3. **Caveat emptor.** The maxim of caveat emptor applies to purchases at sheriff's sales. *Delaware and Lackawanna R. R. Co. v. Blair*, 4 Dutcher (N. J.), 139. 1859.

Claim by Third Person — Justice's Judgment.

4. Claim by third person. Where a sheriff in St. Louis county levies an execution upon personal property, a third person claiming the same, may maintain an action against the sheriff for its possession, without making claim thereto in accordance with § 3 of the local act of March 3, 1855. (Sess. Acts 1855, p. 464.) *St. Louis, Alton and Chicago R. R. Co. v. Castello*, 28 Mo., 379. 1859.

5. Exemption. Lands purchased by a railway company beyond what are actually dedicated to corporate purposes, are bound by the lien of judgments against the corporation, and are liable to be levied in execution and sold as the lands of any other debtor; but the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation. *Plymouth R. R. Co. v. Colwell*, 39 Penn. St., 337. 1861.

6. — A canal basin is not a legitimate incident to a railroad having no authorized canal connection, and is not protected from levy and sale on execution against the company. *Ib.*

7. Franchise. A railway company's interest in the land may be sold under an execution against it, although the corporate franchise itself cannot be sold under an execution. *State v. Rives*, 5 Iredell's Law (N. C.), 297. 1844.

8. — The right of transporting persons or things over the land of another for toll, is but an easement united with a franchise, and is not distinguishable from other franchises. *Ib.*

9. — The franchises and property of a corporation may be seized and sold out on a *feri facias*. Act of April 7, 1870. *Philadelphia and Baltimore Central R. R. Co.'s Appeal*, 70 Penn., St. 355. 1870.

10. Fraud. Where a railway company, on settlement with a contractor, agreed to pay him a certain number of shares, or bonds of the road, at his election, the amount, however, to be retained by the company as indemnity against certain liabilities to which the road was subject, and a certificate was accordingly delivered to the contractor for so many shares, with an agreement indorsed to exchange them for bonds at the election of the contractor, and these certificates were then returned to the company as such indemnity; *held*, that the corporation was bound to deliver the bonds according to the agreement, notwithstanding the treasurer of the road had

entered the shares on the records as the property of the contractor, and they had in consequence been sold on execution as his property. *Jones v. Portsmouth and Concord R. R. Co.*, 32 N. H., 544. 1856.

11. Inadequate price. To retain property sold for an inadequate price, at a sale in some respects irregular, the vendee should be guilty of no misconduct, and should act with most exact good faith. *Parker v. Hannibal and St. Joseph R. R. Co.*, 44 Mo., 415, 1869; *Ruby v. Same*, *ib.*, 443.

12. Indemnifying bond. A sheriff holding three executions levied upon property under all of them, and a claim to the property having been asserted by a third person, he required an indemnifying bond. The plaintiff in the third execution alone executed a bond, but the officer proceeded under all the writs. *Held*, that the priority of the executions was not affected by the bond. *Girard Bank v. Philadelphia and Norristown R. R. Co.*, 2 Miles (Penn.), 447. 1841.

13. — The exemption from liability guaranteed to an officer levying an execution by § 5 of the act of March 3, 1855, where an indemnification bond has been given as required by that act, extends to an action of replevin brought against said officer. *St. Louis, Alton and Chicago R. R. Co. v. Costello*, 30 Mo., 124. 1860.

14. Insolvent corporations. Where there are sundry executions against an insolvent railway company, threatening to seize and sell its road in parcels, the road extending through six different counties, equity will interfere and direct the sale of the entire property for the benefit of all concerned, and distribute the proceeds equitably. *Macon and Western R. R. Co. v. Parker*, 9 Ga., 377. 1851.

15. Jurisdiction. Where the supreme court of a state has by its decree and officers taken judicial control of the property and franchises of a corporation, they cannot be taken in execution by process from any other jurisdiction. *Fox v. Hempfield R. R. Co.*, 2 Abbott (U. S. C.), 151. 1870.

16. Justice's judgment. A copy from a docket of a justice of the peace, certifying that an execution issued to the constable of the township in which defendant resided, and setting out the return of the constable of *nulla bona*, is *prima facie* evidence to authorize the

Levy — Sale of Railway.

clerk of the circuit court to issue an execution upon the transcript of the justice's judgment filed in his office. *Ruby v. Hannibal and St. Joseph R. R. Co.*, 39 Mo., 480. 1867.

17. **Levy.** A seizure under an execution must be accompanied by actual possession by the officer. A levy on the *proceeds* of property to be sold at a future day is invalid. *Goubeau v. New Orleans and Nashville R. R. Co.*, 6 Robinson (La.), 345. 1844.

18. **Municipal corporations.** In authorizing the mayor and city council to sell property on perpetual ground rent, the legislature established a legal detination of the rents, as a portion of the permanent revenue of the city, to enable the city to exercise its power of police and government. These rents therefore cannot be sold on execution against the municipality. *New Orleans and Carrollton R. R. Co. v. Municipality No. One*, 7 La. An., 143. 1852.

19. **Proceedings supplemental to execution.** The provision of the Code (§ 292), in regard to proceedings supplementary to execution, are not applicable to judgments *against* corporations. *Hinds v. Canandaigua and Niagara Falls R. R. Co.*, 10 Howard's Pr. (N. Y.), 487. 1855.

20. — The provisions of the code, in relation to "proceedings supplementary to execution," are not applicable to judgments *against* corporations. *Sherwood v. Buffalo and New York City R. R. Co.*, 12 Howard's Pr. (N. Y.), 136, 1855; but see *Courtois v. Harrison*, *ib.*, 359. 1856.

21. **Sale of railway.** A railroad is liable to be sold on execution unless the sale be forbidden by statute; not the franchise, but the land itself constituting the road. *State v. Rives*, 5 Iredell's Law (N. C.), 297. 1844.

22. — The Columbus, Piqua and Indiana R. R. Co., under its charter, had no power to alienate its franchise. But after the road was constructed and prepared for use, its cars, engines and other property, not fixed to the land, were liable for its debts and subject to execution. *Coe v. Columbus, Piqua and Indiana R. R. Co.*, 10 Ohio St., 372. 1859.

23. — Old or new rails and chairs kept along the track for repairs are not liable to levy and sale under an execution. *Covey v. Pittsburgh, Fort Wayne and Chicago R. R. Co.*, 3 Philadelphia Rep. (Penn.), 173. 1858.

24. — The W. V. R. R. Co., before its road was surveyed, contracted with B., to sell it such lands, owned by him, as should be required for the use of the road. The charter of the company provided that the directors might fix the line of the road, and that the company might enter upon and take possession of such lands as were necessary for the construction of the road and necessary accommodations. The survey designated certain land belonging to B. as depot grounds, and the company paid him therefor, but took no conveyance of the land. The plaintiff, having a judgment against the company, levied upon a portion of this land and brought ejectment against the company to recover possession thereof. The referee, to whom the case was referred, found that a part of the land was never necessary to the purpose of the company, and would not become so prospectively. *Held*, that B.'s contract did not compel him to convey a greater quantity of land than was required for depot accommodations; that the company could not by its charter acquire more land than was necessary; that the estate acquired was only an easement, and could not be levied on and sold; that so long as the directors did not act rashly or in bad faith, their decision as to the quantity of land required would be conclusive. *Hill v. Western Vermont R. R. Co.*, 32 Vt., 68. 1859.

25. — A railroad company having abandoned the use of a portion of its road for any purpose of public service and for use as a road bed, and using it only in the exercise of means and measures to get rid of its character as a railroad, viz.: to take up and carry away the rails and to get terms with the town as to obligations touching street bridges, but without any intention of ever using it for the purpose of a public road, it was *held*, that the fee being in the company, the portion so abandoned was subject to levy of execution, so far as the question of discontinuance and abandonment was concerned. *Benedict v. Heineberg*, 43 Vt., 231. 1870.

26. — Land, which has been vested in a railroad company for the use of the road, if sold by execution, belongs to the purchaser until the franchise of the company would, by the limitation of its charter, have expired. *State v. Rives*, 5 Iredell's Law (N. C.), 297. 1844.

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27. — An injunction will issue to prevent the sale of a railway in parcels upon separate executions. *Noble v. The State*, 43 Ga, 466. 1871.

28. Sheriff. A sheriff has no authority to levy upon and sell land lying out of his district. *Finley v. South Carolina R. R. Co.*, 2 Richardson's Law (So. Car.), 567. 1846.

29. Stock. Where a debtor holds stock standing in his own name upon the books of a corporation, a judgment creditor may proceed by fi. fa. and sale under the act of March 29, 1819, or by attachment execution under the act of June 16, 1836. But where stock held by the defendant in his own name is subject to a charge or lien upon the title, a proceeding by attachment is preferable. *Weaver v. Hunt ingdon, etc. R. R. Co.*, 50 Penn. St., 314. 1865.

30. Title. R. issued execution and levied on land as belonging to a railway company; held, that he thereby affirmed the company's title. *Robinson v. Atlantic and Great Western R. R. Co.*, 66 Penn. St., 160. 1870.

31. What property is realty. Freight cars on the road, side tracks, or turntables of the company are realty. The plaintiff or officer cannot dis sever them, and thus change their character. *Titus v. Mabee*, 25 Ill., 257. 1861.

(See MORTGAGE.)

EXECUTORS DE SON TORT.

1. Estoppel. Defendant was sued as an executor. He pleaded *non assumpsit* and the statute of limitations. He contended on the trial that he was an *executor de son tort*. Held, that by pleading, he was estopped from denying that he was the rightful executor. *Greenville and Columbia R. R. Co. v. Joyce*, 8 Richardson's Law (So. Car.), 117. 1854.

EXEMPLARY DAMAGES.

See DAMAGES; INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK.

EXPERTS.

See EVIDENCE; INJURIES TO DOMESTIC ANIMALS.

EXPLOSIONS.

See INJURIES TO EMPLOYEES.

EXPRESS COMPANIES.

1. Connecting lines. A. delivered to the United States Express Company a package of money, to be transported to a point not on the route of that company. The package was transported by the company to the point on its line nearest to the place of destination, and there delivered, as was customary, to the proprietors of a line of stages, known as "Winslow's Express," to be carried to its destination. The receipt given by the United States Express Company stipulated that the company undertook to forward the package to the point nearest to its destination reached by that company, and that the company should be held liable as a forwarder only. The package was lost while in the custody of Winslow's Express. Suit was brought by the consignees against the United States Express Company to recover the value of the package. Held, that an express company may become liable as a common carrier, though it has not complied with the requirements of section 2, of the "act declaring express companies to be common carriers. (1 G. & H., 327). Held, also, that the United States Express Company was only bound to transport the package safely to the point on its line nearest to the place of destination, and there deliver it to the proper carrier, to be forwarded to its destination, and having done this, that company was not responsible for its subsequent loss. *United States Express Co. v. Rush*, 24 Ind., 403. 1865.

2. Contract. The contract between a railway company and an express company construed. *Ellis v. Boston, Hartford and Erie R. Co.*, 107 Mass., 1. 1871.

3. Delivery to company. V., owner of certain goods about to arrive at the depot of a railroad in Charlotte, N. C., wished them to be carried from thence to Richmond, Va., and an express company, by its agent at Charlotte, undertook to remove and deposit said goods in its warehouse as soon as possible on the arrival of the goods at the depot in Charlotte, and to carry them from Charlotte to Richmond, within a reasonable time, for a reward

Miscellaneous.

paid. The goods arrived at the depot, and the express company had notice of their arrival. *Held*, to be a delivery to the express company as a carrier. *Southern Express Co. v. McVeigh*, 20 Grattan (Va.), 264. 1871.

4. **Injunction.** Where it was alleged that a railway company had been guilty of overcharging an express company upon its freights, and a preliminary injunction was prayed to restrain the railway company from making such overcharges, it was *held*, that the rights of the express company would not be enforced until the final hearing, and the injunction was refused. (U. S. Cir. Ct.) *Camblos v. Philadelphia and Reading R. R. Co.*, 4 Brewster (Penn.), 563. 1873.

5. **Limiting liability as a carrier.** The legal presumption is that stipulations limiting the common law liability, contained in a receipt given by an express company for freight, were known and assented to by the party receiving it. *Belger v. Dinsmore*, 51 N. Y., 166. 1872.

6. — An express company is to be regarded as a common carrier, and its common law liability may be limited by express contract. *Belger v. Dinsmore*, 51 N. Y., 166. 1872.

7. — **monopoly.** A railroad company by its charter was required to transport in the order in which it shall be requested, "all goods, wares, minerals and merchandise, and other articles which shall have been deposited at the company's depots, etc., so that equal justice shall be done to all owners of property who shall pay or tender" the tolls thereon. *Held*, that express companies had as good a right to the benefits of the road as the owners of the packages personally had; that a contract giving to one company the exclusive right of transportation in the passenger trains was illegal and void. *Sandford v. R. R. Co.*, 24 Penn. St., 378. 1855.

8. — Under ch. 193, Public Laws of 1868, a railway company is not permitted to let to an express company the exclusive right to carry express matter upon its trains. And it seems that the same is the rule at common law. *New England Express Co. v. Maine Central R. R. Co.*, 57 Maine, 188. 1869.

EXPRESS MESSENGER.

See INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS.

EXPULSION OF PASSENGERS.

See INJURIES TO PASSENGERS; PASSENGERS; TICKETS.

FAMILY RECORD.

See EVIDENCE.

FARM CROSSING.

See INJURIES TO DOMESTIC ANIMALS; PRIVATE CROSSINGS.

FEDERAL COURTS.

See BRIDGES; CONSTITUTIONAL LAW; HABEAS CORPUS; INJUNCTION; JURISDICTION; MORTGAGE.

1. **Corporation.** A corporation is not a citizen within the meaning of the Constitution of the United States, and cannot maintain a suit in a court of the United States against the citizen of a different state from that by which it was chartered, unless the persons who compose the corporation are all citizens of that state. *Ohio and Mississippi R. R. Co. v. Wheeler*, 1 Black, 286. 1861.

2. — In such cases it may sue by its corporate name, averring the citizenship of all the members, and the suit will be regarded as the joint suit of the individuals. *Ib.*

3. — A suit by or against a corporation must be presumed to be a suit by or against citizens of the state which created the corporate body. *Ib.*

4. — Although a corporation is not a citizen within the meaning of the Constitution in many respects, it is, so far as rights of action are concerned, a citizen of the state where it was created, whatever its *status* may be elsewhere by the legislation of other states. *Railroad Co. v. Whitton*, 13 Wallace, 270. 1871.

5. — A statute of Wisconsin provides that in case of the death of a person through the neglect, etc., of another, an action may be brought for the same, "provided, that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same." *Held*, that this proviso does not prevent a nonresident plaintiff from removing the action, under Act of Congress of March 2, 1867, to a Federal Court, and maintaining it there. *Ib.*

Municipal Bonds—Removal of Causes.

6. — **Jurisdiction.** This Court has, under § 11 of the Judiciary Act of 1789, no jurisdiction of a civil suit against a corporation created by the laws of another state, where the suit is commenced by the service of process within this district, upon an officer of the corporation. *Pomeroy v. New York and New Haven R. R. Co.*, 4 Blatchford (U. S. C. C.), 120, 1857.

7. — The federal courts are not required to discourage suitors from commencing suits in their courts, and parties have the right to become owners of property for the express purpose of maintaining suits therein. *Newby v. Oregon Central R. R. Co.*, 1 Sawyer, (9 U. S. Cir. Ct.) 63. 1870.

8. — A corporation chartered under the laws of Illinois and operating a railway in Iowa may have a cause removed from the courts of the latter state to the federal courts under the Judiciary Act of 1789. *Treadway v. Chicago and Northwestern R. R. Co.*, 21 Ia, 351. 1866.

9. — For jurisdictional purposes as respects the federal courts, this defendant should be regarded as a citizen of Illinois. *Ib.*

10. — Though, under the laws of Iowa, doing business in that state will render it liable there, it still may elect to proceed or be proceeded against in the United States Courts. *Ib.*

11. — A case will fall within the 25th section of the Judiciary Act, where the record shows that in a suit on a contract, the defendants set up that the contract had been rendered void by the provisions of certain acts of congress, and the Constitution of the United States, and shows also that the decision of the highest court in the state was against the right, title, privilege or exemption thus specially set up. *Railroad Co. v. Richmond*, 15 Wallace, 3. 1872.

12. — The circuit court of the United States is not the court of another, sovereign to one of the states. *Commonwealth ex rel. v. Pittsburgh and Connellsville R.R. Co.*, 58 Penn. St., 26. 1868.

13. **Municipal bonds.** When by the laws of Michigan, municipal bonds deposited with the state treasurer are void, a suit to have them given up to be canceled will not be affected by proceedings commenced in a federal court by a stockholder, to obtain them for the corporation, when the corporation itself could not lawfully sue the makers or the depositors in any but a state court, and would not there be

permitted to recover such bonds. *La Grange v. State Treasurer*, 24 Mich., 468. 1872.

14. **Pleading and practice.** The circuit court may adopt, in a particular case, a rule of practice under a state law; and where the circuit court is possessed of a case from another circuit, it may adopt the practice of the state in which the circuit court from which it is transferred sits. *Supervisors v. Rogers*, 7 Wallace, 175. 1868.

15. — A state law prescribing rules of practice has no efficacy in the federal courts unless these courts adopt it. *Mayor v. Lord*, 9 Wallace, 409. 1869.

16. **Precedence of causes — Supreme court.** Although a suit be nominally by a state as plaintiff, yet where the real plaintiffs are individuals — as *ex gr.* in a *quo warranto*, where the state is plaintiff *ex relatione* — this court will not give precedence to the case under the act of June 30, 1870, even by consent of counsel on both sides. *Miller et al. v. The State*, 12 Wallace, 159. 1870.

17. **Removal of causes.** Whenever a general rule as to personal rights or property is established by state legislation, its enforcement between proper parties by the federal courts follows as a matter of course, and the jurisdiction of the court is not subject to the state limitation. *Railroad Co. v. Whitton*, 13 Wallace, 270. 1871.

18. — The act of March 2, 1867, providing for the removal of a cause from a state court to the federal courts in certain cases, upon the petition of a nonresident party, whether plaintiff or defendant, upon filing "an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court," is constitutional. *Ib.*

19. — The filing of the affidavit prescribed by the act of April 14, 1834, by a railroad company for the removal of a cause into the court of an adjacent county, operates as a *superseas*; and any further proceedings in the court in which the suit was originally brought are void. *Hughes v. Mine Hill and Schuylkill Haven R. R. Co.*, 30 Penn. St., 517. 1858.

20. — So much of the act of congress of March 2, 1867, constituting ch. 196, acts of the second session of the thirty-ninth congress (14 U. S. Stats. at Large, 558), as provides that a citizen of one state, who has commenced an

Removal of Causes.

action in a court of another state against a citizen thereof, may remove it to a federal court, is invalid. *Whiton v. Chicago and Northwestern R. R. Co.*, 25 Wis., 424. 1870.

21. — Under the act of congress of July 27, 1868, providing for the removal by corporations, etc., of suits brought against them, from state courts to United States circuit or district courts, upon verified petition, stating a defense, arising under the United States constitution, etc., the truth of the defendants' averment that they have such a defense, must be settled at the trial, and cannot be tried on affidavits. *Fisk v. Union Pacific R. R. Co.*, 10 Abbott's Pr., N. S. (N. Y.), 457. 1871.

22. — The plaintiff and defendant corporation being corporations of Virginia, the owners of the stock, though non-residents, are not entitled to have the cause removed to the United States court to have the question of the validity of the corporation decided. *Washington, Alexandria, etc. R. R. Co. v. Alexandria, etc. R. R. Co.*, 19 Grattan (Va.), 592. 1870.

23. — An answer to the jurisdiction of a state court setting up a removal of a cause to the United States Circuit Court, by filing the petition and bond with the clerk of the state court, is sufficient in form and not demurrable, although omitting to allege that such filing was at the time of entering the defendant's appearance in the state court. *Ayres v. Western R. R. Co.*, 45 N. Y., 260. 1871.

24. — To authorize the removal of a cause to the federal courts, all the plaintiffs must be citizens of the state in which the suit is brought, and all of the defendants must be citizens of some other state or states. *Hubbard v. Northern R. R. Co.*, 3 Blatchford (U. S. C. C.), 84. 1853.

25. — The object of the statutes of New York, passed in 1853 and 1855, requiring corporations created by other states, and doing business in New York, to appoint an agent there, to receive service of process against such corporations, were not intended in any way to cut off the right of such companies to remove litigation to the courts of the United States. *Fisk v. Chicago, Rock Island and Pacific R. R. Co.*, 53 Barbour (N. Y.), 472, 1868; see ib., 513; *Same v. Same*, 36 Howard's Pr. (N. Y.), 20, 1868; 4 Abbott's Pr., N. S. (N. Y.), 378, 1868; 3 ib., 453, 1868.

26. — A railroad company dwells in the

place of its creation, and if not chartered in New York, it is citizen of another state, and its citizenship cannot be questioned, for the purpose of defeating the jurisdiction of the United States courts over an action brought against it. *Ib.*

27. — Where a plaintiff showed that he had a domicile in Boston for several years; that the last year, he purchased a house there, and there his family resided, he coming to the city of New York for the purpose of his business, and returning to his home, in Boston, at intervals, as his occupation permitted, *held*, that he was deemed to be a citizen of Massachusetts. *Ib.*

28. — In ascertaining the residence of a party, the place where he has regularly voted may be properly inquired into and considered. *Ib.*

29. — The various acts of congress providing for the removal of causes from the state courts to the federal courts, construed. *Fisk v. Union Pacific R. R. Co.*, 6 Blatchford (U. S. C. C.), 362, 1869; *Same v. Same*, 8 ib., 243, 1871; *Same v. Same*, ib., 299, 1871.

30. — It is too late for the plaintiff, after the removal of a cause, to have it remanded upon motion, after having pleaded anew in the federal court. *Carrington v. Florida R. R. Co.*, 9 Blatchford (U. S. C. C.), 467. 1872.

31. — act of 1789. A suit brought in a state court of New York, by a citizen of New York, against a corporation created by a state other than New York, and against other defendants who are citizens of New York, cannot be removed into a circuit court of the United States in New York, under the 12th section of the Judiciary act of September 24, 1789, unless the defendants who are citizens of New York, are merely nominal parties to the suit. *Hatch v. Chicago, Rock Island and Pacific R. R. Co.*, 6 Blatchford (U. S. C. C.), 105. 1868.

32. — Unless all the plaintiffs be citizens of the state in whose court the action is brought, and all the defendants citizens of a state other than that, the action cannot be removed to a federal court, under the judiciary act of 1789. *Fisk v. Chicago, Rock Island and Pacific R. R. Co.*, 53 Barbour (N. Y.), 472, 1868; see ib., 513; *Same v. Same*, 36 Howard's Pr. (N. Y.), 20, 1868; 4 Abbott's Pr. N. S. (N. Y.), 378, 1868; 3 ib., 453, 1868.

Common Law Rule.

33.—It has been held, under the act of 1789, that only those suits can be removed from the state courts which could originally be brought in the United States courts, and the same language upon which Judge Story based that decision is used in all the subsequent acts. The citizenship of all the *plaintiffs* must be taken together. Act of July 27, 1866. *Hazard v. Union Pacific R. R. Co.*, 9 R. L., 602. 1868.

34.—Where a suit is brought in a state court, and is duly removed into this court, by the defendant, under § 12 of the act of September 24, 1789, the question of the jurisdiction of this court is not dependent upon any of the provisions of § 11 of that act. *Winans v. McKean R. R. Co.*, 6 Blatchford (U. S. C. C.), 215. 1868.

35.—Where the governing officers of a corporation are citizens of the state which created the corporation, and the other party is a citizen of another state, the federal courts have jurisdiction, and the cause may be removed under the act of 1789. *Wheeden v. Camden and Amboy R. R. Co.*, 2 Philadelphia Rep. (Penn.), 23. 1856.

36.—A corporation is not, *per se*, a citizen within the meaning of the third article of the constitution of the United States. *Wheeden v. Camden and Amboy R. R. Co.*, 1 Grant's Cases (Penn.), 420. 1856.

37.—When a corporation sues or is sued, the governing officers, by whatever name called, are the substantial party; and if they are citizens of the state which created the corporation, and the other party is a citizen of another state, the federal courts have jurisdiction, and the cause is removable under the judiciary act of 1789. *Ib.*

38.—An action commenced in the supreme court of New York by one foreign corporation against another, cannot be removed for trial, into the circuit court of the United States, under the act of congress of 1789. *Ayres v. Western R. R. Co.*, 48 Barbour (N. Y.), 132, 1866; *Same v. Same*, 32 Howard's Pr. (N. Y.), 351, 1866.

39.—But where the assignee of a foreign corporation, suing another foreign corporation, is a citizen of New York, the action may be removed, provided the claim is of such a nature that the United States court can take cognizance of it. *Ib.*

40. **Transfer from one circuit to another.** The act of Feb. 28, 1839, (§ 8, 5 Stat. at Lar., 322), providing in certain cases for the transfer of a case from one circuit court to another, is not repealed by the act of March 3, 1863 (12 Stat. at Lar., 768), providing that circuit judges may hold courts for each other. *Superintendents v. Rogers*, 7 Wallace, 175. 1868.

FENCES.

See EMINENT DOMAIN: INJURIES TO DOMESTIC ANIMALS; RIGHT OF WAY.

1. **Common law rule.** In the absence of a statute requiring it, it is generally well settled that railway companies are not required to fence between themselves and adjoining landholders. *Stucke v. Milwaukee and Mississippi R. R. Co.*, 9 Wis., 202. 1859.

2. **Contract.** The defendant, a railway company, agreed with plaintiff to pay him four shillings per rod to construct a fence on both sides of the railway through plaintiff's land according to a specified plan. Subsequently, plaintiff appealed from the decision of the commissioners assessing damages for the crossing of his land by the road, and in the county court, plaintiff was allowed certain damages, and one dollar per rod for building and keeping fences in repair, unless such fences were built by defendant. Plaintiff took judgment for the full amount of damages including the allowance for fences, which was paid by the railway company. *Held*, that the judgment was a merger of the former contract. *Curtis v. Vermont Central R. R. Co.*, 23 Vt., 613. 1851.

3.—Plaintiff having subsequently erected the fences according to the contract, it was *held*, that he could not recover, although it appeared that the fence erected under the contract was not such a fence as he would otherwise have built, and that the fence which he otherwise would have built would have cost no more, and been worth thirty cents per rod more, than the one erected by him under the contract. *Ib.*

4.—Under a breach of covenant to erect and maintain fences, etc., on each side of a railroad, it is proper to show how much the

Defects — Statutes.

land would yield each season, and the market value of the crops at harvest season, from which should be deducted the cost of tillage, harvesting and marketing, to ascertain the true measure of damage. *Chicago and Rock Island R. R. Co. v. Ward*, 16 Ill., 522. 1855.

5. — A written contract between a railroad company and the owner of a farm through which its road is constructed obliged the company to construct and maintain good and sufficient fences on each side of the track, and also two crossings for teams. *Held*, that the omission, in the contract, of any provisions as to gates or bars at the crossings, did not relieve the company from its statutory obligation to maintain them. *Poler v. New York Central R. R. Co.*, 16 N. Y., 476. 1857.

6. Defects. While it is the primary duty of a railroad company to discover and repair defects in fences, gates, etc., which it is bound to maintain, it is the duty of an adjoining proprietor interested in their security, to give notice to the company when a defect has come to his knowledge. *Ib.*

7. — A railway company is liable for the damages resulting from the insufficiency or want of repair of its fences, in the absence of any proof showing an extraordinary cause for such condition. *Bay City and East Saginaw R. R. Co. v. Austin*, 21 Mich., 390. 1870.

8. Fires. A railway company is not bound to make fences along its track unless required by its charter. *Pennsylvania R. R. Co. v. Riblet*, 66 Penn. St., 164. 1870.

9. — An act requiring a railway company to rebuild fences destroyed by fire from its trains in Erie county, is within the police power of the state and constitutional. Act of April 13, 1868. *Ib.*

10. Partition fences. Adjoining land-owners cannot compel a railroad company to put up a fence along such road, nor require it to contribute thereto. *Cattle guards*, at each end, are all that can be required. *Long Island R. R. Co. v. McConochie*, 3 Edward's Ch. (N. Y.), 487. 1841.

11. — A railroad company is interested in the keeping up of the partition fences which separate the lands taken for the use of its railway from the adjoining lands. *Rensselaer*

and Saratoga R. R. Co., In matter of, 4 Paige Ch. (N. Y.), 553. 1834.

12. Statute — California. Where the law requires a railway company to erect and maintain sufficient fences along its road, and does not specify what a sufficient fence shall be, it must be considered as referring to the general law fixing the standard of fences. *Enright v. San Francisco and San José R. R. Co.*, 33 Cal., 230. 1867.

13. — Such a law is for the benefit of adjoining land owners, and its provisions may be waived by them. *Ib.*

14. — Experts will not be permitted to testify as to the sufficiency of fences. *Ib.*

15. — Massachusetts. A railroad company is not bound to erect and maintain fences, if the location of the road was filed with the county commissioners and its construction began before the St. of 1846, ch. 271, § 3. *Baxter v. Boston and Worcester R. R. Co.*, 102 Mass., 383. 1869.

16. — The "suitable" fences which a railroad corporation is required by the Gen. Sts., ch. 63, § 43, to erect and maintain on both sides of its road, need not of necessity be such fences as are required to be maintained by owners of adjoining improved lands. *Emes v. Salem and Lowell R. R. Co.*, 98 Mass., 560. 1868.

17. — Where it appeared that the railroad company built its roadbed, but did not lay the rails, before the passage of the statute, and filed the location of the road after its passage; and it did not appear that the corporation took any other title from the land owner, it was *held*, that the company was bound to erect and maintain fences under St. 1846, ch. 271. *Sawyer v. Vermont and Massachusetts R. R. Co.*, 105 Mass. 196. 1870.

18. — Michigan. Under Comp. Laws, § 1987, where one railway corporation operates the road of another company under a contract, the former corporation is held to be the agent of the latter. The neglect of such agent to erect or maintain fences along the line of the road will render the corporation owning the road liable for the consequent damages. Under Laws of 1867, p. 221, the injured party has the right to elect against which corporation he will proceed. *Bay City and East Saginaw R. R. Co. v. Austin*, 21 Mich., 390. 1870.

19. — Missouri. A railroad company is

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liable to an adjoining proprietor for damage caused by the failure of the company to fence in his land along its track. The provision of the statute requiring such fencing is not unconstitutional. *Trice v. Hannibal and St. Joseph R. R. Co.*, 49 Mo., 438. 1872.

20. — In a suit against a railroad company for damages to crops, caused by failure of defendant to fence its line of road through plaintiff's premises, where it appeared from the petition that the company had constructed its "road-bed," but no allegation showed that the road was completed, *held*, that though the petition was not good as a pleading framed on the statute (Wagn. Stat. 310, § 43), it set forth a good cause of action at common law, and should be proceeded with. And as a common law action, it was not demurrable because it asked for a judgment for double damages. The character of a petition is not always determined by the relief it prays for. The court may grant any relief consistent with the case and embraced in the issues. *Comings v. Hannibal and Central Missouri R. R. Co.*, 48 Mo., 512. 1871.

21. — Under the act touching railroad companies (Wag. Stat. 310, § 43), a railroad corporation is liable to an adjoining owner for fences erected by him in pursuance of that section, notwithstanding the fact that such fences were erected nearer the track than the outer boundary of the land belonging to the road. Such an erection without other acts amounting to a claim of ownership would not constitute an appropriation of the company's land outside the fence. *Marshall v. St. Louis and Iron Mt. R. R. Co.*, 51 Mo., 138. 1872.

22. — New Hampshire. Railroad companies are required by statute to maintain fences on the sides of their roads. *Dean v. Sullivan R. R. Co.*, 2 Foster (N. H.), 316, 1851; *Horn v. Atlantic and St. Lawrence R. R. Co.*, 35 N. H., 169, 1857; *Smith v. Eastern R. R. Co.*, *Ib.* 356.

23. — New York. The statute requiring railroad corporations to maintain cattle guards at road crossings applies as well to streets which are crossed by railroads in villages as to country highways. *Brace v. New York Central R. R. Co.*, 27 N. Y., 269. 1863.

24. Trespassers. Railway companies are

not liable to the owners of lands adjoining their roads for damages committed on those lands by cattle wrongfully permitted by their owners to run at large in the highway, and thence escaping upon the railroad track, and from thence, through defects of the fences of the railroad, upon the lands of such adjoining owners. *Chapin v. Sullivan R. R. Co.*, 39 N. H., 53, 1859; *Same v. Same. Ib.*, 564.

25. — It is the settled law in Vermont, that the obligation upon railway companies to build a fence along the line of their roads only extends to the owner or rightful occupier of the adjoining fields, and not to mere trespassers therein. *Bemis v. Connecticut and Passumpsic Rivers R. R. Co.*, 42 Vt., 375. 1869.

26. Willow trees. A railway corporation which was bound by its charter to fence its road, commenced to set out willow trees near the line of its right of way, with the expectation of nailing boards to them when they should grow to a sufficient size. It having been proved that these trees, by spreading their roots into, and their branches over, plaintiff's land, would seriously injure the same, and that there was no controlling necessity for erecting the fence in that particular manner; *held*, that the corporation might be properly enjoined from planting such trees. *Brock v. Connecticut and Passumpsic Rivers R. R. Co.*, 35 Vt., 373. 1862.

27. "Worm" fence. In erecting a fence along the side of a railway, the crooked or "worm" fence may be used, and the construction of half of it on the land of the adjoining proprietor is no trespass. *Ferris v. Van Buskirk*, 18 Barbour (N. Y.), 397. 1854.

 FERRIES.

See BRIDGES; CHARTER.

1. Charter. The legislature chartered a railroad company with power to construct a railroad from New Haven to Stonington, crossing New London harbor by a ferry at New London; the provision as to the ferry being as follows: "To establish a ferry from the

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termination of the railroad on the east side of New London harbor, to some convenient point on the west side as a part of its railroad or route, to connect the same with said railroad on the west side." *Held*, that a general ferry was not granted, and the railroad company was enjoined against the use of the ferry for any other purpose than the transportation of the passengers and freight of the railroad. *Fitch v. New Haven, New London and Stonington R. R. Co.*, 30 Conn., 38. 1861.

2. — The right of a ferryman to his toll, is by the common law, and every subtraction from his profits, by carrying his *customers* over the stream, whether for pay or not, is an injury for which he can recover damages. *Taylor v. Wilmington and Manchester R. R. Co.*, 4 Jones' Law (N. C.), 277. 1857.

3. — But not so as to the carrying of persons other than his customers. *Ib.*

4. **Collisions.** Persons running steam ferry boats are bound to exercise such reasonable care and prudence to prevent collisions as ordinary prudence would suggest. *Philadelphia, Wilmington, etc., R. R. Co. v. Kerr*, 25 Md., 521. 1866.

5. **Employees.** What acts of the captain of a ferry boat may be considered as not in the course of his employment—considered. *Aycrigg v. New York and Erie R. R. Co.*, 1 Vroom (N. J.), 460. 1864.

6. **Indictment.** An indictment charging a railroad company, as the owner of a public ferry, for not keeping up the same, must set forth how the duty of keeping up the ferry and transporting passengers became imposed by its charter. *State v. Wilmington and Manchester R. R. Co.*, Busbee's Law (N. C.), 234. 1853.

7. **License.** The mere fact, that parties, claiming and using a ferry right, had not regularly paid the license therefor, would not be available, as a defense, to one who should disturb those who possessed the right, or who should destroy or injure the same, but might, perhaps, be a ground for proceedings to declare the same forfeited. *New Albany and Salem R. R. Co. v. Huff*, 19 Ind., 315. 1862.

8. **Penalty.** The Raleigh and Gaston R. R. Co. did not incur the penalties imposed by the Rev. Code, c. 101, § 30, by transporting its passengers and freight *in boats* across the Roan-

oke, at Gaston, during the time that there was no bridge at that point, in consequence of its having been burned by the military, in 1865. *Pugh v. Raleigh and Gaston R. R. Co.*, Phillips' Law (N. C.), 359. 1867.

9. **Rates of toll.** The St. of 1864, ch. 229, § 26, limiting the rates of toll to be charged by ferry companies for passengers transported on the cars of street railway companies, is constitutional, and binds a ferry company, incorporated before its passage, whose charter is liable to alteration or repeal under the Rev. Sts., ch. 44, § 23. *Parker v. Metropolitan R. R. Co.*, 109 Mass., 506. 1872.

10. **Western R. R. Co.** The grant by the legislature to the Western R. R. Co., of power to connect the terminus of its road on the east side of the Hudson, with a depot on the west bank, though it may, by implication, give the right to establish a ferry, does not constitute such ferry a part of the railroad, so that persons merely crossing the river may be regarded as passengers carried under the general railroad franchise. *Alkin v. Western R. R. Co.*, 20 N. Y., 370, 1859; reversing, *Same v. Same*, 30 Barbour (N. Y.), 305. 1857.

FIREMAN.

See INJURIES TO EMPLOYEES.

FIRES.

See BAGGAGE; CARRIAGE OF MERCHANDISE; CONTRACTORS; CONSTRUCTION OF RAILWAYS; EMINENT DOMAIN; FENCES; INSURANCE; SUNDAY LAWS.

I. COMPANIES NOT LIABLE EXCEPT FOR NEGLIGENCE.

II. NEGLIGENCE.

1. *Presumptions.*

2. *Dry grass and weeds.*

3. *Management of engines.*

4. *Negligence of property owner.*

III. STATUTORY LIABILITY.

IV. EVIDENCE.

V. DAMAGES.

VI. LESSEES AND CONTRACTORS.

VII. GENERAL MATTERS.

Companies not Liable except for Negligence — Negligence.

I. COMPANIES NOT LIABLE EXCEPT FOR NEGLIGENCE.

1. **Accident.** The ignition of combustible substances lying along the track of a railroad, by sparks dropped by a passing engine, is not an unavoidable accident. *Flynn v. San Francisco and San José R. R. Co.*, 40 Cal., 14. 1870.

2. **Negligence.** A railway company is only responsible for damages occasioned by fires set out through negligence. *Jefferies v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 3 Houston, (Del.), 447. 1866.

3. — To render a railway company liable for the burning of a house, it must appear that such fire originated through the neglect of the company or its employes. Such company has the right to pile up wood at its stations for its use. *Macon and Western R. R. Co. v. McConnell*, 31 Ga., 133. 1860.

4. — The care which a railroad company must exercise, in the running of its trains so as not to injure property situated near its track, is not contingent upon such circumstances as the force and direction of the wind, the dryness of the weather or the combustible nature of the property liable to be affected. The company not being in fault as to the quality or character of its equipments, the special risks incident to proximity to railroads must be borne by those who establish themselves in such localities. *Michigan Central R. R. Co., v. Anderson*, 28 Mich., 244. 1870.

5. — Where a corporation was incorporated by the legislature with power to construct a railroad, and to hold lands, engines, cars and other things necessary for its use; and while a locomotive belonging to this company, drawing a train of cars, was passing on the railroad, some sparks from the smokepipe passed directly therefrom to the roof of a building of the plaintiff standing 18 inches from the side and 26 feet from the middle, of the road, whereby the building, without any negligence on the part of the company, was set on fire and consumed; in an action on the case against the company for this injury, it was held, that the defendant was not liable. *Burroughs v. Housatonic R. R. Co.*, 15 Conn., 124. 1842.

II. NEGLIGENCE.

1. *Presumption.*

6. **Negligence.** The burden of proving that the engine was properly guarded in respect to fire is upon the company, it having been shown that a fire was set out by such engine. *St. Louis, Alton and Terre Haute R. R. Co., v. Montgomery*, 39 Ill., 335, 1866; *Case v. Northern Central R. R. Co.*, 59 Barbour, (N. Y.), 644. 1871.

7. — The escape of fire from a locomotive raises a presumption of negligence against the railway company. *Illinois Central R. R. Co. v. Mills*, 42 Ill., 407, 1866; *Chicago and Alton R. R. Co. v. Quaintance*, 58 Ill., 389, 1871; *Clemens v. Hannibal and St. Joseph R. R. Co.*, 53 Mo., 366, 1873; *Ellis v. Portsmouth and Roanoke R. R. Co.*, 2 Iredell's Law, (N. C.) 138, 1841; *Clevelands v. Grand Trunk R. R. Co.*, 42 Vt., 449, 1869; *Bedford v. Hannibal and St. Joseph R. R. Co.*, 46 Mo., 456, 1870; *Spaulding v. Chicago and Northwestern R. R. Co.*, 30 Wis., 110. 1872.

8. — The highest and clearest evidence is not required to rebut the presumption of negligence raised by the escape of fire. *Spaulding v. Chicago and Northwestern R. R. Co.*, 30 Wis., 110. 1872.

9. — The mere fact that a fire has been occasioned by sparks from its engine does not make a *prima facie* case against a railway company. The negligence of the company must either be shown directly or by circumstances. *Gandy v. Chicago and Northwestern R. R. Co.*, 30 Iowa, 420, 1870; *McCummons v. Same*, 33 ib., 187. 1871.

10. — In an action for damages against a railroad company for negligently managing its engines, so that fire was communicated to the standing grass and crops of the plaintiff, the burden of proof is upon the plaintiff, to show that the fire was caused by the negligence or want of care of the defendant. There is no legal presumption of negligence in such cases; it must be shown as a matter of fact. *Smith v. Hannibal and St. Joseph R. R. Co.*, 37 Mo., 287. 1866.

11. — If fire is communicated from an engine to property near the track by reason of a failure to use proper preventives, or by the carelessness of employes, the company is lia-

Negligence.

ble for the consequences; but negligence in either respect should not be inferred without proof, the burden of which rests on the party alleging it. *Indianapolis and Cincinnati R. R. Co. v. Paramore*, 31 Ind., 143, 1869; *Same v. Stark*, ib., 149.

2. Dry grass and weeds.

12. On railway lands. For a railway company to allow dry grass, weeds and other combustible matter, which are the natural accumulations of the soil, to remain in its right of way, is not negligence *per se*; and the company would not be guilty of negligence and liable for losses resulting from fire occasioned by sparks, emitted from its engine, igniting such accumulations, unless such accumulations were such as would not have been permitted by a cautious or ordinarily prudent man on his own premises, if exposed to the same hazard. *Kesse v. Chicago and Northwestern R. R. Co.*, 30 Iowa, 78. 1870.

13. — While the owner of land has the right to stack his grain or hay on premises adjacent to a railway, and thereby only takes the risk of accident by fire not occasioned by the company's negligence, yet if he is guilty of negligence himself in not plowing around the stacks, or in omitting to do such acts as would have protected the property and prevented the loss, this would be a case of contributory negligence, and he would not be permitted to recover against the company although it were also guilty of negligence in permitting an accumulation of dry grass and weeds along its track, in which the fire was ignited by sparks from the engine of a passing train. *Ib.*

14. — Persons occupying farms along railroads are entitled to cultivate and use them in the manner customary among farmers, and may recover for damages by fire caused by the negligence of the railway company, although they have not ploughed up the stubble or taken any other unusual means to guard against such negligence. *Kellogg v. Chicago and Northwestern R. R. Co.*, 26 Wis., 223. 1870.

15. — In the exercise of his lawful rights, every person has the right to presume that every other will perform his duty and obey the law, and it is not negligence for him to

assume that he is not exposed to danger which can only come to him through a disregard of law on the part of some other person. *Ib.*

16. — Where sparks from defendant's engine set fire to dry grass, weeds and bushes, suffered to remain and accumulate on land used for the railway, and the fire, spreading upon plaintiff's lands, destroyed his property, the question whether defendant was negligent in leaving its land in that condition, was properly left to the jury. *Kellogg v. Chicago and Northwestern R. R. Co.*, 26 Wis., 223. 1870.

17. — It was not error, as against defendant, to submit to the jury the question whether plaintiff was also negligent in not ploughing a strip to prevent the spread of fire. *Ib.*

18. — The fact that the fire passed through intervening fields and destroyed plaintiff's property does not render the damages remote. *Ib.*

19. — The fact that the fire would not have spread but for the dry weather and strong wind does not affect defendant's liability. *Ib.*

20. — The drouth and high wind are ordinary and not extraordinary circumstances. *Ib.*

21. — It is negligence in a railroad company, to permit vegetation to grow upon its right of way, to such an extent that cattle may be concealed from view. *Bass v. Chicago, Burlington and Quincy R. R. Co.*, 28 Ill., 9, 1862; see *Illinois Central R. R. Co. v. Frazier*, 47 ib., 505. 1868.

22. It is not negligence *per se* for a railway company to permit standing grass and weeds to remain on its right of way. *Kansas Pacific R. R. Co. v. Butts*, 7 Kans. 308. 1871.

23. — At a time of continued and extreme drouth, while a strong wind was blowing from the land of the defendant toward the adjoining wood land of the plaintiff, coals were negligently dropped from one of the defendant's engines, which set fire to a tie; the fire was communicated to an accumulation of weeds and grass and rubbish which defendant had suffered to gather by the side of its track; thence it spread to the fence and on plaintiff's woodland, burning and destroying his forest trees, etc: *held*, that these facts were sufficient to sustain a verdict in favor of the plaintiff for damages. *Webb v. Rome, Watertown and Ogdensburgh R. R. Co.*, 49 N. Y., 420. 1872.

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24. — In an action for damages caused by a fire which spread from the grass and weeds on the right of way of a railway company, where the evidence shows that there had been no suitable time to remove the grass and other combustible material by burning, it being conceded that there was no other way to remove it, it was held that the court ought not to have refused an instruction "that the defendant was not bound to burn the dry vegetation on any portion of its way, where, by reason of the direction and force of the wind, or other attendant circumstances, doing so would endanger its own property or that of others." *Spaulding v. Chicago and Northwestern R. R. Co.*, 30 Wis., 110. 1872.

25. On adjoining lands. It is not negligence, in a legal sense, for a farmer to leave grass and stubble standing on his pasture and grain field, along side of which, and separated therefrom by a fence, a railroad passes. *Flynn v. San Francisco and San José R. R. Co.*, 40 Cal., 14. 1870.

26. — Negligence of the plaintiff to release the defendant from liability must be the proximate cause of the injury; and the negligence of a railway company in leaving dry grass and weeds upon its right of way, whereby a fire was communicated to the field of the plaintiff, was the proximate cause of the injury. *Ib.*

27. — Where the conduct of defendant's agents was the immediate and proximate cause of the injury, it is no defense that the plaintiff was guilty of remote negligence in leaving grass in the fence corners adjacent to the road, whereby the fire was kindled. *Fitch v. Pacific R. R. Co.*, 45 Mo., 322. 1870.

28. — The damages are not too remote where the property consumed was separated from the track by a strip of ground forty or fifty yards wide, where the plat was covered with dry grass and other combustible matter. *Clemens v. Hannibal and St. Joseph R. R. Co.*, 53 Mo., 366. 1873.

29. — In case of fire communicated because of dry grass and weeds accumulating upon the right of way, the question of comparative negligence on the part of the plaintiff and the company, in respect to the accumulation of such combustible material, is a question of fact properly left to the jury. *Illinois Central R. R. Co. v. Nunn*, 51 Ill., 78. 1869.

3. Management of engines.

30. Acts of negligence. The use of wood in a coal burning engine, in a dry time, with a high wind prevailing is negligence. *Chicago and Alton R. R. Co. v. Quintance*, 58 Ill., 389. 1871.

31. — Negligence, either in running a train through a city at an unlawful rate of speed, or in opening grates and flues about the boiler in a careless manner, thereby allowing cinders to be thrown upon plaintiff's premises in said city, would be a sufficient ground of recovery for injuries to property by fire thus caused. *Martin v. Western Union R. R. Co.*, 23 Wis., 437. 1868.

32. — Proof of negligence in one of these particulars was held sufficient where both were alleged. *Ib.*

33. Defective locomotives. The grant of a franchise to operate a railroad does not confer the right to use upon it locomotives so constructed as to throw out burning coals that may set fire to buildings along the line. But the road must be operated with engines so constructed as to cause the least danger. *King v. Morris and Essex R. R. Co.*, 3 C. E. Green's Ch. (N. J.), 397. 1867.

34. — The use of ordinary fuel to make steam in engines is legal; the limit on its use is that the latest improvements in its management in practical use should be applied to it. *Lackawanna and Bloomsburg R. R. Co. v. Doak*, 52 Penn. St., 379. 1866.

35. — It is the duty of the company to use such precaution as might reasonably prevent damages to others, and a failure to do so is negligence. *Ib.*

36. — A building near a railway was found to be on fire, whilst a train, drawn by an engine without a "spark catcher," was passing; there was no direct evidence that sparks had come from the engine. Held, that it was proper for the court to submit the question of negligence to the jury. *Ib.*

37. — The fact of the use of a locomotive without a screen over the smoke stack is sufficient evidence of negligence to go to the jury in an action for damages caused by a fire originating from such engine. *Bedell v. Long Island R. R. Co.*, 44 N. Y., 367. 1871.

38. Degree of care required. The emission of sparks from the stack of a locomotive

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is not in itself illegal, and the loss of property adjacent to the road from the sparks, apart from misuse, is *damnum absque injuria*. *Frankford and Bristol Turnpike Co. v. Philadelphia and Trenton R. R. Co.*, 54 Penn. St., 345. 1867.

39. — It is the duty of railroad companies, running their engines close to buildings, to use the utmost vigilance and foresight to avoid injury. *Ib.*

40. — Every known safeguard should be adopted, and every approved invention from time to time should be used, to lessen the danger. *Ib.*

41. — The best precautions in use should be adopted. *Ib.*

42. — It was held not to be error to charge, that "if the defendants used ordinary skill in procuring a good and safe sparkcatcher, such as are most in use in the country, and approved by experienced railroad operators and mechanics, they would not be required to use any other or greater care or skill in respect to the spark catcher used by them." *Ib.*

43. — The evidence of the practice and common use of a stack by many others in the same business, is admissible on the question of the safety of the stack. *Ib.*

44. — The duty of the company was performed, if the construction of the stack was that which was best adapted to the purposes in known practical use. *Ib.*

45. — A railroad company running an engine through a village where wooden buildings are so near the track as to be exposed to fire from the sparks, is bound to a higher degree of care than when running in the open country. *Fero v. Buffalo and State Line R. R. Co.*, 22 N. Y., 209. 1860.

46. — Under such circumstances, and after the law had been stated in effect as above, an instruction to the jury that the plaintiff could not recover if the engine was in good order, of proper construction, and used with ordinary care, was properly refused. *Ib.*

47. — When the exposure of the buildings is increased by reason of a wind blowing towards them from the engine, which is standing at rest upon the track, the corporation is responsible for the utmost vigilance and care. *Ib.*

48. — *By reasonable care and diligence* is meant, having engines properly constructed, in good order, with suitable fixtures for pre-

venting injuries by fire; the sparkcatchers, such as are known to the company to have been used and approved of, and best calculated to prevent the emission of sparks, while allowing sufficient draft to create steam enough to propel the engine at proper speed; and such care and diligence in using the locomotive upon the road, as would be exercised by skillful, prudent, and discreet persons, having control of the engine, regarding their duty to the company, and having a proper desire to avoid injuring property along the road. *Baltimore and Susquehanna R. R. Co. v. Woodruff*, 4 Md., 242. 1853.

49. — A railway company is responsible for fires caused by the careless emission of sparks in the running of its engines. *Huyett v. Philadelphia and Reading R. R. Co.*, 23 Penn. St., 373. 1854.

50. — It is the settled law of America that railway companies are responsible for fires caused by the negligent construction or management of their engines. *Spaulding v. Chicago and Northwestern R. R. Co.*, 30 Wis., 110. 1872.

51. — A railway company is liable for damages resulting from fire communicated from cinders emitted from an engine operated on its road, in consequence of the negligence of its servants, or a defect in the engine, or want of the best contrivances in use for the prevention of the spread of fire. *Jackson v. Chicago and Northwestern R. R. Co.*, 31 Iowa, 176, 1870; *Spaulding v. Chicago and Northwestern R. R. Co.*, 30 Wis., 110, 1872; *Kansas Pacific R. R. Co. v. Butts*, 7 Kans., 308, 1871; *St. Louis, Alton and Terre Haute R. R. Co. v. Gilham*, 39 Ill., 455, 1866; *Rood v. New York and Erie R. R. Co.*, 18 Barbour (N. Y.), 80, 1854.

52. — An engine, which throws sparks into a meadow one hundred feet from the track, is not provided with proper appliances for arresting its sparks. *Illinois Central R. R. Co. v. McClelland*, 42 Ill., 355. 1866.

53. Evidence. If in an action against a railroad company to recover damages for the destruction of property by fire communicated by a locomotive, it is relied upon as a ground of defense that no burning sparks could reach so far as to set fire to the property, evidence is competent to show that the same engine using similar fuel, has emitted burning sparks which have fallen at as great a distance; and

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if evidence has been introduced in defense to show that other similar engines upon other roads did not emit sparks that would set fire to buildings, evidence is competent in reply to show that such engines upon one of said roads have emitted sparks which set fire to objects. *Ross v. Boston and Worcester R. R. Co.*, 6 Allen (Mass.), 87. 1863.

54. — The jury may infer negligence from the fact that fire has been scattered along by an engine, where there is no other explanation of the cause. To rebut that inference, the railway company should show the use of the best machinery and contrivances to prevent fire in that particular case, and that competent servants were employed. *Fitch v. Pacific R. R. Co.*, 45 Mo., 322. 1870.

55. — The fact that fire was communicated from the defendant's engine to the plaintiff's grain, with proof that this result was not probable, from the ordinary working of the engine, is *prima facie* proof of negligence sufficient to go to the jury. In such case, the finding of the jury will not be reviewed. *Hull v. Sacramento Valley R. R. Co.*, 14 Cal., 388. 1859.

56. — Where a house was set on fire by sparks from an engine on a dry and windy day, and it appears from the evidence that sparks flew to a great distance from defendant's engines and also set fire to several fields and fences near the same time and place, it was for the jury to say whether this was sufficient evidence of carelessness. *Huyett v. Philadelphia and Reading R. R. Co.*, 23 Penn., St., 373. 1854.

57. — The plaintiffs claimed, and their evidence tended to prove, that the fire by which their property was destroyed, originated by fire communicated by the engines of the defendant. The defendant gave evidence to show that its engines were not permitted to run when not in good condition, or when defective in the fire pans, dampers, screen, or smoke stack, which are the only places where fire can escape. The plaintiffs then gave evidence, without objection, tending to show that engines in suitable repair and of proper construction would not scatter fire so as to endanger property. *Held*, that it was proper for plaintiffs to show that, at or about that time, defendant's engines generally and habitually scattered fire in the vicinity of said

property. *Cleavelands v. Grand Trunk R. R. Co.*, 42 Vt., 449. 1869.

58. Negligence a question of law. When the facts are agreed, what constitutes negligence is a question of law, and this court can determine what is shown in the facts as readily and as fully as the district court. *Kansas Pacific R. R. Co., v. Butts*, 7 Kans., 309. 1871.

59. Excessive use of steam. If it appears that there was employed a greater amount of steam than was necessary on the engine, by reason of which an undue quantity of sparks was emitted, that will constitute negligence on the part of the company, if such unnecessary employment of the steam caused the destruction of property. *Great Western R. R. Co., v. Haworth*, 39 Ill., 346. 1866.

60. Inspection of locomotives. It seems that proof that the engines in use on the railroad were properly inspected as often as once in two days, and found to be in proper order, would seem to be sufficient, although it does not come down to the very moment that the fire escaped which caused the injury, and show that at that time there was no defect in the engine. *Spaulding v. Chicago and Northwestern R. R. Co.*, 30 Wis., 110. 1872.

4. Negligence of property owner.

61. Comparative negligence. Land owners are as much bound, in law, to keep their lands free from an accumulation of dry grass and weeds as railroad companies are; so where a fire is ignited on the company's right of way, and is communicated to fields adjoining, the negligence of such owner will be held to have contributed to the loss. *Ohio and Mississippi R. R. Co., v. Shanefelt*. 47 Ill., 497. 1868; *Illinois Central R. R. Co., v. Frazier*, ib., 505; *Chicago and Northwestern R. R. Co., v. Simonson*, 54 ib., 504. 1870.

62. — Unless it appears that the negligence of the company is greater than that of such land owner, the latter cannot recover for injuries thus arising. *Id.*

63. — When the owner of a building exposes it to such a degree of danger that it will most probably be destroyed, as when he permits the windows of a warehouse to remain open and unglazed, and other openings in the building to remain unrepaired, so that the fire emitted from a passing engine is liable to be blown

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into it, he is guilty of negligence; and if injury happen, he cannot recover, unless greater negligence is shown on the part of the company. *Great Western R. R. Co. v. Haworth*, 39 Ill., 346. 1866.

64. Contributory negligence. The fact that part of a pane of glass was out of the window of plaintiff's house, adjoining defendant's road, and that the damage was caused by sparks blown through the window from defendant's engine (which was being driven at an unlawful speed), *held* not to be such contributory negligence as would prevent a recovery. *Martin v. Western Union R. R. Co.*, 23 Wis., 437. 1868.

65. — In an action against a railroad company to recover damages for the destruction of property by fire communicated by a locomotive, if the question of the plaintiff's negligence involves a consideration of the dryness of the season, the strength and direction of the wind, and the condition of the plaintiff's buildings, it is proper to submit it to the jury, under general instructions, to determine whether the plaintiff exercised due care or not; and where this is done, no exception lies to a refusal to instruct the jury that "if the season was dry, and the wind was from the railroad and strong, and the plaintiff knew those facts, and left a door of a shed open towards the railroad, and shavings within the shed, or old and dry shingles upon the roof known to him to be such, and either of those things contributed to the fire, it is evidence of negligence on his part, which should preclude his recovery." *Ross v. Boston and Worcester R. R. Co.*, 6 Allen (Mass.), 87. 1863.

66. — Whether the leaving of a door partly open, through which sparks flew — such door being in a part of the house then in course of construction and under the hands of the builders — was culpable negligence on the part of the owner or his servants, is a question which may properly be referred to the jury as one of fact. *Fero v. Buffalo and State Line R. R. Co.*, 22 N. Y., 209. 1860.

III. STATUTORY LIABILITY.

67. Maine. In an action under R. S., ch. 51, § 31, it was held, that where the plaintiff has an absolute title to the property destroyed, he may recover, although he holds such

absolute conveyance as security for a debt. *Bean v. Atlantic and St. Lawrence R. R. Co.*, 58 Me., 82. 1870.

68. — A law providing that railway companies shall be responsible for damages from fire in certain cases will be enforced, and an action may be maintained thereunder, although no form of action has been provided in the statute. (Ch. 9, § 5, acts of 1842.) *Stearns v. Atlantic and St. Lawrence R. R. Co.*, 46 Me., 95. 1858.

69. — Suit may be brought under the statute without demand or notice. *Ib.*

70. — The defendant corporation is liable, although it may have leased its road to another company which controlled and managed the same. *Ib.*

71. — It is necessary to allege that the engine causing the fire was in the use of the defendant or its lessees. *Frye v. Atlantic and St. Lawrence R. R. Co.*, 47 Me, 523. 1860.

72. — Under ch. 9, § 5, acts of 1842, a railway company is not liable for damages done by fire from its engines to cedar posts deposited a few rods from the track, and intended for use in a short time at some other place. *Pratt v. Atlantic and St. Lawrence R. R. Co.*, 42 Me., 579. 1856.

73. — It is liable, however, for damages to growing timber. *Ib.*

74. — The language "along the route," used in the statute, applies to buildings near enough to be exposed to danger from fires from the engines. *Ib.*

75. — The said statute is remedial, and applies to corporations in existence before its passage. *Ib.*

76. — By § 5, ch. 9, Laws of 1842, railway companies are liable for injuries by fire communicated by their locomotives, and may effect insurance in their own behalf on the property exposed to such danger. Said statute applies only to permanent property. *Chapman v. Atlantic and St. Lawrence R. R. Co.*, 37 Me., 92. 1853.

77. — For injuries thus occasioned to other property, they are only responsible in case of negligence, unskillfulness or imprudence on their part. *Ib.*

78. Maryland. Under the act of 1838, the burden of proof is upon the railway company to show that it was not negligent in permitting fire to escape. *Baltimore and Susquehanna R. R. Co., v. Woodruff*, 4 Md., 242. 1853.

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79. — The statute rendering railway companies responsible for fires in certain cases, applies where the fire was occasioned by coals and cinders being thrown from the engine by the servants of the company. The burden of proof in such case is upon the company. *Baltimore and Ohio R. R. Co. v. Dorsey*, 37 Md., 19. 1872.

80. Massachusetts. The statute of 1840, ch. 85, making the proprietors of railroads responsible for injuries by fire communicated from their locomotive engines, applies to railroads established before as well as since its passage; and extends as well to estates, a part of which is conveyed by the owner, as to those of which a part is taken by authority of law, for the purpose of a railroad. *Lyman v. Boston and Worcester R. R. Co.*, 4 Cushing, (Mass.), 288. 1849.

81. — The statutes of 1840, ch. 85, holding railway companies liable for injuries occasioned by fires escaping from their engines, applies to personal property. *Ross v. Boston and Worcester R. R. Co.*, 5 Allen (Mass.), 87. 1863.

82. — A shop, adjoining a railroad track, was destroyed by fire communicated by a locomotive engine of a railroad company; and while the shop was burning, the wind wafted sparks from it, across a street, sixty feet, upon a house, and set it on fire, whereby it was injured: *Held*, that the owner of the house was entitled to recover of the railroad corporation the damages caused by the fire, under St. 1840, ch. 85, § 1, which provides that when any injury is done to a building of any person "by fire communicated" by a locomotive engine of a railroad corporation, the said corporation shall be responsible, in damages, to the person so injured. *Hart v. Western R. R. Co.*, 13 Metcalf (Mass.), 99. 1847.

83. — Under the St. of 1840, ch. 85, a railroad corporation is liable for injuries by fire communicated from one of its locomotive engines to machinery, tools, patterns and lumber in a building near its road, or to a fence by the side of its track. *Trask v. Hartford and New Haven R. R. Co.*, 16 Gray, (Mass.), 71. 1860.

84. — Under the Gen. Sts., ch. 63, § 101, if a spark from a locomotive engine sets fire to grass near the track, and the fire spreads in a direct line, without any break, across land of

several different proprietors, and a highway, to woodland half a mile distant from the railroad, the railroad company is responsible in damages to the owner of the wood. *Perley v. Eastern R. R. Co.*, 98 Mass., 414. 1867.

85. — A fire, set by sparks from a locomotive engine to wood piled against a freight house at the railroad station in a village, consumed the freight house and spread to and injured the station house, which was thirty feet distant from the freight house. A dwelling house, about sixteen hundred feet distant from the station house, and seven hundred and forty feet from the track, caught fire from sparks wafted from this conflagration, and was injured. *Held*, that the railroad company was liable for the injury, under the Gen. Sts., ch. 63, § 101. *Safford v. Boston and Maine R. R. Co.*, 103 Mass., 583. 1870.

IV. EVIDENCE.

86. Memorandum. It is proper to permit the plaintiff, in giving his testimony, to refresh his recollection from a memorandum he had made of the articles destroyed by the fire. *Chicago and Northwestern R. R. Co. v. McCall*, 56 Ill., 28. 1870.

87. Proof of negligence may come from either side. It is immaterial whether the evidence of negligence comes from the plaintiff or defendant. *McCready v. South Carolina R. R. Co.*, 2 Strobbart's Law, (So. Car.), 356. 1847.

88. — Where the fact of damages from the fire of a railroad was established by the party injured, and the manner in which the fire was communicated also appeared, it was held immaterial whether the evidence came from the plaintiff or from the defendant, and that it went properly to the jury whose province it was to judge of the fact of negligence. *McCready v. South Carolina R. R. Co.*, 2 Strobbart's Law, (So. Car.), 356. 1847.

89. Proof of other acts of negligence. In an action for damages resulting from negligence in setting out fire, it is not admissible for the plaintiff to prove that fire had before been communicated to the property of other persons on the road by defendant's engine. *Baltimore and Susquehanna R. R. Co. v. Woodruff*, 4 Md., 242. 1853.

90. — In an action to recover the value of a building which was burnt, and which is al-

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leged to have been set on fire by sparks from one of the defendant's engines which passed shortly before the fire was discovered, and is claimed to have been carelessly managed and unskillfully constructed, evidence that engines of the company, passing near that place on other occasions, emitted sparks and coals, which fell further from the track than the building in question, is competent. *Sheldon v. Hudson River R. R. Co.*, 14 N. Y., 218, 1856; reversing *Same v. Same*, 29 Barbour, 226. 1859.

91. — Upon the question whether fire was communicated to a building by sparks or coals from particular engines upon a specified occasion, evidence that sparks, and even coals, were emitted from other engines running on the same road upon other occasions, is incompetent, unless it be conceded that those other engines were of the same construction, used in the same manner and in the same state of repair. *Boyce v. Cheshire R. R. Co.*, 42 N. H., 97. 1860.

92. — Such evidence will be competent if it be conceded that the other engines are of the same construction, used in the same manner and in the same state of repair. *Same v. Same*, 43 ib., 627. 1862.

93. — A party is not answerable for the reasonable exercise of a right. He is liable for negligence, unskillfulness, or malice. The firing of woods several times by sparks from the engine of a company is not in itself evidence from which negligence in managing the fires can be inferred. *Railroad Co. v. Yeiser*, 8 Penn. St., 366. 1848.

94. Unusual quantity of sparks. Proof of the fact that the engine threw out an unusual quantity of fire was held sufficient to overcome any direct evidence given that it was in good order, or, if in good order, that it was skillfully managed by the engineer. *Chicago and Northwestern R. R. Co. v. McCahill*, 56 Ill., 28. 1870.

95. Wind. In an action on the Gen. Sts., ch. 63, § 101, for the injury of the plaintiff's buildings by fire communicated by the locomotive engine of a railway company, the introduction by the plaintiff of evidence of the direction of the wind at a place five miles distant from the fire does not afford the defendant good ground of exception, unless it appears to have misled the jury as to its direction at the

time and place of the fire. *Pierce v. Worcester and Nashua R. R. Co.*, 105 Mass., 199. 1870.

V. DAMAGES.

96. Interest. Interest from the commencement of the action may be allowed on the value of the property destroyed. *Chapman v. Chicago and Northwestern R. R. Co.*, 26 Wis., 295. 1870.

97. Owner of property must use due effort to save it. Where the son and servant of the plaintiff were in a position to have prevented any damage from a fire, and made no efforts to do so, the plaintiff cannot recover damages from the company, whose engines were the cause of the fire. *Illinois Central R. Co. v. McClelland*, 42 Ill., 355. 1866.

98. — Where fire is communicated to a building through the negligence of a railroad company, the owner cannot recover for the loss of such portion of the property as he could, easily and without danger, have saved from destruction. *Toledo, Peoria and Warsaw R. R. v. Pindar*, 53 Ill., 447. 1870.

99. Remote damages. Where it appeared that by the escape of sparks from a passing engine, a building belonging to the railway company was set on fire, and while burning, by means of a high wind, fire was blown across the street and there communicated to the house of the plaintiff; upon the question whether the injury complained of was not too remote to entitle the plaintiff to recover, it was held, to be a question of fact for the jury, under the instructions of the court. *Ib.*

100. — A railway company through negligence set fire to a quantity of wood in one of its sheds. The fire consumed the woodshed, and spread to and consumed the house of the plaintiff, situate about one hundred and thirty feet distant from the shed. Held, that no cause of action existed in favor of the plaintiff against the railroad company, by reason of such loss, the damages being too remote. *Ryan v. New York Central R. R. Co.*, 35 N. Y., 210, 1866; see *Field v. Same*, 32 ib., 339, 1865; *Webb v. Rome, etc., R. R. Co.*, 3 Lansing (N. Y.), 453. 1870.

101. — An engine set fire to a house by reason of the negligence of the employés, the fire from the house communicated to another at some distance from it, which was consumed with all its contents. Held, that the railroad

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company was not liable for damages done to the last building and its contents. The person committing the first act of negligence is liable for the immediate, not the remote consequences. *Pennsylvania R. R. Co. v. Kerr*, 62 Penn. St., 353. 1869.

102. — If fire is communicated from a locomotive to the house of A, and thence to the house of B, it is not a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote, and not the proximate, cause of the injury to B, but that is a question of fact, to be determined by the jury, under the instructions of the court; but if a high wind should arise, spreading the fire to a great distance, the damage might properly be considered too remote for compensation. *Pent v. Toledo, Peoria and Warsaw R. R. Co.*, 59 Ill., 349. 1871.

103. — He who by his negligence or misconduct creates or suffers a fire upon his own premises, which, burning his own property, spreads thence to the immediately adjacent premises and destroys the property of another, is liable for the damages sustained by him. *Webb v. Rome, Watertown and Ogdensburgh R. R. Co.*, 49 N. Y., 420. 1872.

104. — A fire arising from negligence is not a fire "accidentally begun," within the meaning of the act of Anne (6 Anne, ch. 31, § 67), as amended by the act of George III (14 George III, ch. 78, § 76), providing for exemption of liability for fires accidentally begun. *Ib.*

VI. LESSEES AND CONTRACTORS.

105. **Contractors.** The maxim *respondet superior* is limited by this principle: the responsibility of the master grows out of, is measured by, begins and ends with his control of his servant. *Callahan v. Burlington and Missouri River R. R. Co.*, 23 Iowa, 562. 1867.

106. — In an action against a railway company for damages growing out of the wrongful acts of an employé, the petition alleged that the defendant contracted with W. & Co. for the grading of its road, reserving the right to give directions as to the manner of the performance of this work; W. & Co. sublet the work to F.; the contract between the defendant and W. & Co. required the removal or burning of perishable materials, as the "en-

gineer of the company might direct;" that an engineer of the defendant directed F. to burn some rubbish that was on the line of the grading, which F. did, but in so negligent a manner that the fire was permitted to escape, and damage was done thereby. *Held*, that these averments in the petition were insufficient to justify a recovery against the defendant, as the loss appeared to have been occasioned, not by the burning ordered by the engineer, but by the negligent manner in which it was done. *Ib.*

107. Section 1327, Rev. 1860, does not extend the liability of railroad companies to the acts of those not their servants. *Ib.*

108. **Lessees.** Where one railroad corporation operates and controls the railroad of another corporation under a lease or a contract which is equivalent to a lease, the lessee corporation becomes the proprietor of the leased railroad, by virtue of General Statutes, ch. 145, § 1, and is liable under General Statutes, ch. 148, § 8, for damage accruing by fire or steam from a locomotive by said lessee corporation upon the track of the leased railroad. *Pierce v. Concord R. R. Co.*, 51 N. H., 590. 1872.

VII. GENERAL MATTERS.

109. **Assignment of cause of action.** A right of action for negligently setting fire to and burning up grass and fences, and hay stacked, upon a farm, is assignable. *Fried v. New York Central R. R. Co.*, 25 Howard's Pr. (N. Y.), 285. 1858.

110. **Common Law.** The statute, 6 Anne, ch. 3, § 6, which declares that "no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin," with the construction which makes it include fires caused by negligence, became and is a part of the common law of this country. *Spaulding v. Chicago and Northwestern R. R. Co.*, 30 Wis., 110. 1872.

111. — But the statute of Geo. III, ch. 78, § 86, (enacted in 1774), which declares that "no action shall be maintained against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin," if understood to include fires caused by negligence, has never been received as part of the common law of this country. *Ib.*

112. — Even if the said act were received

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as a part of the common law, whether it would apply to fires caused by locomotives, *quære? Ib.*

113. Contract for right of way. Where the owner of land conveyed a strip thereof to a railroad company, for its track, the value of which did not exceed \$60, and received therefor \$1,600; it was *held*, that it might fairly be presumed that in making such conveyance, the grantor must have contemplated the risk of injury to his remaining lands by fire, from engines running on the road. *Rood v. New York and Erie R. R. Co.*, 18 Barbour (N. Y.), 80. 1854.

114. Cord wood piled near railway. Where the owner of a quantity of cord wood deposits the same at a certain place near a railroad track, in accordance with the direction of an agent of the railroad company, and under an agreement with such agent by which it is to become the property of the railroad company when measured and paid for by the company, but until so measured and paid for, to remain the property of such owner, and while so remaining his property is consumed by fire originating from a locomotive engine in the use of the company and caused by the negligence of the employes of the company, and these facts are averred in the complaint in a suit by such owner against the company to recover the value of the wood; it is not necessary to allege also the destruction of the wood without the fault or negligence of the plaintiff. *Indianapolis and Cincinnati R. R. Co. v. Paramore*, 31 Ind., 143, 1869; *Same v. Stark*, *ib.*, 149.

115. — The railroad company is not bound to provide a watchman to protect property so placed by the owner, at his own instance, without any contract with the company, in danger of taking fire by unavoidable accident from the engines used by the company. *Ib.*

116. Cutting off hose. Where a hose was necessarily laid across a railway to obtain water to extinguish a fire, and the railway company knowingly run a train over it and cut it off; the railway crossed another railway at grade a few hundred feet from such hose but the train did not stop at the crossing as required by the statute, it was *held*, that the severing of the hose was the proximate cause of the destruction of the building, and the railway company was liable. *Metallic Casting*

Company v. Fitchburg R. R. Co., 109 Mass., 277. 1872.

117. — Damages caused by the spreading of a fire in consequence of defendant's negligently injuring a hose actually in use in extinguishing it, whereby the supply of water was cut off, are too remote to sustain an action. *Mott v. Hudson River R. R. Co.*, 1 Robertson (N. Y.), 585, 1863; see *Same v. Same*, 8 Bosworth (N. Y.), 345, 1861.

118. Damages from fire included in estimate of damages for right of way. If a jury, in estimating damages for right of way, include compensation for the exposure of the buildings of the land owner to fire in consequence of the neighborhood of the railroad, such compensation will be presumed to be estimated with due allowance for the indemnity provided by the Gen. Sts., ch. 63, § 101, in event of their injury by fire communicated by locomotive engines of the railroad corporation. *Pierce v. Worcester and Nashua R. R. Co.*, 105 Mass., 199. 1870.

119. — By the charter of the Philadelphia and Reading R. R. Co., the assessment of damages for the right of way included the probable consequences of fire caused by the necessary emission of sparks from the engines of the company. *Railroad Co. v. Yeiser*, 8 Penn. St., 366. 1848.

120. — The venue and proceedings thereon, with proof of payment of damages, is evidence in an action for damages occasioned by fire to ascertain whether the danger and inconvenience of sparks were considered in estimating the damages. *Ib.*

121. Failure to extinguish the fire. Where the engine of the defendant's gravel train, on which were a large number of its workmen, set fire to combustibles on the track, which was known to defendant's servants in charge of the train, and the fire spread to plaintiff's property, a failure to stop the train and leave the men to extinguish the flames was negligence, which renders the company liable. *Rolke v. Chicago and Northwestern R. R. Co.*, 26 Wis., 537. 1870.

122. — It seems that in case of a passenger train a different rule might apply. *Ib.*

123. Fruit trees. In an action to recover damages for the destruction by fire, of fruit trees, through the negligence of the defendant, it is proper for the judge to instruct the

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jury that the plaintiff is entitled to recover the value of the trees, as they stood upon his land at the time of the fire, if he is entitled to recover at all; and to refuse to charge that the plaintiff can only recover the diminished value of the land since the destruction of the trees. *Whitbeck v. New York Central R. R. Co.*, 36 Barbour (N. Y.), 644. 1862.

124.—The true rule of damages is, the value of the thing destroyed, although it is part of the realty if it has a value which can be accurately measured and ascertained, without reference to the value of the soil. *Ib.*

125. Joint action. Where two or more persons have a joint interest in the damage caused by the destruction of buildings by fire, through such fault of another as would make him answerable therefor, they may maintain a joint action for the loss, without having jointly the legal title to the buildings destroyed. *Cleavelands v. Grand Trunk R. R. Co.*, 42 Vt., 449. 1869.

126.—And it was thus held, where one of the plaintiffs held the legal title to certain realty and the buildings thereon, and had executed to another a bond for a deed for the undivided one-half thereof. *Ib.*

127. Judgment in bar. A judgment against a railroad company, for damages for the destruction of a building by fire communicated from a locomotive, is a bar to a subsequent action by the same plaintiff against the same company for damages for the destruction of other buildings by fire communicated from the building first destroyed, although the subsequent action is brought and prosecuted for the benefit of an insurance company which has paid to the plaintiff the amount of a policy of insurance upon such other buildings. *Trask v. Hartford and New Haven R. R. Co.*, 2 Allen (Mass.), 331. 1861.

128. Nuisance. That a building was erected after a railroad was laid out and constructed, is no impediment to relief against any nuisance arising from operating the road. *King v. Morris and Essex R. R. Co.*, 3 C. E. Green's Ch. (N. J.), 397. 1867.

129. Warehouses. The owner of a warehouse adjoining a railway track and of goods stored therein, is bound, as against the railway company, only to use what would be ordinary care and prudence to avoid injury to such warehouse and goods by fire from locomotives

on the road. *Ward and Butterfield v. Milwaukee and St. Paul R. R. Co.*, 29 Wis., 144. 1871.

130.—In an action for such injury it was error to instruct the jury that plaintiffs could not recover unless their "warehouse was in such condition as *very* prudent and cautious men would generally keep their property in under like circumstances." *Ib.*

131.—The true question was what care would usually be exercised by men of ordinary prudence, in respect to property of the same kind, and similarly situated. *Ib.*

132. Wood yard. When a railroad company has used a piece of ground as a wood yard, for a long time, all persons building contiguous thereto, are bound to know the fact, and of the right of the company to pile up wood upon any part of the premises, when it suits their interest or convenience to do so. *Macon and Western R. R. Co. v. McConnell*, 27 Ga., 481. 1859.

FICTITIOUS SUIT.

1. Such proceeding is a contempt. A court will not take cognizance of a suit which appears to be fictitious. *Smith v. Junction R. R. Co.*, 29 Ind., 546. 1868.

2.—Such a proceeding is a punishable contempt of court, and will be dismissed at the costs of the real party to the action. *Ib.*

FLOODS.

See CARRIAGE OF MERCHANDISE.

FLYING SWITCH.

See INJURIES TO PERSONS ON THE TRACK.

FORCIBLE ENTRY AND DETAINER.

1. Presumption—trespass. In this case, it was presumed that the act of a railway superintendent and employes in taking pos-

Franchise — Misappropriation of Right of Way.

session of lands was not a willful trespass, but an official act. *People ex rel. v. New York Central R. R. Co.*, 51 N. Y., 623. 1872.

FORECLOSURE.

See MORTGAGE.

FOREIGN CORPORATIONS.

SEE ATTACHMENT; FEDERAL COURTS; GARNISHMENT; JURISDICTION.

1. **New Jersey.** A foreign corporation carrying on business in New Jersey, under legislative sanction, is liable for injuries occasioned by its acts, upon the same principles and to the same extent that a company incorporated by the laws of that state would be. *Austin v. New York and Erie R. R. Co.*, 1 Dutcher, (N. J.), 381. 1856.

2. **New York.** A foreign corporation, doing business in New York, cannot exempt itself from liability under the laws of New York by pleading a different rule of law in force in the state in which it is organized. *Milnor v. New York and New Haven R. R. Co.*, 53 N. Y., 363. 1873.

3. **Ohio.** Under the laws of Ohio, foreign railroad corporations, whose roads lie partly in this state, are accorded the right to own, operate and maintain their roads in Ohio, in the same manner as domestic railroad companies. *State ex rel. v. Sherman*, 22 Ohio St., 411. 1872.

FOREIGN STATUTE.

SEE PLEADING.

FORFEITURE.

SEE CHARTER; CONSTRUCTION OF RAILWAYS; SUBSCRIPTIONS BY INDIVIDUALS.

1. **Franchise.** A railroad company which has built a branch road under authority from

the legislature, maintains it in good condition for use, uses it regularly and sufficiently for the transportation of freight, and is ready at all times to transport passengers and draw passenger cars over it whenever any shall be offered to be transported or drawn for a reasonable toll or compensation, does not forfeit its franchise by discontinuing, after public notice, the running of regular passenger trains over the branch railroad, when there is not sufficient passenger business at any rate of toll or fare to pay the expense of running them, by reason of the establishment, under authority of the legislature, of a competing line for the transportation of passengers over a horse railroad. *Commonwealth v. Fitchburg R. R. Co.*, 12 Gray, (Mass.), 180. 1858.

2. — **Abandonment of route.** A railroad company which has completed its road between the *termini* named in its charter or articles, forfeits its franchise by abandoning or ceasing to operate a part of its route. *People v. Albany and Vermont R. R. Co.*, 24 N. Y., 261, 1862; see *Same v. Same*, 37 Barbour (N. Y.), 216, 1861; see *Same v. Same*, 19 Howard's Pr. (N. Y.), 523, 1860; 20 ib., 353, 1860; 11 Abbott's Pr. (N. Y.), 136, 1860; 12 ib., 171. 1860.

3. — **Collateral proceeding.** In a proceeding in chancery against a corporation to set aside conveyances of real estate, alleged to have been obtained by fraud of the company, the fact whether the company ever had a corporate existence may be inquired into. *Carrey v. Cincinnati and Chicago R. R. Co.*, 5 Iowa, 357. 1857.

4. — But in such collateral proceeding, where the corporation has done no act which *per se* works a forfeiture or dissolution, or has not surrendered its franchises, the courts of another state cannot inquire whether there have been such irregularities or failure to comply with the terms of its charter, or the laws under which it was organized as to work a forfeiture of its existence. *Id.*

5. — In such case, the forfeiture must be first declared in the state where it was incorporated. *Id.*

6. **Misappropriation of right of way.** The misappropriation by a railroad corporation, of land taken by right of eminent domain for the location of the railroad, cannot be set up as working a forfeiture of the franchise on a writ of entry brought by the owner of the

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fee; but the defendant may maintain the writ to establish his right in the land and recover damages or *mesne* profits for the unauthorized use of it. *Proprietors of Locks and Canals v. Nashua and Lowell R. R. Co.*, 104 Mass., 1. 1870.

7. Waiver of forfeiture. By an act of the legislature recognizing the existence of a corporation, all previous acts of forfeiture are waived. *State v. Mississippi, Ouachita and Red River R. R. Co.*, 20 Ark., 495. 1859.

FORMER ADJUDICATION.

SEE INJURIES TO DOMESTIC ANIMALS.

1. Contract. Upon a plea of former adjudication, the identity of the present with the former cause of action is a question of fact for the jury, to be determined upon the evidence. *Amsden v. Dubuque and Sioux City R. R. Co.*, 32 Ia. 1871.

2. — Where a railway company agreed to put in and maintain a side track and switch, and to regularly run its cars thereon to any warehouse that might be built by plaintiff, for the purpose of receiving and discharging grain, it was *held*, that the adjudication of an action to recover damages for a refusal by the company to receive a car load of freight, would not be a bar to an action to recover damages for a subsequent total abandonment of the side track, unless such refusal to receive was intended as a final abandonment, and that the plaintiff knew it when he commenced his former action. *Id.*

3. Employes — dismissal. If a servant or agent wrongfully dismissed from service elect to sue for the breach, before the termination of the period for which he was hired, and recovers, such recovery will be a bar to any subsequent action upon the same contract. *Booge v. Pacific R. R. Co.*, 33 Mo., 212. 1862.

4. Equity. Where it appears that all material matters in equity between the same parties have been settled and adjudicated in another state, the bill of the complainant will be dismissed. *Brown v. Lexington and Danville R. R. Co.*, 2 Beasley's Ch. (N. J.), 191. 860.

5. Errors of law in former trial. Where

a former suit is set up as a bar to a cause of action, the fact that upon the trial of the prior action evidence was given not wholly irrelevant to the issue therein, and also relating to the transaction upon which the cause of action in suit arose, is not sufficient to bar the claim where it was not within the issues and was not submitted or passed upon in such prior action. *East New York and Jamaica R. Co. v. Elmore*, 53 N. Y., 624. 1873.

FRANCHISES.

See CHARTER; CONSTITUTIONAL LAW; EMINENT DOMAIN; EXECUTIONS; FORFEITURE.

1. Special franchise. The fact that a party is a corporation in the exercise of its corporate powers does not tend to establish its right to a special franchise. *Schierhold v. North Beach and Mission R. R. Co.*, 40 Cal., 447. 1871.

2. Use of track. The use of its track by a railroad company is a franchise, granted by law to such company, in the nature of a contract, and as such, inviolable, except under the general power reserved to the state, to alter or repeal the company's charter. *Commissioners of Central Park, In matter of*, 63 Barbour (N. Y.), 282. 1872.

FRAUD.

See ELECTION OF CORPORATE OFFICERS; MORTGAGE.

1. Act of legislature. An act of the legislature cannot be attacked on the ground of fraud. *Oroville and Virginia R. R. Co. v. Plumas Co.*, 37 Cal., 354. 1869.

2. Assignment of executory contract. The defendant, being the president of a railway company, together with the secretary of the company, let the contract for the construction of the road to certain contractors, and then immediately became the assignee of a part of the contract. The contract was afterwards approved by the board of directors, but there was no evidence that they knew of the assignment. The contractors were to be paid

Conveyances — Possession.

in the bonds of the company, and the bonds were placed in the defendant's hands for that purpose. He refused to surrender them. *Held*, that had the assignment been valid as to the contractor, yet being wholly unperformed at the time, and made without the knowledge of the company, the defendant had no right to interfere as between the company and the contractor. That the assignee must look to his assignor and not to the company. That the whole transaction between the president and secretary and the contractor was fraudulent and void as to the company. That it was immaterial whether there was fraud in fact or injury to the company; that the agents of the corporation could not be permitted to place themselves in a situation where it was to their interest to let the contract to the highest bidder. *Flint and Pere Marquette R. Co. v. Dewey*, 14 Mich., 478. 1866.

3. **Conveyances.** A conveyance made with intent to defraud the creditors of the grantor is void as to third parties, if without consideration to an innocent grantee. *New York and Harlem R. R. Co. v. Kyle*, 5 Bosworth (N. Y.), 587. 1859.

4. — A conveyance of real estate obtained by fraud will, in equity, be treated as if it had never been made. *Carey v. Cincinnati and Chicago R. R. Co.*, 5 Ia., 357. 1857.

5. — The fraudulent vendee is merely the trustee of the vendor. *Id.*

6. — A sale, though fraudulent and void as to the creditors of the vendor, is good as to other persons. *La Crosse and Milwaukee R. R. Co. v. Seeger*, 4 Wis., 268. 1855.

7. — A judgment creditor cannot treat a conveyance of the debtor as a nullity and seize the property so conveyed in the hands of a third person. His remedy is by an action to annul the conveyance. *Drummond v. Com'rs of Clinton and Port Hudson R. R. Co.*, 7 Robinson (La.), 234. 1844.

8. **Equity.** Although there must be something special in a case of fraud, and in a case of combination or confederacy, to make either an independent ground of chancery jurisdiction, yet a combination to defraud, will, in general, be relieved against in equity. *Story v. Norwich and Worcester R. R. Co.*, 24 Conn., 94. 1855.

9. **Evidence.** In an action to recover the price of timber and lumber sold and delivered

by the plaintiff to the defendant, and which the plaintiff had previously purchased of S. & W., the defendant offered to show that the sale to the plaintiff, by S. & W., was made for the purpose of defrauding the creditors of S. & W.; that H. & F. were their creditors, at the time of such sale; and that they had duly attached, in the hands of the defendant, the money due for such timber and lumber, in an action brought against S. & W., and had recovered judgment and issued an execution against them, to the sheriff, who in virtue thereof and of said attachment and levy, had demanded of the defendant the money so due for the timber and lumber, and the defendant had paid it over to the sheriff, in satisfaction of the judgment and execution. *Held*, that this evidence was properly excluded, as being immaterial, and constituting no valid defense to the action; the defendant having no standing in court which would enable it to litigate the question of fraud in the sale from S. & W. to the plaintiff. *Campbell v. Erie R. R. Co.*, 46 Barbour (N. Y.), 540. 1866.

10. **Invoice.** The facts in a particular case with relation to the delivery of goods and the payment to an unauthorized person upon a pretended invoice — considered. *McGoldrick v. Willits*, 52 N. Y., 612. 1873.

11. **Officers of corporation.** Where a bill in chancery alleges that a corporation made false representations, it will not be presumed that those through whom the corporation acted, exceeded their authority. *Carey v. Cincinnati and Chicago R. R. Co.*, 5 Ia., 357. 1857.

12. **Possession: evidence.** Where it has been proven that the defendant obtained and had possession of certain slaves illegally, and was the last person seen in possession of them, they will be presumed to be still in his possession, and, the burden of proof is on him to show that he has parted with the possession. *Drummond v. Com'rs of Clinton and Port Hudson R. R. Co.*, 7 Robinson (La.), 234. 1844.

13. — By the law of Virginia the retention of the possession of personal property by the vendor, is *prima facie* evidence of fraud. *Baltimore and Ohio R. R. Co. v. Hoge*, 34 Penn. St., 214. 1859.

14. — Circumstantial evidence may be given in case of alleged fraud, to show that a receipt, purporting to be given for one purpose, was

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merely intended as a cover to a conditional sale. *Ib.*

15. — Where a *prima facie* case of fraud is made out, the sufficiency of evidence to rebut it is exclusively the province of the jury. *Ib.*

16. **Railroad stock.** The question of fraud discussed with reference to the sale of certain railway stock. *Yates v. Alden*, 41 Barbour (N. Y.), 172. 1863.

17. **Receiver.** In equity, upon a hearing on the merits, the court were equally divided on the question whether the bill should be dismissed. *Held*, that no judgment could be entered, that the cause remained pending, and that receivers who had been appointed to hold the property during the pendency of the suit, would remain in possession. *Northern R. R. Co. v. Concord R. R. Co.*, 50 N. H., 166. 1870.

18. **Sale of personal property.** When the defendants having bought certain railroad cars, paid for them and received them in their possession, and the seller afterwards induces the plaintiffs to pay him for the same cars, upon the fraudulent representation that he has delivered them to their agent, the plaintiffs must bear the loss. *Ohio and Mississippi R. R. Co., v. Kasson*, 37 N. Y., 218. 1867.

19. **Transfer of a railway.** The Northern R. R. Co., brought a bill in equity against the Concord R. R. Co., to enforce a contract made by a former board of directors of the Concord R. R. Co., substantially transferring the management of the Concord railroad to the Northern R. R. Co., for the term of five years. Upon the evidence, a majority of the court found that the controlling purpose of the directors of the Concord R. R. Co., in making the contract, was to prevent the management of the road from passing into the hands of a new board of directors, whose election at the next annual meeting was generally anticipated; and that this purpose was known to the Northern R. R. Co. On this state of facts, a majority of the court *held*, that the contract was invalid because of the purpose for which it was made. *Northern R. R. Co., v. Concord R. R. Co.*, 50 N. H., 166. 1870.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FREE PASSES.

See BAGGAGE. INJURY TO PASSENGERS.

FREEZING OF FRUITS.

See CARRIAGE OF MERCHANDISE.

FREIGHTS.

See CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE.

FREIGHT TRAINS.

See CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; INJURIES TO PASSENGERS.

FRIGHTENED TEAMS.

See INJURIES TO PERSONS ON THE TRACK.

FUND IN COURT.

1. **Distribution.** Where there is a fund in court to be distributed among different claimants, a decree of distribution will not preclude a claimant, not embraced in its provisions; but, having rights similar to those of other claimants, who are thus embraced, from asserting by bill, previous to the distribution, his right to the share in the fund. *Howard, In the matter of*, 9 Wallace, 175. 1869.

GARNISHMENT.

See MORTGAGE.

1. **Answer of garnishee.** When a corporation is proceeded against as garnishee, its answer is to be received in the only mode in which a corporation can answer, under its

Appeal — Books of Corporation.

corporate seal. *Baltimore and Ohio R. R. Co., v. Gallahue*, 12 Grattan (Va.), 655. 1855.

2. — If a corporation is made a garnishee, it may answer by its proper officer, but the answer must be sworn to. *Oliver v. Chicago and Aurora R. R. Co.*, 17 Ill., 587. 1856.

3. — The answer of a garnishee must stand, whether it be a denial or an affirmation of new matter, until evidence is produced tending to overthrow it. *Holton v. South Pacific R. R. Co.*, 50 Mo., 151. 1872.

4. — A garnishee answering that he has the property of the defendant in his hands may be permitted afterwards to show that a prior attachment had been levied thereon, *EUSTIS*, J. dissenting. *Robeson v. Mississippi and Alabama R. R. Co.*, 13 La. (O. S.), 465. 1838.

5. — Where a commissioner is appointed by the court to take the disclosure of a trustee, the course pursued should conform, as near as may be, to that adopted by the court. The trustee may have counsel to aid him in making his disclosure. His answers to the interrogatories may be drawn by the commissioner if the trustee desires it, or they may be drawn by himself, or by some one whom he may request to do it for him. They may be drawn in the presence of the commissioner, or in some near and convenient place, at the option of the trustee; and they should be made as soon as may be. The trustee should personally appear before the commissioner at the time and place specified in the notice served upon him. *Boston and Maine R. R. Co. v. Salmon Falls Bank*, 27 N. H., 455. 1853.

6. **Appeal.** Plaintiff obtained a judgment *in solido* against A., B. and C. A. appealed, and the judgment was reversed. But pending the appeal, plaintiff issued an execution against B., and garnished A., who answered that he had funds of B., but if the judgment already rendered against him in the suit should be maintained on appeal, then he would owe B. a balance, which would depend on the amount of the interest and costs due on such judgment. *Held*, that the garnishee was liable upon the answers. That the suspension appeal did not prevent the plaintiff from exercising his right of garnishment against A., who had taken it. *Baker v. New Orleans, Opelousas and Great Western R. R. Co.*, 10 La. An., 110. 1855.

7. — On appeal from an order making a

rule absolute, requiring garnishees to pay money and effects over to the sheriff: *held*, that no answer to the rule is required. The liability of the garnishees is to be tested from their answers. *Oakey v. Mississippi and Alabama R. R. Co.*, 13 La. (O. S.), 567. 1838.

8. **Assignment.** In an execution attachment, the defendant having admitted the debt and suggested an assignment of it, the assignees were summoned, who asserted their claim against the attachment. *Held*, that the case was in fact an interpleader, the issue of which the defendant was bound to await before paying the money; and that he had not been in fault in not paying the money into court, where he had been ruled to do so by the assignee. *Irwin v. Pittsburgh and Connellsville R. R. Co.*, 43 Penn. St., 488. 1863.

9. — An assignment by the party to his attorneys of the report of referees, to secure advances and counsel fees, leaves the assignor the owner of the residue, and his interest is liable to attachment. *Fithian v. New York and Erie R. R. Co.*, 31 Penn. St., 114. 1857.

10. **Attachment.** Property under attachment by garnishee process at the suit of one creditor, cannot be attached specially by another creditor. *Kendrick v. B. and New York Central R. R. Co.*, 3 R. I., 235. 1855.

11. **Bills and notes.** A person indebted by a note not negotiable, or not assignable by the law merchant, may be made liable as a garnishee, after the note has become due and before it is assigned, but not, as a general rule, before it becomes due, nor after he has had notice of its assignment, if he rely upon such notice in his answer. *Junction R. R. Co. v. Cleneay*, 13 Ind., 161. 1859.

12. — The judgment rendered against him as a garnishee, will bar a subsequent action by an assignee who had not given notice of the assignment prior to such judgment. *Id.*

13. — In the case of commercial paper, before a judgment can be rendered against a garnishee defendant, the plaintiff must show that the paper has matured, and that at the time of maturity it was held by the attachment defendant, or that it was not in the hands of a *bona fide* holder. *Cleneay v. Junction R. R. Co.*, 26 Ind., 375. 1866.

14. **Books of corporation.** A railway corporation, in making a disclosure by its agent under a trustee process, is not concluded by

Burden of Proof — Costs.

the entries upon its books. Such entries may be explained. *Bigelow v. York and Cumberland R. R. Co.*, 37 Me., 320, 1853; *Jones v. Same. Ib.*

15. Burden of proof. The burden of proof is on the party seeking to subject a railroad company to liability as garnishee in a suit against a contractor, to show facts which would have enabled the contractor himself to maintain a suit against the company. *Reagan v. Pacific R. R. Co.*, 21 Mo., 30, 1855.

16. Connecting railways. The consignee of goods transported over two connecting railroads is not liable as trustee in foreign attachment of the railroad company from which he receives the goods, for freight upon the first road, although it is the custom of the two companies for the one first receiving the goods to charge freight to the other upon delivery to it, and of the latter to collect the whole freight from the consignee. *Gould v. Newburyport R. R. Co.*, 14 Gray (Mass.), 472, 1860.

17. Contingent liability. A party summoned as a trustee, while it is contingent whether he will be indebted to the principal defendant, will be discharged. *Williams v. Androscoggin and Kennebec R. R. Co.*, 36 Me., 201, 1853.

18. — The changing of such contingency into an absolute indebtedness *after* the service upon the trustee, though *before* the judgment, will have no effect to render the trustee chargeable. *Ib.*

19. Contract. Garnishment cannot have the effect of changing the nature of a contract between the garnishee and the defendant, or of preventing the garnishee from performing a contract with a third person: any other doctrine would lead to mischievous results. *Baltimore and Ohio R. R. Co. v. Wheeler*, 18 Md., 372, 1862.

20. — A contract anterior to an attachment, *bona fide*, and for good consideration, between two railroad companies, whose roads connected and a system of through fare and freight established, that each should receive and advance for the other, the balances between them to be settled monthly, controls the attachment, and such contract may be implied or inferred, by or from a course of mutual dealing. *Ib.*

21. — A corporation was summoned as a trustee in a suit against A. The company had contracted to pay A. a certain sum for con-

struction of a road, and \$29,000 of the sum was to be used in payment of land damages. The whole \$29,000 had been charged up to A. on the company's books. *Held*, that the company could only take credit for so much thereof as had been actually paid. *Harris v. Somerset and Kennebec R. R. Co.*, 47 Me., 298, 1859.

22. — Where a railway company was garnished as the debtor of one of its contractors, by service on its chief engineer, made July 7, 1854, who answered for the company, setting up the contract between the company and the contractor, which contained the following provisions: "It is further agreed, that as the work progresses, monthly estimates shall be made by the chief engineer, of the work done, and on the presentation of such estimates, certified by such engineer, the company will pay the amount of such estimates, less such sum, not exceeding twenty-five per cent. as said engineer may recommend to be retained as security for the faithful completion of this contract," etc. "And lastly, it is mutually agreed, that the contractors shall at any time, when required, furnish the engineer with satisfactory evidence that the men employed on the above work have been paid, and that if they shall fail to furnish evidence within twenty days, after the first of the month, that all labor on this contract for the preceding month has been paid, then the engineer may, at his discretion, claim and receive from the company any money due or becoming due to the contractors;" and the contract further provided that in no event should the company be held for the debt of the contractors; and where the answer further stated that all moneys due the contractors at the time of the garnishment had been subsequently paid out to the laborers by the company, the contractor having absconded a few days previous to the garnishment. *Held*, that the contractors could not sue the company until they had furnished satisfactory evidence of the payment of the laborers, and that the engineer held the money for the laborers, and that the plaintiff could not recover against the garnishee. *Taylor v. Burlington and Missouri R. R. Co.*, 5 Ia., 114, 1857.

23. Corporations. Corporations are liable to the process of garnishment. *Ib.*; *Baltimore and Ohio R. R. Co. v. Gallahue*, 12 Gratian (Va.), 655, 1855.

24. Costs. Under Rev. Sts., ch. 109, § 50, a

Demand — Interest.

person, adjudged a trustee, can retain out of the goods in his hands for his costs and charges, only such sum as may be allowed by the court in which he is charged. If that taxation is erroneous, it may be appealed from, but the question cannot be raised in a suit against such trustee by the principal debtor for the balance in his hands. *McLaughlin v. Western R. R. Co.*, 12 Cushing (Mass.), 131. 1853.

25. Demand. In the case of an execution against a debtor and against his effects in the hands of a railroad company as his trustee, a demand on the president of the corporation to satisfy the execution was held to have been made upon a proper officer of the corporation. *Bickford v. Boston and Lowell R. R. Co.*, 21 Pickering (Mass.), 109. 1838.

26. Evidence. A railroad company having been summoned as a garnishee, and a jury having been impaneled to try whether it has made a full disclosure of its indebtedness to the defendant in the action, the statements of a division engineer to a third person in relation to the indebtedness of the company to the defendant, was not competent evidence; it not appearing that said engineer was the agent of the company having any authority on this subject, or that at the time of making the statement he was engaged as agent about the business referred to, so as to make his statements part of the transaction, and explaining the nature thereof. *Baltimore and Ohio R. R. Co. v. Gallahue*, 12 Grattan (Va.), 655. 1855.

27. Execution. Process of garnishment will not lie against the debtor of a garnishee against whom an execution has been returned *nulla bona*. *Illinois Central R. R. Co. v. Weaver*, 54 Ill., 319. 1870.

28. Exemption. Ch. 79, R. S., § 40 (which exempts employes, etc., of railway companies, from garnishment in certain cases), was, in effect, repealed by the passage of ch. 148, Laws of 1858. The subsequent amendment of said ch. 148, limiting the exemption to married persons, etc., applies, therefore, to railroad employes as well as others. *Burlander v. Milwaukee and St. Paul R. R. Co.*, 26 Wis., 76. 1870.

29. — A garnishee may set up as a defense that the property, money, effects or indebtedness is exempt from seizure. R. S., ch. 120, § 113; ch. 161, Laws of 1861. *Winterfield v.*

Milwaukee and St. Paul R. R. Co., 29 Wis., 589. 1872.

30. — Whether if he knows of such exemption, and especially when requested by the principal debtor, whether he is not bound to do so to protect himself, *quære?* *Id.*

31. Foreign corporation. A judgment debt due by a foreign corporation doing business in Pennsylvania is subject to garnishment in Pennsylvania. *Fithian v. New York and Erie R. R. Co.*, 2 Philadelphia Rep. (Penn.), 318, 1856; *Jones v. New York and Erie R. R. Co.*, 1 Grant's Cases (Penn.), 457. 1857.

32. — A railroad company, incorporated by the laws of another state, cannot be charged by the trustee process, although in possession of railroads in Massachusetts under leases from the proprietors thereof. *Gold v. Housatonic R. R. Co.*, 1 Gray (Mass.), 424. 1854.

33. — A railroad company, which, under an agreement between itself and other railroad corporations, whose roads form a connecting line, settles and pays accounts monthly with that corporation only whose road adjoins its own, including therein the amounts due to the corporations whose roads lie beyond, is not liable as trustee in foreign attachment of that corporation for a sum so found due to it, and for which it is in turn liable to the other corporations under the agreement. *Chapin v. Connecticut River R. R. Co.*, 16 Gray (Mass.), 69. 1860.

34. — A foreign railway company that has accepted the privilege of extending its works into this state, upon condition that they keep at least one resident manager or officer on whom process against the company may be served, may be garnished in an attachment proceeding, in respect to a debt owing by the company to a nonresident. *Fithian v. New York and Erie R. R. Co.*, 31 Penn. St., 114. 1857.

35. — A judgment recovered against the company in the court of another state, may be attached under such process. *Id.*

36. Interest. A garnishee in an attachment execution is not liable for interest on the money in his hands while the action is pending, and in all attachment cases the garnishee without fault recovers costs. *Irwin v. Pittsburgh and Connellsville R. R. Co.*, 43 Penn. St., 488. 1862.

37. — The party injured has his remedy

against the wrongful litigants for the loss of his interest. *Ib.*

38. Judgment. Until interrogatories are filed, and an opportunity offered to answer them, a final judgment cannot be entered against a garnishee. *Michigan Central R. R. Co. v. Keohane*, 31 Ill., 144. 1863.

39. — A judgment in the trustee process, in Massachusetts, against an inhabitant of the state who owes a debt to a corporation established in another state, will protect the trustee against a suit brought in that state by such corporation, to recover such debt. *Ocean Insurance Co. v. Portsmouth Marine R. R. Co.*, 3 Metcalf (Mass.), 420. 1841.

40. Lien of factor. Although a factor may have a lien on goods for storage, and may have the goods in his possession, he may nevertheless maintain an action of debt or *assumpsit* against the owner for the amount of storage; consequently, if the owner of the goods is summoned, by process of garnishment, as the debtor of the factor, and his answer admits the claim for storage, the plaintiff may have judgment against him on the answer, although he also states that the goods are still in the possession of the factor. *Mobile and Ohio R. R. Co. v. Whitney*, 39 Ala., N. S., 468. 1864.

41. Payment. A payment, made by the garnishee, after service, under an order of court in a foreign jurisdiction, is no protection to him, as against the plaintiff, unless he affirmatively shows that the latter was a party or privy to the foreign suit. *Ib.*

42. Proceedings. The proceedings in a certain garnishment of a railway company — reviewed. *Baltimore and Ohio R. R. Co. v. Wilson*, 2 W. Va., 528. 1868.

43. Property in transit. A railroad company cannot be held liable to judgment on the process of garnishment, when, at the time of issuing and serving the writ, the property had left the county, and was *in transitu* on its route, consigned to the debtor. *Illinois Central R. R. Co. v. Cobb*, 48 Ill., 402. 1868.

44. Railway bonds. The bonds of the Minneapolis and Cedar Valley R. R. Co. are "property" within the meaning of the Garnishee Act, and the garnishee process was intended to reach this species of property. *Banning v. Sibley*, 3 Minn., 389. 1859.

45. Service of process. It is too late to ob-

ject to defective service of process, after the corporation has appeared and submitted to the jurisdiction of the court. *Harris v. Somerset and Kennebec R. R. Co.*, 47 Me., 298. 1859.

46. — The foundation for the process in foreign attachment is that the defendant is beyond the reach of process, and the property within it. But if the property be without the reach of process there is an end of the attachment writ. *Pennsylvania R. R. Co. v. Pennock*, 51 Penn St., 244. 1865.

47. — In a foreign attachment, the first thing is to serve the property; the next, the person in whose hands it is found; but such attachment may be well executed when the officer is prevented by fraud or force from getting at the property. *Ib.*

48. — In such cases, the return should show the facts, and that the officer has attached as nearly according to the requirements of the statute as possible. *Ib.*

49. — There must be an actual seizure of goods intended to be attached; but a seizure of part of a certain thing would bind the whole when it came to hand. *Ib.*

50. — Distinct parcels of goods coming into the hands of the garnishee after the service of the attachment are not bound by it. *Ib.*

51. — The Central R. R. Co. cannot be served with process of garnishment by service on one of its agents. The service must be upon the president of the company. The statute providing for service of other process upon the agent of a corporation does not apply to garnishment. *Clark v. Chapman*, 45 Ga., 486. 1872.

52. — The service of a garnishment returned, "Executed by leaving a copy of the within with L. O., president of the M. & E. R. R. Co., this 4th day of May, 1868," was held insufficient to sustain a judgment on failure to answer, without proof that L. O. was such president, at the date of service. *Montgomery and Eufaula R. R. Co. v. Hartwell*, 43 Ala., 508. 1869.

53. — Where a trustee process appears by the return to have been served on a certain day at a stated hour, a payment made by the trustee to his principal on the same day will, in the absence of proof, be regarded as subsequent to the service. *Harris v. Somerset and Kennebec R. R. Co.*, 47 Me., 298. 1859.

54. Setoff. A., having obtained possession

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of chattels under a judgment against B., and used them until the judgment was reversed, and the property awarded to B., the claim of the latter for such use would be a good setoff against any liability on his part to A., which might subject him to garnishment. *Keyes v. Milwaukee and St. Paul R. R. Co.*, 25 Wis., 691. 1870.

55. — A trustee is entitled to set off or retain any money due him at the time of the disclosure upon a contract existing prior to the action, however contingent or uncertain might have been the liability upon which the money has since become due, at the time the trustee suit was brought. *Boston and Maine R. R. Co. v. Oliver*, 32 N. H., 172. 1855.

56. Sheriff. Moneys in the hands of a sheriff, collected by him on an execution, cannot be seized or garnished under an attachment in favor of a creditor of the execution plaintiff. And it was so held in a case where such moneys were garnished under an attachment in favor of the sheriff himself. *Hill v. La Crosse and Milwaukee R. R. Co.*, 14 Wis., 291. 1861.

57. Station agent. Money in the hands of a station agent, received for tickets and freight, cannot be attached in his hands by trustee process against the company. *Pettin-gill v. Androscoggin R. R. Co.*, 51 Me., 370. 1863.

58. — An attachment execution against a railroad company cannot be levied on money in the hands of its ticket agents, arising from the sale by them of tickets to passengers. An attachment is intended to reach the effects of the defendant in the hands of third persons, and ticket agents are not to be regarded as third persons in this case. *Fowler v. Pittsburgh, Fort Wayne and Chicago R. R. Co.*, 35 Penn. St., 22. 1859.

59. Superintendent. The superintendent of the Western and Atlantic R. R. Co. is not subject to garnishment process. *Dobbins v. Orange and Alexandria R. R. Co.*, 37 Ga., 240. 1867.

60. What payment will release garnishee. Suit was brought for work and labor. The answer alleged that defendant had been adjudged to pay a part of the amount of the plaintiff's claim, as garnishee, at the suit of a third person, before a justice of the peace of another state named, the defendant offering to

confess judgment for the residue of the plaintiff's claim. The transcript of the proceeding before said justice and certain statutes of said state were filed with the answer, from which it did not appear that there was any notice to the defendant in the principal action before said justice; but it appeared that the money was paid voluntarily, before judgment against the principal defendant, and upon an insufficient affidavit against the garnishee. *Held*, that the answer was bad on demurrer. *Toledo, Wabash and Western R. R. Co. v. McNulty*, 34 Ind., 531. 1870.

61. Unliquidated damages. A matter of unliquidated damages, growing out of a contract for the purchase of railway stock, is not the subject of an attachment in trustee process. *Rand v. White Mountains R. R. Co.*, 40 N. H., 79. 1860.

GAUGE.

See CONNECTING LINES.

1. Connecting lines. A contract between railroad companies, using the same gauge, to transport passengers and freight continuously over both lines, does not imply a contract on the part of either company that it will not change the gauge of its road. *Sussex R. R. Co. v. Morris and Essex R. R. Co.*, 4 C. E. Green's Ch. (N. J.), 13. 1868.

GIFT.

1. Voluntary conveyance. Where the intestate and his wife, in his lifetime, by indenture with his two sons, by which they assumed upon themselves certain obligations, among which were the support of the intestate and his wife, and also the payment of \$2,500, to wit: \$500 to missionary societies, and \$2,000 in equal shares to six children of the intestate, and at the same time and as a part of the same transaction, the intestate conveyed by deed about 300 acres of land to the said two sons, and they mortgaged back the same as security for the performance of their obligations in said indenture, and for the pay-

Miscellaneous.

ment of said \$2,500; and about two years after the above transaction, the intestate subscribed for certain shares in a railway company, but did not in his lifetime pay anything on his subscription, and the subscription was subsequently allowed as a claim against the estate. The plaintiffs claimed that said \$2,500 should be considered as assets in the hands of the administrator. *Held*, that the contract was not revocable by the decedent in his lifetime, and that neither the \$2,500 nor the land could be inventoried as a part of said estate. *Rutland and Burlington R. R. Co. v. Power's Adm'r.*, 25 Vt., 15. 1852.

GRANTS.

See EMINENT DOMAIN; LAND GRANTS.

1. **State grants.** The amendment to the state constitution, limiting the state debt to \$25,000,000, does not affect a grant previously made to a railway company. *State ex rel. v. Graham*, 23 La. An., 622. 1871.

2. — Aid granted by the state to a railway company to construct its road through the state, cannot be considered as a private donation, but is an act of public policy. *Ib.*

3. — By an Act of Assembly, a railroad company was to receive from the state treasurer certain tolls, which were to cease when "the net proceeds of the road, after paying necessary expenses of motive power and superintendence, exceeded six per cent. per annum." The receipts, after paying expenses, were less than six per cent. on the capital stock and funded debt, but exceeded six per cent. on the capital stock. *Held*, that the grant had ceased. *West Branch Canal Co. v. Elmira and Williamsport R. R. Co.*, 55 Penn. St., 180. 1867.

GRATUITOUS PASSENGER.

See BAGGAGE; INJURIES TO PASSENGERS.

GENERAL TERM.

See APPEALS.

GUARDIAN AND WARD.

1. **Dividends.** If a guardian sue a railway company for dividends belonging to his ward, the company cannot set up by an equitable plea that it had paid the dividends to a person not authorized to receive them, but that the money had been applied to the support of the ward by the person receiving it. *Southwestern R. R. Co. v. Chapman*, 46 Ga., 538. 1872.

2. — But it was held that in equity, the suit might be enjoined until there was a proper accounting between the ward and the person who had received the money. *Same v. Same*, *ib.*, 557. 1872.

HABEAS CORPUS.

1. **Federal Courts.** A person who is held in custody under an order issued by a court of the United States, in the regular course of procedure, is not entitled to be released on a writ of *habeas corpus* issued by a state court. *Ex parte Holman*, 28 Ia., 88. 1869.

2. — Therefore, where a federal court was proceeding by an attachment for contempt to compel the levy of a tax to pay a judgment rendered in such court on bonds issued by a county in aid of a railway company, and a member of the board of supervisors of the county had been arrested, it was *held*, that the state court could not release him on a writ of *habeas corpus*, although the state courts had declared said bonds void before the judgment had been rendered upon them in the United States court. *Ib.*

HARBOR.

See EMINENT DOMAIN; RIGHT OF WAY.

HEADLIGHT.

See INJURIES TO DOMESTIC ANIMALS.

Establishment and Alteration of Highways.

HIGHWAY.

See CERTIORARI; CONSTRUCTION OF RAILWAYS; EJECTMENT; EMINENT DOMAIN; INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYEES; INJURIES TO PERSONS ON THE TRACK; MANDAMUS; MUNICIPAL CORPORATION; NUISANCE.

I. ESTABLISHMENT AND ALTERATION OF HIGHWAYS.

1. *Taking of railway lands for highway purposes.*
2. *Change of location.*
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II. CROSSINGS.

III. OBSTRUCTION OF HIGHWAYS.

IV. CONSTRUCTION OF RAILWAYS.

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VII. INJURIES TO PERSONS BY DEFECTS IN HIGHWAYS.

VIII. REPAIRS.

I. ESTABLISHMENT AND ALTERATION OF HIGHWAYS.

1. *Taking of railway land for highway purposes.*

1. **Powers of municipal corporations.** Public and municipal corporations, under their general authority to lay out highways, cannot take land for a parallel highway previously taken and occupied by a railroad company, under and pursuant to its grant. Presumptively, there is no necessity so urgent as to require it. But they may lay out highways *across* a railroad, because such layout does not dispossess the railroad company, and being a more urgent and constantly occurring necessity, must be presumed to have been contemplated by the parties to the grant. *Bridgeport v. New York and New Haven R. R. Co.*, 36 Conn., 255. 1869.

2. **Railroads are improved property.** The ground appropriated for a railroad is improved property within the road laws. *Road in Lancaster City*, 68 Penn. St., 396. 1871.

3. **Station lands.** A highway cannot be

laid out over grounds acquired by a railroad corporation for the site of an engine house, etc., necessary for its use at a station. *Albany Northern R. R. Co., v. Brownell*, 24 N. Y., 345. 1862.

4. — An injunction will be issued to restrain highway commissioners from taking possession of such site. *Ib.*

5. **Streets.** Power to appropriate the property of a railroad in such a manner as to destroy or greatly injure its franchise, or render it impossible or very difficult to prosecute the object of its organization, cannot be inferred from the general grant of power to establish a road across its track, but such general grant is sufficient to warrant the laying of the road across its track whenever public necessity demands it; and as to whether that public necessity exists, the city council must be the judge. *Hannibal v. Hannibal and St. Joseph R. R. Co.*, 49 Mo., 480. 1872.

2. *Change of location.*

6. **For railway purposes.** The charter of a railroad company provided that where any highway was so located that the railroad could not be judiciously laid out without interfering therewith, the company might, with the consent of the commissioners, cause the highway to be so altered that the railway might be made on the best site of ground for that purpose; also that the company should maintain all bridges which it should construct for the purpose of conducting any highway over the road. The company, having made its road through a deep cut in a ridge, across the line of a highway which traversed the ridge, for the purpose of avoiding the expense of constructing a bridge for the highway, changed the location of the same, with the consent of the commissioners, to a place where it could cross the railroad at the grade. *Held*, that the charter did not authorize such change of location, as its object was wholly to save the expense of a bridge, and not to make a more judicious location of the railroad; and that the portion of the old highway between the points of junction with the new location, was not thereby discontinued. *Norwich and Worcester R. R. Co. v. Town of Killingly*, 25 Conn., 402. 1856.

7. **Proceedings.** Before a public road can

Establishment and Alteration of Highways.

be vacated by the opening of a new road, in accordance with the statute for changing and vacating roads, the county court must be satisfied that the new road is open and in good condition, and must have made an order vacating the old road. *Phelps v. Pacific R. R. Co.*, 51 Mo., 477. 1873.

3. Dedication.

8. Dedication of land owner. There was evidence that a road over a railroad had in 1856 been dedicated to public use by a land owner. In an action for an injury sustained at this crossing, the court instructed that "if this strip of ground so thrown out was dedicated to the public use, without any intention of resuming the exclusive right to, or use of the said ground, and if from that time to this, the public has used this as a public road, then it has become public, with all the characteristics of a public highway, so far as that question can have any legitimate bearing on this issue." *Held*, not to be error. *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Dunn*, 56 Penn. St., 280. 1867.

9. Dedication may be made. A highway may be acquired under the laws of Rhode Island as at common law, by dedication. *Hughes v. Providence and Worcester R. R. Co.*, 2 R. I., 493. 1853.

10. Railway companies have power, in connection with the owners of the fee, to dedicate for a public highway lands taken by them under their charters, where there is nothing in such charters to forbid it. *Green v. Town of Canaan*, 29 Conn., 157. 1860.

11.—A railway company can dedicate land for a public highway; but under the facts of this particular case, it was *held* that there was no such dedication. *Williams v. New York and New Haven R. R. Co.*, 39 Conn., 509. 1873.

4. Contract.

12. Letters. Where the defendant, in letters signed by him, and addressed to the plaintiff or its agents, stated the terms and conditions upon which he would consent to the making of a road across his land, by the plaintiff, upon a compliance with which terms and conditions he agreed to convey the title to the land; and the plaintiff manifested its assent

to the terms, by commencing operations upon the road, with the knowledge of the defendant: *held*, that the plaintiff, by accepting the defendant's proposition, came under a legal obligation to perform the requirements of the agreement, and that this was a valid and sufficient consideration for the defendant's agreement. *New York and New Haven R. R. Co. v. Pixley*, 19 Barbour (N. Y.), 428. 1855.

5. Proceeding.

13. Appeal. A statute, giving to land owners a right of appeal from decisions of selectmen laying out highways, will not be construed as applicable to proceedings pending at the time of its passage, unless such intent of the legislature is clearly manifested. *Boston and Maine R. R. Co. v. Cilley*, 44 N. H., 578. 1863.

14. Benefits. The easement possessed by a railroad company, in a limited portion of the land adjoining a new highway, cannot be assessed for the benefits assumed to be conferred upon the company by the laying out of such new and adjoining highway; but such benefits may be assessed upon the franchise of the company, where they are direct, immediate, appreciable and certain. Contingent, remote, inappreciable or uncertain benefits will not authorize such assessment. *Bridgeport v. New York and New Haven R. R. Co.*, 36 Conn., 255; 1869.

15.—Therefore, where, in laying out new highways, parallel with the line of a railroad and upon a curve, buildings and other objects which had somewhat obstructed and contracted the lines of sight from the road in turning the curve, were removed for the purpose of making the highway, and the railroad company was assessed for benefits conferred by thus extending its line of sight, on the ground that such extension would enable the company to run its trains with greater speed and with less liability to casualties, and with less expense for maintaining gates or keeping flagmen at the crossings, and it appeared that the company in respect to such speed, gates and flagmen was subject to the control of the railroad commissioners,—it was *held* that the benefits were too contingent, remote, and uncertain, and did not authorize the assessment. *Id.*

Crossings.

16. Collateral proceeding. Where a highway was laid out along side of a railway, and in places, was laid in part upon the land taken by the railway company, it was *held*, that the town being a party to the adjudication of the county court, establishing the road, the adjudication is binding on the town, and cannot be set aside in a collateral matter. *State v. Vernon*, 25 Vt., 244. 1853.

17. Depot grounds. A highway was laid out by the selectmen of a town, nearly parallel with a railroad track. Between the railroad track and the highway so laid out, there was, for its entire length, an open space of ground, which was in part within the limits of the company's right of way, and in part owned by it in fee. The railroad depot stood upon this open space, which furnished the only means of access to the depot, and had been for twenty years used by the public for a highway. The highway laid out was composed of a strip of land lying contiguous to the open space, and the object of the selectmen in laying it out was to provide, in connection with the open space, a safe and convenient way to and from the depot. Upon the petition to set aside the proceedings of the selectmen in laying out the highway, a committee found that the highway as laid out was of common convenience and necessity; that they were unable to determine from the facts before them whether the open space was a public highway or not, but that the interests of the railroad company required that it should be used, as it had been, for public travel; that they were satisfied that such use would continue, and as long as it continued, there was no necessity for a highway wider than that laid out by the selectmen. The committee further found that the layout was judicious and proper, and within the lawful powers of the selectmen; that the layout, by itself and unconnected with the use of the open space, was too narrow to accommodate public travel, and that, if the open space should be closed, the layout would need to be widened, for which purpose there was ample and convenient land adjacent. *Held*, that the layout was judicious and should not be set aside. *Sackett v. Town of Greenwich*, 38 Conn., 525. 1871.

18. Jurisdiction. The jurisdiction of the circuit court in respect to roads and highways is limited to *ad quod damnum* proceedings.

In all other matters relating to roads, the board of supervisors has exclusive jurisdiction. Ch. 86, Laws of 1868. *Kennedy v. Dubuque, C. and M. R. R. Co.*, 34 Iowa, 421. 1872.

19. Location. Under the St. of 1857, ch. 287, an adjudication of county commissioners laying out a highway across a railroad, which does not state whether the highway is to be carried over or under or on a level with the railroad, or show that special notice was given to the railroad corporation, is erroneous and will be quashed on *certiorari*, although the railroad company actually appeared and was heard before the commissioners. *Old Colony and Fall River R. R. Co. v. County Com'rs of Plymouth*, 11 Gray (Mass.), 512. 1858.

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20. Change of grade. An order of county commissioners, passed on the petition of mayor and aldermen or selectmen, under St. 1842, ch. 22, which determines that the raising of a highway at a place named, where it is crossed by a railroad on a level, so as to pass over the railroad, is necessary for the security of the public, without defining the height above the railroad to which the highway shall be raised, the grade of the ascent, the mode and material of the structure, or the time within which it shall be made, is too indefinite to be specifically enforced by this court in equity under St. 1849, ch. 222, §. 5. *Roxbury v. Boston and Providence R. R. Co.*, 2 Gray (Mass.), 460. 1854.

21. Damages for crossing railway. In estimating the damages sustained by a railroad company by the laying out of a highway across its railroad, the jury have no right to take into consideration any supposed future benefit to it from a probable increase of business in consequence of the establishment of the new highway. *Boston and Maine R. R. Co. v. County of Middlesex*, 1 Allen (Mass.), 324, 1861; *Old Colony and Fall River R. R. Co. v. Inhabitants of Plymouth*, 14 Gray (Mass.), 155, 1859.

22. — A railroad company is entitled to damages for land taken by the laying out of a public highway across its track; and for the expense of erecting and maintaining signs and cattle guards at the crossing, and of floor-

Crossings.

ing the same and keeping it in repair; but not for any increased liability from accidents, or for the increased expense of ringing the bell, or for its liability to be ordered by the county commissioners to build a bridge for the highway over its track. *Ib.*

23. — The provision of the act regulating "the construction of roads and streets across railroad tracks" (§ 1, ch. 62, Laws of 1853), which authorizes the laying out of streets and highways across the track of any railroad without compensation, has reference only to tracks used for public traffic, and for turn outs and switches. *Boston and Albany R. R. Co. v. Greenbush*, 52 N. Y., 510. 1873.

24. — It does not include tracks laid for storing cars. *Ib.*

25. — The statute (ch. 62 of 1853), authorizing the construction of highways across railroad tracks without compensation, is constitutional. *Albany Northern R. R. Co. v. Brownell*, 24 N. Y., 345, 1863; but see *Miller v. New York and Erie R. R. Co.*, 21 Barbour (N. Y.), 513. 1856.

26. **Flagmen.** Evidence that daily, twenty trains on a railroad, and about as many vehicles on a highway, passed over a place where a railroad crossed the highway at grade, but was in full view from the highway at any point within one hundred and fifty feet of the crossing; and where the public authorities never required the establishment of a gate, station agent or flagman, although the crossing had existed for many years; is not sufficient to warrant a finding that the company was guilty of negligence in omitting to provide any safeguard there. *Commonwealth v. Boston and Worcester R. R. Co.*, 101 Mass., 201. 1869.

27. — The establishment of a flag station at a railway crossing is legal evidence of the consent of the corporation to the use of the crossing. *Webb v. Portland and Kennebec R. R. Co.*, 57 Me., 117. 1869.

28. — The open, notorious use of a way as a highway, and the acts of a railway company recognizing it as such, without objection, bind the railway company to the exercise of the same precautions at such crossings as would be required at a lawful highway. *Ib.*

29. **Injunction.** An injunction will not be granted against a railroad company, restraining a necessary cut and excavation it is mak-

ing across a public highway, in anticipation that the wooden bridge intended to be substituted, will not restore the highway to its former usefulness. *Baucus v. Albany Northern R. R. Co.*, 8 Howard's Pr. (N. Y.), 70. 1853.

30. **Joint occupancy of railways.** Where one railway company is using the track of another, it is held to the same care and prudence at a crossing as the company owning the road. *Webb v. Portland and Kennebec R. R. Co.*, 57 Me., 117. 1869.

31. **Landing places.** Railway companies are bound to keep safe and suitable landings at the places where passengers usually get on and off the trains. They are not bound to prepare landing places where no passing can reasonably be expected. *Murch v. Concord R. R. Co.*, 29 N. H., 9. 1854.

32. **Municipal corporations.** The city council of Bangor is a body entirely distinct from the mayor and aldermen; and the consent of the former to the construction of a railway across a street is nugatory. *Inhabitants of Veazie v. Mayo*, 45 Me., 560. 1858.

33. — The obligation of a town to make roads safe and convenient for travelers continues where such roads are crossed by railroads at grade. *Davis v. Leominster*, 1 Allen (Mass.), 182. 1861.

34. **Nuisance.** A railroad company, constructing its railroad across a highway without lawful authority, is liable to indictment for a nuisance. *Commonwealth v. Vermont and Massachusetts R. R. Co.*, 4 Gray (Mass.), 22. 1855.

35. — The crossing of highways by a railway at grade is not unlawful; nor is it a nuisance or a trespass; nor does it require the consent of the highway commissioners. *Baxter v. Spuyten Duyvil, etc. R. R. Co.*, 11 Abbott's Pr., N. S. (N. Y.), 178. 1871.

36. — Under R. S. of 1857, ch. 51, § 15, a railroad crossing, not made in the "manner determined in writing by the county commissioners," is to be regarded as a nuisance. *State v. Portland, Saco and Portsmouth R. R. Co.*, 58 Me., 46. 1870.

37. — An indictment in such case for nuisance is fatally defective unless it alleges substantially that the railway crosses the highway in a manner not determined in writing by the county commissioners. *Ib.*

38. **Number of tracks.** A railroad com-

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pany which has lawfully located its road across a public highway without any restriction as to the number of tracks or the place where they should be laid, is authorized to lay and maintain as many tracks as are essential to the convenient transaction of its business; and for that purpose may make any necessary alteration in the surface of the highway. *Commonwealth v. Hartford and New Haven R. R. Co.*, 14 Gray (Mass.), 379. 1860.

39. Obstructions. Where no positive injury to the individual is shown, an action will not lie in favor of an individual against a railway company for obstructing a highway at a crossing. The company is, under the statute, liable to the town. *Buck v. Connecticut and Passumpsic Rivers R. R. Co.*, 42 Vt., 370. 1869.

40. Proceedings. Under Rev. Sts., ch. 24, § 13, county commissioners have final jurisdiction of the question whether a highway crossing a railroad shall be laid out over, under, or on a level with it. *Boston and Maine R. R. Co. v. County of Middlesex*, 1 Allen (Mass.), 324. 1861.

41. — A railroad corporation was authorized by the county commissioners to raise a highway at a certain grade so as to cross its road on a level, and raised the highway accordingly, but at a steeper grade. The commissioners subsequently, on the application of the towns between which the highway lay, modified their former order by postponing the time within which it should be complied with, and assessed damages to the towns. *Held*, that that part of the second order assessing damages was unauthorized, and that the whole order was therefore void, and would not justify the corporation in not complying with the first order. *Commonwealth v. Vermont and Massachusetts R. R. Co.*, 4 Gray (Mass.), 22. 1855.

42. Statutory requirements. An open and traveled street in a city, though not so laid out and established by the municipal authorities as to make the city responsible for damages occasioned by defects therein, is a "traveled place," within the meaning of St. 1849, ch. 222, § 2; and a railroad corporation is bound to maintain a sign board, and the other precautions required by statute at railroad crossings, at the place where it crosses the railroad. *Whittaker v. Boston and Maine R. R. Co.*, 7 Gray (Mass.), 98. 1856.

43. — The N. C. R. R. Co. is not required

under § 26 of its charter to construct crossings and bridges over its track except where public roads cross the same, which have been kept up by the public. *Coon v. North Carolina R. R. Co.*, 65 N. C., 507. 1871.

44. — Under ch. 41, § 3, Acts of 1853, a corporation cannot extend a curve in a branch track partly over or along a highway, but without crossing it. *Bangor, Oldtown and Milford R. R. Co. v. Smith*, 47 Me., 34. 1859.

45. — Ch. 41, § 3, Acts of 1853, in relation to the construction of railways across streets and highways, is remedial, and applies to all railways not completed or in process of construction. *Veazie, Inhabitants of, v. Mayo*, 45 Me., 560. 1858.

46. — The general railroad act, as originally enacted (Laws of 1850, p. 232, § 39), required the bell to be rung or the whistle sounded, each time the engine passed over the railway where the latter crossed a public highway, although the railroad and highway did not cross each other upon the same level. *People v. New York Central R. R. Co.*, 13 N. Y., 78. 1855. *Same v. Same*, 25 Barbour (N. Y.), 199. 1855.

47. Tunnels. Where the charter of a railroad company directs the company to keep sufficient passages over or under its railroad, where any public road crosses the same, so that carriages, etc., on the said road shall not be impeded thereby, it is lawful for such company, having laid a public road over its track, subsequently to lay the same through a tunnel under such track, whenever the safety or convenience of the public requires such change. *State v. Central R. R. Co.*, 3 Vroom (N. J.), 221. 1867.

III. OBSTRUCTIONS OF HIGHWAYS.

48. Acts of third persons. A corporation owning and operating a railway which crosses a highway, is under no obligation to remove from the highway obstructions placed on the crossing by a stranger, if the material constituting the obstruction is neither the property, nor under the control of the corporation, although the existence of such obstruction is brought to the knowledge of its agents. *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Maurer*, 21 Ohio St., 421. 1871.

49. — The fact that such material is waste

Construction of Highways.

manure from the company's stock cars, and is placed there by one of the company's brakemen, does not make the company liable, if the brakeman so placed the manure there for his own use, without the authority of the company, and was at the time not acting within the scope of his employment as a brakeman. *Ib.*

50. Adjoining proprietors. A railroad company having the right to use a public highway for the ordinary purposes of a railroad as a means of travel and transportation, is responsible to adjoining proprietors only for using it in an illegal manner. *Lackland v. North Missouri R. R. Co.*, 34 Mo., 259. 1863.

51. Criminal law — Indictment. A railroad laid out over and along a highway in such a manner as to obstruct it, without express statute, authority or necessary implication, is liable to indictment as a nuisance. *Commonwealth v. Old Colony and Fall River R. R. Co.*, 14 Gray (Mass.), 93. 1859.

52. — Where selectmen, besides requiring other alterations to be made by a railroad company in a way over which its railroad passed, pursuant to Rev. Sts., ch. 39, § 67, ordered a draw to be made in the railroad for the accommodation of public travel on the way, it was held, that the railroad company building its road without such a draw, so as to obstruct public travel, was liable to indictment for a nuisance. *Commonwealth v. Nashua and Lowell R. R. Co.*, 2 Gray (Mass.), 54. 1854.

53. — An obstruction to that part of a highway which is outside of the finished way is a nuisance for which an indictment will lie. *Commonwealth v. Boston and Lowell R. R. Co.*, 12 Cushing (Mass.), 254. 1853.

54. — information. In Indiana, under the criminal law, a corporation cannot be prosecuted, by information or otherwise, for misfeasance. *State v. Ohio and Mississippi R. R. Co.*, 23 Ind., 362. 1864.

55. — judgment. The confirmation, by statute of the illegal location of a railroad in a highway, is no ground for arresting a previous judgment on an indictment for a nuisance caused by such obstruction. *Commonwealth v. Old Colony and Fall River R. R. Co.*, 14 Gray (Mass.), 93. 1859.

56. — process. Where an information was filed against a railroad company for obstructing a highway, and a summons was issued

and served by delivering a copy to a station agent, and one to an attorney and director of said company, the process and the service thereof were properly set aside. *State v. Ohio and Mississippi R. R. Co.*, 23 Ind., 362. 1864.

57. — receiver. An indictment will not lie against a railroad company for the obstruction of a highway by its trains, while the road is under the sole management of a receiver appointed by a court of chancery. *State v. Vermont Central R. R. Co.*, 30 Vt., 108. 1858

58. Damages — Innkeeper. In an action by an innkeeper against a railroad company for obstructing a road leading to his inn, it is erroneous not to allow a witness to testify as to the number of guests entertained at the inn, or as to the expedition and care with which the work which caused the obstruction was prosecuted. *Illinois Central R. R. Co. v. White*, 18 Ill., 164. 1856.

59. — In claiming damages of defendants for the bad condition in which they have left the passage-way from the highway to his tavern stand, the plaintiff cannot show that the carriages of travelers were upset by reason of the defendant's omission. *Hubbard v. Androscoggin and Kennebec R. R. Co.*, 39 Maine, 506. 1855.

60. Depot grounds. Railway companies have no right to build their depots in highways which they merely cross with their railroad, and the location of which they do not change. The only use to which they may put the highway is for a track crossing, and in this they are bound to do as little damage as possible. *State v. Vermont Central R. R. Co.*, 27 Vt., 103. 1854.

61. — Railroad companies are liable to indictment for the acts of their agents in erecting and maintaining a nuisance. *Ib.*

62. — The word "unlawfully" is not indispensable in an indictment for nuisance against a railway company. The words "wrongfully and injuriously" are sufficient. *Ib.*

63. — A railroad company has no right to use a highway as a part of its freight yard; but it has a right to pass and repass over a highway in making up its trains and shifting its cars, provided this is done only to a reasonable extent. *Gahagan v. Boston and Lowell R. R. Co.*, 1 Allen (Mass.), 187. 1861.

64. Duties of railway companies. It is the duty of a railway company not to obstruct

Construction of Railways — Taking Highway for Railway Purposes.

public roads, either by stopping a train across them, or otherwise. Speed should be slackened at a side track, and a signal warning should be given when approaching a crossing. *Murray v. South Carolina R. R. Co.*, 10 Richardson's Law (So. Car.), 227. 1856

65. Forfeitures. Under R. S., ch. 131, § 13, an indictment will lie to recover the forfeiture provided for in R. S., ch. 51, § 40, for "unreasonably and negligently obstructing any way by engines, tenders and cars." *State v. Grand Trunk R. R. Co.*, 59 Me., 189. 1871.

66. Rights of the public. It is a proper instruction to be given to a jury, on an indictment against a railroad company for obstructing a highway with its cars while discharging and receiving freight and passengers, that the right of the public in the highway for the purpose of travel is paramount to the right and convenience of the company for any other purpose than that of transit. *State v. Morris and Essex R. R. Co.*, 1 Dutcher (N. J.), 437. 1856.

IV. CONSTRUCTION OF RAILWAYS.

67. Alterations in highway. An action will not lie against a railroad company for consequential damages arising from building a bridge over its railroad, in accordance with the provisions of the Revised Statutes, ch. 142, § 4. *Toule v. Eastern R. R. Co.*, 17 N. H., 519. 1845.

68. — The legislature has a right to provide for and determine the mode of making such alterations in the highways as public good may require by reason of the construction of a railroad, and such alteration cannot be made the subject of an action against the corporation. *Ib.*

69. By § 4, ch. 335, Laws of June Sess., 1846, it was enacted, among other things, that where the property of individuals shall have sustained consequential damages by the construction or continuance of bridges theretofore erected by a railroad company over its railway, at the intersection of the railroad with a highway, and the owners have not been compensated therefor, they may have damages assessed against the railroad company, on petition for that purpose; *held*, that this provision was a retrospective law for the decision of a civil cause, and void for that reason. *Toule v. Eastern R. R. Co.*, 18 N. H., 547. 1847.

70. — Where the charter of a railroad company gives it power to alter and grade the public and other roads, the company has no right to change the route of any public or other road. *State v. Warren R. R. Co.*, 5 Dutcher (N. J.), 353. 1862.

71. Liability of company. A railway company authorized to construct its road across a highway is bound to use reasonable care in protecting those passing thereon from injury. *Veazie v. Penobscot R. R. Co.*, 49 Me., 119. 1860.

72. Such company cannot relieve itself from any such liability by its agreement with its contractors. *Ib.*

73. Trespass. A person who interferes to prevent a railway company from constructing its road across a highway where it has no right to build it, is not liable for damages to the company therefor. Nor can the company claim that he committed a trespass upon the lands of another person in so doing. *Bangor, Oldtown and Milford R. R. Co. v. Smith*, 49 Me., 9. 1860.

V. TAKING HIGHWAY FOR RAILWAY PURPOSES.

74. Depots. A railroad company is not justified in building a depot upon a public highway, or so near to it that the trains must injuriously obstruct the public travel. *State v. Morris and Essex R. R. Co.*, 1 Dutcher (N. J.), 437. 1856.

75. Injunction. The construction of a railway operated by steam upon a public highway is a nuisance which will be restrained by injunction. *Attorney General v. Morris and Essex R. R. Co.*, 4 C. E. Green's Ch. (N. J.), 386. 1869.

76. Proceedings. The Hancock Brook road was laid out by the county court in 1845, for two miles through a narrow and precipitous gorge, to accommodate, by a shorter and more level route, the travel which then passed around an ancient, circuitous and hilly road. In 1853, a railroad company, authorized by its charter to locate its road along the same general route and to occupy, where necessary, the track of any highway, took about a mile of the central portion of this road. By its charter, and by the general statute on the subject, it became its duty to alter the highway under the advice of the commissioners on the railroad, and under their direction to put the

Adverse Enjoyment — Injuries to Persons by Defects in Highway — Repairs.

highway thus altered into as good repair as it was before, the determination of the commissioners thereon to be final. After taking the portion of the highway stated, the company surveyed and laid before the commissioners for their approval a substitute road on the other side of the gorge. This road the commissioners disapproved, and advised the adoption of the ancient highway as the substitute road, which the company accordingly adopted, but made no repairs or improvements thereon, and the commissioners formally accepted. *Held*, on an application for a mandamus to compel the company to make the substitute road through the gorge, that so long as the commissioners were acting within their jurisdiction and without fraud, their determination could not be reviewed by the superior court. *Waterbury, Town of v. Hartford, Providence and Fishkill R. R. Co.*, 27 Conn., 146. 1858.

77. Right to use highway. The authority of a railroad company to lay tracks in a public highway, must be given by express enactment, or if it rests upon implication, it must flow necessarily out of the law from which it is derived. *State v. City of Hoboken*, 6 Vroom (N. J.), 205. 1871.

78. Title of highway. The right to a town or county road is but an easement for public use in which the town has legally no title or property. *Vassalborough, Inhabitants of, v. Somerset and Kennebec R. R. Co.*, 43 Me., 337. 1857.

VI. ADVERSE ENJOYMENT.

79. Adverse enjoyment. The occupation of premises on the line of a highway, for a period of twenty years or more, without any paper title, affords no presumption, as a matter of law, that the possessor's title extends beyond the limits of his actual possession or to the center of the highway. *Hatch v. Vermont Central R. R. Co.*, 28 Vt., 142. 1855.

80. — Nor can such person acquire a title to any portion of the highway by an occupancy of it with his wagons and carriages and those of his customers, if such occupancy is not adverse to the right of the public, or under some other claim of right to the premises than as a highway. *Id.*

VII. INJURIES TO PERSONS BY DEFECTS IN HIGHWAY.

81. Injuries to travelers on highway. Where a railroad corporation has been authorized by law to alter highways, for its own convenience in building its road, upon condition that it should restore such highways to their former state of usefulness, and the corporation has altered such a highway, but has failed so to restore it, and has left it in an unsafe condition, and the town to which the highway belongs has suffered it to continue in the same condition, and has consequently become liable in an action brought against it by a third party for injuries sustained by him through the defects of the highway, the railroad company is bound to indemnify the town for the judgment recovered against the town in such action, and for the costs and expenses incurred by the town in defending the action. *Hamden, Town of, v. New Haven and Northampton R. R. Co.*, 27 Conn., 158. 1858.

82. — A railroad company is liable for injuries sustained by a traveler, driving a horse upon a highway with due care, through a fright of the horse occasioned by a derrick which it maintained projecting over the highway so as naturally to frighten passing animals. *Jones v. Housatonic R. R. Co.*, 107 Mass., 261. 1871.

VIII. REPAIRS.

83. — A supervisor may enter upon land adjoining a highway in his district and take material for the repair of the road. § 16, 1 G. and H., 591. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Daugherty*, 40 Ind., 33. 1872.

HORSE RAILWAY.

See EMINENT DOMAIN; STREET RAILWAYS.

HORSES.

See CARRIAGE OF LIVE STOCK; CONTAGIOUS DISEASES.

Miscellaneous.

HUSBAND AND WIFE.

See BAGGAGE; DAMAGES; INJURIES TO EMPLOYEES;
INJURIES TO PASSENGERS; INJURIES TO PERSONS.

1. **Conveyance.** If land be conveyed to a *feme covert*, the husband is seized of an estate therein for their joint lives. *Junction R. R. Co. v. Harris*, 9 Ind., 184. 1857.

2. — And if the wife, though a minor, join in a conveyance of the land in fee, the deed is effectual to pass the husband's estate; and the right to possession and profits will be in the vendee. *Ib.*

3. — A husband may act as the agent of his wife in transactions relating to her separate estate, and may execute in her name a conveyance of her land under a power of attorney. *Weisbrod v. Chicago and Northwestern R. R. Co.*, 18 Wis., 35. 1864.

4. **Death — statute.** A husband is not next of kin of the wife, within the meaning of the act "requiring compensation for causing death," etc. (ch. 450, Laws of 1847, amended by ch. 256, Laws of 1849), and previous to the amendment in 1870 (ch. 78, Laws of 1870), he was not entitled to a distributive share of any recovery, under said act, for causing her death. *Drake v. Gilmore*, 52 N. Y., 389. 1873.

5. **Parties to action.** A married woman, domiciled in another state, and by the laws thereof holding property to her separate use, in seeking a remedy to recover for loss or injury thereto in New York, is governed as to her remedy by the laws of New York, and may bring an action in her own name. *Stone-man v. Erie R. R. Co.*, 52 N. Y., 429. 1873.

6. — A married woman has the right to sue for personal injuries without joining her husband. *Seymour v. Chicago, Burlington and Quincy R. R. Co.*, 3 Bissell (U. S. C. C.), 43, 1871; *Chicago, Burlington and Quincy R. R. Co. v. Dunn*, 52 Ill., 260, 1869.

7. — Under the Revision of 1860, § 2771, the husband and wife being joined in an action for an injury to the wife, may recover, not only for the injuries done to the wife, but also for the loss of service to the husband. *McDonald v. Chicago and Northwestern R. R. Co.*, 26 Ia., 124. 1868.

8. **Personal injury to the wife.** The right of action accruing by reason of personal injuries received by a married woman, from the

negligence of a railroad company, is her separate property, and comes under the operation of the act of 1861. *Chicago, Burlington and Quincy R. R. Co. v. Dunn*, 52 Ill., 260. 1869.

9. **Personal property.** If a married woman suffers her personal property to pass into the possession of and under the control of her husband, without having filed notice of her ownership with the recorder of deeds, as provided in the statute, it is liable to be taken for the debts of the husband. The *joint* possession of such property by the husband and wife is regarded as his possession. *Mazouck v. Iowa Northern R. R. Co.*, 31 Ia., 558. 1871.

10. **Release.** A married woman released railroad damages, her husband not joining. *Held*, that she was not bound by the release. *Delaware, Lackawanna and Western R. R. Co. v. Burson*, 61 Penn. St., 369. 1869.

11. — In such cases, her husband cannot, without her consent, adjust or release her cause of action. *Chicago, Burlington and Quincy R. R. Co. v. Dunn*, 52 Ill., 260. 1869.

ILLEGITIMATE CHILDREN.

1. **Evidence.** Declarations of a deceased mother that her child was born before her marriage, and corroborating statements by her of the circumstances and history of her life, are competent evidence to prove that the child was illegitimate; but evidence of a general reputation that the child was illegitimate is not competent. *Haddock v. Boston and Maine R. R. Co.*, 3 Allen (Mass.), 298. 1862.

INCOME BONDS.

1. **Mortgage.** The Central Ohio R. R. Co. issued certain bonds styled "income bonds," providing "for the punctual payment of the principal and interest of said bonds and others of like tenor, issued, or to be issued, in preference to the payment of dividends on the capital stock of the company, the income arising from the road and its appurtenances is hereby specifically pledged." *Held*, that it was no fraud upon the holders of these bonds

Contract Limiting Liability — Forms.

for the company to issue *mortgage* bonds for an additional sum upon the line of its road. *Garrett v. May*, 19 Md., 177. 1862.

INCOME TAX.

SEE MORTGAGE; TAXATION.

INDEMNIFYING BOND.

1. Condition. If a party give a bond to indemnify the obligee against a release of an unsatisfied debt, and the condition is broken, judgment will be rendered on the bond for the amount of the debt. *Kimball v. Cocheo R. R. Co.*, 3 Foster (N. H.), 579. 1851.

INDICTMENT.

SEE BRIDGES; EMBEZZLEMENT; FERRIES; HIGHWAYS; MALICIOUS MISCHIEF; NUISANCE; OBSTRUCTING RAILWAY TRACKS.

1. Contract limiting liability. A memorandum endorsed on a season ticket issued by a railroad company, that it "assumes no liability for any personal injury received while in a train to any such season ticket holder," is no defense to an indictment of the corporation on the Gen. Sts., ch. 63, § 97, for causing the death of the ticket holder by gross negligence. *Commonwealth v. Vermont and Massachusetts R. R. Co.*, 108 Mass., 7. 1871.

2. — Railroad corporations are by statute subjected to indictment and fine in case of the loss of life by reason of the negligence of the proprietors or their servants. *Held*, that a corporation may be legally subjected to such proceedings. *Boston, Concord and Montreal R. R. Co. v. The State*, 32 N. H., 215. 1855.

3. Default. Judgment may be rendered against a corporation upon an indictment upon default of appearance, after notice to appear. *Ib.*

4. — A summons is the only process necessary in such a case. *Ib.*

5. Employés. This remedy is limited to cases where the person dies immediately, and is not applicable in any case to the employés of the road. *State v. Maine Central R. R. Co.*, 60 Me., 490. 1872.

6. Evidence. In the trial of a railway corporation on an indictment, under R. S. of 1857, ch. 51, § 42, the same rules of evidence and the same principles of law should be applied as in analogous civil actions for damages. *State v. Grand Trunk R. R. Co.*, 58 Me., 176, 1870; See *State v. Manchester and Lawrence R. R. Co.*, 52 N. H., 528. 1873.

7. Fences. In an indictment against a railway company for an unlawful and willful neglect to erect and maintain fences, it is necessary to aver that it was the duty of the corporation to erect and maintain such fences. *People v. New York Central R. R. Co.*, 5 Parker Cr. (N. Y.), 195. 1861.

8. Form. Where the county is stated in the margin of an indictment, it is sufficient, in describing the place where the offense was committed, to say that it was in the town of A., "in the county aforesaid." *State v. Wentworth*, 37 N. H., 196. 1858.

9. — It is not necessary that the state should be named if the indictment sets forth the name of the town and county. *Ib.*

10. — So far as the form of the indictment is concerned, it must be governed by the principles of the criminal law. *State v. Manchester and Lawrence R. R. Co.*, 52 N. H., 528. 1873.

11. — An indictment to recover the fine imposed by the Statute of 1850, where the life of a person is lost by carelessness on a railroad, must be against the corporation, and not against the individual stockholders. *State v. Gilmore*, 24 N. H., 461. 1852.

12. — The indictment under this statute should show that there is a surviving relative of the deceased, entitled to the fine. *Ib.*

13. — R. S., ch. 51, § 36, provides that in case of negligence on the part of a railway company or its employés whereby a person, in the exercise of due care and diligence, loses his life, a forfeiture of not less than \$500 and not more than \$5,000 shall be recovered by indictment found within one year, wholly to the use of his widow, if no children; and to the children, if no widow; if both, to her and them equally. An indictment under this law must give the names of the persons who are to re-

Bond — Dissolution.

ceive the forfeiture, and it is not sufficient to aver that "their names are to the jurors unknown." The indictment must aver that the person whose life was lost left a widow, or heirs, or both; and the averment, that he had then and there "a lawful wife and child," or that "there is now living a widow and one child," is insufficient. *State v. Grand Trunk R. R. Co.*, 60 Me., 145. 1871.

14. — The St. 1840, ch. 80, applies to corporations owning and running a railroad, and an indictment thereon need not set out the names of those servants or agents who are guilty of negligence, nor the nature or manner of such negligence, nor the names of the heirs at law of the deceased, if it aver their names to be unknown. *Commonwealth v. Boston and Worcester R. R. Co.*, 11 Cushing (Mass.), 512. 1853.

15. — An indictment under St. 1840, ch. 80, which imposes a fine on any common carrier by whose negligence the life of a passenger is lost, "to be recovered by indictment to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs," must aver that he left a widow, or heirs, or both, as the case may be. *Commonwealth v. Eastern R. R. Co.*, 5 Gray (Mass.), 473. 1855.

16. — It is not necessary to state by what particular acts of negligence or carelessness, or by what special unfitness of servants, the accident occurred. *State v. Manchester and Lawrence R. R. Co.*, 52 N. H., 528. 1873.

17. **Instantaneous killing.** Where a state declares that railroads, by whose negligence the life of a person is lost, shall forfeit not less than \$500 nor more than \$5,000, to be recovered by indictment to the use of the heirs of the deceased; *held*, that to bring a case within this statute, the killing must be instantaneous. *State v. Grand Trunk R. R. Co.*, 61 Me., 114, 1873; *State v. Maine Central R. R. Co.*, 60 ib., 490. 1872.

18. **Limitation.** An indictment against a railroad company under St. 1840, ch. 80, for negligently causing the death of a passenger is not within Rev. Stats., ch. 120, § 21, limiting actions and suits for any penalty, or forfeiture to one year after the offense is committed. *Commonwealth v. Boston and Worcester R. R. Co.*, 11 Cushing (Mass.), 512. 1853.

INFORMATION.

1. **Description of corporation.** In an information against a railroad company, a description of the respondent by name, and as "a corporation existing under and by virtue of the laws of this state, duly organized and doing business," is a sufficient allegation that it is a corporation *in esse*. *State v. Vermont Central R. R. Co.*, 28 Vt., 583. 1856.

2. — The time and place where its existence commenced need not be averred. *Ib.*

INJUNCTION.

See BRIDGES; CONSTITUTIONAL LAW; ELECTION OF CORPORATE OFFICERS; EMINENT DOMAIN; EXPRESS COMPANIES; HIGHWAYS; JURISDICTION; LOCATION OF RAILWAYS; MORTGAGE; NUISANCE; PARTIES TO ACTIONS; PENALTIES; TAX SALE.

I. BOND.

II. DISSOLUTION.

III. CONTEMPT.

IV. SUBJECT AND GROUNDS OF INJUNCTION.

V. DAMAGES.

VI. APPEALS.

VII. GENERAL MATTERS.

I. BOND.

1. **Form.** An injunction bond improperly made payable to the sheriff, his heirs and assigns, instead of the defendants, is nevertheless sufficient to sustain an action in behalf of the real parties in interest. *Vicksburg, Shreveport and Texas R. R. Co. v. Barksdale*, 15 La. An., 465. 1860.

2. — And the court will examine the petition for the injunction to ascertain what obligation the parties to the bond have assumed. *Ib.*

3. **Parties not served.** An undertaking, given on the issuing of an injunction, is for the benefit of all the defendants enjoined, whether served or not. Consequently it is not necessary for the defendant not served to appear in the action, to have the benefit of the undertaking. *Dry Dock, etc., R. R. Co. v. Cunningham*, 45 Howard's Pr. (N. Y.), 458. 1873.

II. DISSOLUTION.

4. **Amendment.** While under the statute a

Contempt — Subjects and Grounds of Injunction.

petition may be amended so as to sustain an existing injunction, even after motion to dissolve, yet, if the plaintiff, instead of so amending his petition as to make it appear therefrom that his purpose is to support his existing writ, files as an amended petition what is in fact a petition for a new writ, the action of the court in sustaining the motion to dissolve the writ filed before this amended petition, will not be disturbed by reason of the matters contained therein. *Des Moines Navigation and R. R. Co. v. Carpenter*, 27 Ia., 487. 1869.

5. Answer. An injunction will not invariably be dissolved, even upon a full denial of the equity of the bill. It was always a matter in the discretion of the court. *Camden and Amboy R. R. Co. v. Stewart*, 3 C. E. Green's Ch. (N. J.), 489. 1867.

6. — Where, in an injunction suit by a stockholder in a corporation, as such, it is denied by the answer that plaintiff is a stockholder, a preliminary injunction granted on the complaint will be dissolved. *Blatchford v. New York and New Haven R. R. Co.*, 5 Abbott's Pr. (N. Y.), 276. 1857.

7. — A preliminary injunction cannot be sustained where the equities of the complaint are denied by the answer. *Ib.*

8. — When the defendant moves alone on his answer to dissolve an injunction, the plaintiff can read no affidavits in opposition to the motion; but if the defendant uses affidavits to move for a dissolution of the injunction, with or without his answer, the plaintiff may read additional or counter affidavits. *Blatchford v. New York and New Haven R. R. Co.*, 7 Abbott's Pr. (N. Y.), 322. 1858.

9. Appeals. Where an appeal has been taken to the supreme court from an order dissolving a temporary injunction, and the judgment below has been affirmed, such affirmation does not dispose of the action below for a perpetual injunction, and it is error to sustain a motion by the defendant to dismiss the action for that cause. *Rayle v. Indianapolis, etc., R. R. Co.*, 40 Ind., 347. 1872.

10. Constitutional law. Under the constitution of Ohio, the general assembly cannot confer on a judge of the supreme court jurisdiction at chambers, to grant or dissolve an injunction in a cause pending in another court. *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Hurd*, 17 Ohio St., 144. 1866.

11. Motion. On motion to dissolve an injunction in vacation, all amendable defects in the bill will be considered as amended. *Alabama and Florida R. R. Co. v. Kenney*, 39 Ala., N. S., 307. 1864.

12. — A motion to dissolve an injunction may be made before answer put in. *Middletown v. Rondout, etc., R. R. Co.*, 43 Howard's Pr. (N. Y.), 144. 1872.

III. CONTEMPT.

13. Return of writ. Where a judge in one county grants an injunction in a suit pending in another county, the order has no greater force by having been made by him while sitting as a court, than if it had been made in chambers. *Androscoggin and Kennebec R. R. Co. v. Androscoggin R. R. Co.*, 49 Me., 392. 1862.

14. — In case of contempt for violation of such an injunction, the attachment is not returnable to the court or judge where the writ was ordered, but to the court where the suit is pending. *Ib.*

15. — In matters of contempt, exceptions may be taken on the question of jurisdiction, where it is distinctly raised and acted on as a matter of law. *Ib.*

16. Review. A proceeding for a contempt in disobeying an injunction is not an order in the cause; but is in the nature of a criminal proceeding, and the judgment in such a proceeding can only be reviewed by a superior tribunal by writ of error, and not always in that way. *Baltimore and Ohio R. R. Co. v. Wheeling*, 13 Grattan (Va.), 40. 1855.

IV. SUBJECTS AND GROUNDS OF INJUNCTION.

17. Against dissolution of corporation. A corporation, defendant in a suit in equity, and which might be held liable to respond pecuniarily to the plaintiff, in the suit, and which had made one attempt to procure its own dissolution, was enjoined from taking any proceedings for its own dissolution, or for the appointment of a receiver of its effects, or for the distribution thereof among its stockholders, or any other persons, and from making any distribution or transfer of any of its effects. *Fisk v. Union Pacific R. R. Co.*, 10 Blatchford (U. S. C. C.), 518. 1873.

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18. Assessment. An injunction to prevent the collection of an assessment, is not sufficient in evidence to prevent the rendition of a judgment of confirmation of such assessment. *Ottawa v. Chicago and Rock Island R. Co.*, 25 Ill., 47. 1860.

19. Canals. The courts interfere, by injunction, to prevent wrongs of a repeated and continued character, or which occasion damages which can be estimated only by conjecture, and not by any accurate standard, and this is what is meant by irreparable damage and mischief. *Commonwealth v. Pittsburgh and Connellsville R. R. Co.*, 24 Penn. St., 159. 1854.

20. — When public rights or private rights secured by statute or by contract, are invaded, and an injunction is asked for in order to protect them, no question of the amount of damages is raised; but only one of right. *Ib.*

21. — A railway company having begun to fill up part of the state canal, and to erect an arch over it which would obstruct its use, an injunction was granted at the instance of the state, although the canal had been abandoned for several years. *Ib.*

22. Change of line of railway. Conceding that it is not competent for the general assembly to authorize a corporation to embark in new enterprises, entirely beyond and outside the scope of the objects contemplated by its charter at the time stockholders became members of the corporation by subscribing to its stock, and thus to effect a fundamental change in the charter, and in the risks and prospects of its stockholders, without the consent of all the stockholders; yet it is clear that before a stockholder can be entitled to a remedy by injunction against such departure from the original objects of the incorporation, he must have shown himself prompt and vigilant in the assertion of his rights as such stockholder. It will not do for him to wait until the mischief of which he complains is accomplished, fortunes expended, and great public interests created. If he do, he must be held to have acquiesced in the change, or to content himself with some other form of remedy. *Chapman v. Mad River and Lake Erie R. R. Co.*, 6 Ohio St., 119. 1856.

23. Criminal act. Threats of personal violence to the agents of the company, if they attempt the construction of the road, will not

give chancery jurisdiction to interfere by injunction, to restrain the former proprietor of the land from obstructing its construction by violence. *Montgomery and West Point R. R. Co v. Walton*, 14 Ala., N. S., 207. 1848.

24. Crossings of two railways—compensation. Where a bill was filed by B., a railway company which had existed for years, to enjoin C., another railway company recently chartered, from the further construction of its road and from crossing B.'s track, on the ground that C.'s charter was a violation of B.'s, B.'s rights being regarded as, at least, doubtful, and it appearing that there had been great delay in its application for relief; that it had acquiesced, for a long time, in the building of C.'s road; that during such delay and acquiescence, C. had expended, and incurred liabilities for large sums of money, and that the consequences to the stockholders of C., if it were enjoined, would be disastrous, the injunction was denied; but the bill was retained in order that compensation might be made for crossing B.'s track. *South Carolina R. R. Co. v. Columbia and Augusta R. R. Co.*, 13 Richardson's Eq. (So. Car.), 339. 1867.

25. Elevated railway. The legislature of New York having authorized the construction of an elevated railway through certain streets, the federal courts will not interfere by injunction with its construction. *Currier v. West Side Elevated R. R. Co.*, 6 Blatchford (U. S. C. C.), 487. 1869.

26. Executory contract. The complainants contracted with a railway company to lay down the iron for its road, to erect the necessary bridges, buildings, etc., and were to be paid in the mortgage bonds and stock of the company, but in consequence, as they allege, of the defendant's fault, they had not entered upon the work, the road bed not having been prepared by the company as agreed upon. The complainants asked an injunction, to restrain the company from making a contract with others to equip the road, and prayed a specific execution of their contract. The court sustained a demurrer to the bill and refused to retain the bill for compensation. *Fallon v. Railroad Co.*, 1 Dillon (8 U. S. Cir. Ct.), 121. 1871.

27. Foreign corporation—bonds. Before a foreign corporation can rightfully be restrained by the supreme court of New York

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from issuing bonds, or from executing and delivering a mortgage upon its property, to secure such bonds, it must appear that the execution of the mortgage would be an injury or obstruction to rights of the plaintiff, which could be enforced in that court. *Rogers v. Michigan Southern and Northern Indiana R. Co.*, 28 Barbour (N. Y.), 539. 1858.

28. Fraud. Matters, such as fraud, which should have been pleaded as a defense, are not sufficient grounds, after judgment, upon which to apply to equity to enjoin process to collect the judgment. *Muscatine v. Mississippi and Missouri R. R. Co.*, 1 Dillon (U. S. Cir. Ct.), 536. 1870.

29. Fulfillment of a contract delayed by an injunction. The plea that the parties had forfeited the right of way by voluntarily abandoning the construction of railroads in certain streets, and by failing to construct said roads within the time limited by the contract, is not made out, when proved that it was prohibited to do the work by an injunction by a third party; and because the injunction taken in September, 1866, was not dissolved before June, 1872, it is not to be inferred that it was kept so long in force by the wish and connivance of the relators, when the city was a party to the injunction suit, and having the same right to push the case that the relators had, did not do so. *State ex rel. v. Cockrem*, 25 La. An., 356. 1873.

30. Injunction against an injunction. In an action brought in the supreme court by S. against a railway company, an injunction order was granted by a justice of the first district. Subsequently the railway company brought an action, in the same court, against S. and others, laying the venue in a county in the eighth district, and obtained from a different justice of the first district an injunction order stopping all proceedings in the action of S. *Held*, that the granting of the second injunction order was not a valid exercise of judicial power, and the order was void. *Schell v. Erie R. R. Co.*, 51 Barbour (N. Y.), 368, 1868; *Same v. Same*, 35 Howard's Pr. (N. Y.), 438, 1868; *Same v. Same*, 4 Abbott's Pr. (N. Y.), 287, 1868; see *Erie R. R. Co. v. Ramsey*, 57 Barbour (N. Y.), 449, 1870.

31. Interference by state officers. It is competent for the state, at common law, through its officers, to maintain proceedings

by injunction to restrain public corporations from doing acts in violation of the constitution and laws of the state. Section 24 of the statutes concerning injunctions (W. S. 1032), which provides that "the remedy by injunction or prohibition shall exist in all cases where injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate remedy cannot be enforced by an action for damages" also applies to such cases. *State v. Saline County Court*, 51 Mo., 350. 1873.

32. Lien. The existence of a lien upon a railway, on behalf of the complainant, will not entitle him to an injunction to restrain the defendant, the owner, from the free use of the property. *Pensacola and Georgia R. R. Co. v. Spratt*, 12 Fla., 26. 1867.

33. Mistake. Where a clerical mistake is made in the computation of a judgment, and no application is made for its correction, and it appears the mistake would not have been made but for the laches of the debtor, an injunction to restrain the collection of the judgment will be denied. *Muscatine v. Mississippi and Missouri R. R. Co.*, 1 Dillon, (U. S. Cir. Ct.), 536. 1870.

34. Mortgage. Where a mortgagee advertises to sell and convey the mortgaged property, "to the full extent of the powers derived to or by him under and by virtue of said deed, and not otherwise," he proposes only to exercise a legal right, and an injunction will not be granted to restrain him. *York and Cumberland R. R. Co. v. Myers*, 41 Me., 109. 1856.

35. Rates fixed by law. An injunction will not be granted to compel a common carrier to transport goods at the rates fixed by law; but it will issue to prevent any railway company, bound by law to transport goods, from entering into an agreement not to transport them at the rates fixed by law. *Rogers Locomotive, etc., Works v. Erie R. R. Co.*, 5 C. E. Green's Ch. (N. J.), 379. 1869.

36. Right of way. A railway company is entitled to an injunction to restrain the erection of a mill within seven or eight feet of its track, upon land over which it has the right of way. *Cunningham v. Rome R. R. Co.*, 27 Ga., 499. 1859.

37. — A court of equity will not grant an

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injunction to restrain the construction of a railroad, on the ground that the plaintiff will sustain indirect damages by the construction, where his property is not taken or appropriated. *Barnes v. South Side R. R. Co.*, 2 Abbott's Pr., N. S. (N. Y.), 415. 1866.

38. — A court of equity has jurisdiction to prevent, by injunction, a railroad company from making its railroad over the land of a private citizen where the company has not paid or tendered compensation for the use of the land, as provided in art. 3, § 46, of the constitution of the state. *Western Maryland R. R. Co. v. Owings*, 15 Md., 199. 1859.

39. — Where a party conveys land to a railway company for its right of way, relying upon the assurance of the president that certain stock gaps would be erected, it was held, that the railway company would not be enjoined from using the right of way until the "stock gaps" were erected. *Cook v. North and South R. R. Co.*, 46 Ga., 618. 1872.

40. — Where an injunction is asked to restrain a railway company from using a right of way, where the damages have been assessed by the county commissioners more than six years before, the question of the bar of the statute of limitations may be raised by demurrer. *Moors v. Kennebec and Portland R. R. Co.*, 58 Me., 279. 1870.

41. — The petition for such injunction must allege a demand of the damages more than thirty days before the filing of the bill. *Ib.*

42. — Where, in equity, A. alleged a contract with a railroad company, under which he was to convey to the company a right of way over his grounds, and a tract of land for the erection of a depot, and charged that in violation of this contract the company had purchased other grounds, and intended to erect its depot thereon, and abandon the ground contracted for (which abandonment was denied by the respondent), and praying for an injunction; held, that the plaintiff was not entitled to relief in equity but must resort to his remedy at law. *Gallagher v. Fayette Co. R. R. Co.*, 38 Penn. St., 102. 1860.

43. — Where a party whose land has been taken by a railroad company might have insisted on receiving a compensation at the time, but neglected to do so, and forbears to assert his right until after the road is completed and in full operation, an injunction

should not be granted, until all the ordinary means for obtaining an indemnity have failed. *Hentz v. Long Island R. R. Co.*, 13 Barbour (N. Y.), 646. 1852.

44. **Specific performance.** When allowed on a bill for specific performance of a contract, an injunction should be granted, if, upon the case made in the bill, the court ought to entertain it, and there is a probability that the defendant will, before the hearing, render itself incapable of executing the contract specifically. *Ross v. Union Pacific R. R. Co.*, 1 Woolworth (U. S. D. C.), 26. 1863.

45. — But if it does not state a case on which at the hearing, specific performance will be decreed, an injunction, which is sought only to make the final decree effective, ought not to be allowed. *Ib.*

46. — A restriction of the manner of using land granted, not against public policy, and beneficial to the adjacent land of the grantor, may be enforced in equity against the grantee or his assignees with notice. *Whitney v. Union R. R. Co.*, 11 Gray (Mass.), 359. 1858.

47. **Spring of water.** A party owning a spring of water is entitled to an injunction to prevent a railway company from laying pipes across his land to such spring for the purpose of appropriating the water. *Strohecker v. Alabama and Chattanooga R. R. Co.*, 42 Ga., 509. 1871.

48. **Streets.** The location of a railroad through a public street in a line not warranted by law will not be enjoined at the instance of the owner of an unimproved lot, suffering no present injury. *Zubriskie v. Jersey City and Bergen R. R. Co.*, 2 Beasley's Ch. (N. J.), 314. 1861.

49. — The erection of a trestle work for a railway in a public street or levee is not such a trespass as will authorize the issuance of a writ of injunction, as the trestle work can readily be removed. *Schurmeier v. St. Paul and Pacific R. R. Co.*, 8 Minn., 113. 1863.

50. **Street Railways.** A person who is not the owner of the fee of the land in a street in a city, over which the track of a horse railroad is about to be laid, but is only an abutting proprietor, owning up to the line of the street, must show special damage sustained, or likely to be sustained by him, differing from that of every other lot owner on the street, in order to support an individual action by him-

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self to restrain the laying of such track. *Osborne v. Brooklyn City R. R. Co.*, 5 Blatchford (U. S. C. C.), 366. 1866.

51. Taxation. Circuit courts have jurisdiction, by injunction, to stay any illegal proceedings to assess a tax upon, and sell by coercive sale, the property of an individual or corporation. *Louisville and Nashville R. R. Co. v. Warren County Court*, 5 Bush (Ky.), 243. 1868.

52. Tide waters. Whether the owner of land along the shore on tide waters has any right in the shore or the lands under water, by reason of adjacency, or by the provisions of the wharf act, is a disputed question, not settled by the courts of law in this state, and an injunction will not be granted to protect the shore owners in such rights. *Stevens v. Paterson and Newark R. R. Co.*, 5 C. E. Green's Ch. (N. J.), 126. 1869.

53. Wharves. The right to erect wharves and employ steamboats, if destructive to a paramount right of general navigation and fishing, cannot be redressed by an injunction at the suit of a private individual. *Delaware and Maryland R. R. Co. v. Stump*, 8 Gill & Johnson (Md.), 479. 1837.

54. When not to be granted. An injunction will not be granted where it would cause great injury to the defendants, and might be of serious detriment to the public without corresponding advantage to the complainant. *Torry v. Camden and Atlantic R. R. Co.*, 3 C. E. Green's Ch. (N. J.), 293. 1867.

55. — Injunctions will only be granted for great and irreparable injuries, and where adequate relief cannot be had at law. *Whittlesey v. Hartford, Providence and Fishkill R. R. Co.*, 23 Conn., 421. 1855.

56. — An injunction will not be granted when there is a doubt in the mind of the court as to the right of the complainant. *Cooper v. Second and Third St. R. R. Co.*, 3 Philadelphia Rep. (Penn.), 232. 1853.

V. DAMAGES.

57. Proof of damage must be made. Upon the dissolution of an injunction restraining the sale, under a deed of trust, of the property, effects, franchises, etc., belonging to a railway company, it is erroneous for the court to assess the damages at six per cent. without proof; the

damages assessed should be commensurate with the actual injury sustained. *St. Louis v. Alexander*, 23 Mo., 483. 1856.

58. Reference. Upon a reference for the assessment of damages sustained by defendant in consequence of an injunction, it is the duty of the party claiming to have sustained damages, to establish the fact and the amount, by satisfactory proof. *Dwight v. Northern R. R. Co.*, 54 Barbour (N. Y.), 271. 1869.

59. Rents — Participation in suit. K. and B., as trustees of the bondholders of a railroad company, after foreclosure, made a lease of the road to another company. The orators, who owned one-fourth and represented a majority of the bonds, brought a bill for themselves and all other bondholders who should choose to come in and prosecute, against K. and B., and the lessees, to set aside the lease; and an injunction was granted against the use of the road by the lessees. The bill was dismissed, and the damages were assessed at \$63,097.86, as to K. and B., and as to the lessees, at \$17,383.52, and that the funds in the hands of a receiver who had been appointed to take charge of the road pending the suit, should be applied in payment of these damages so far as they went, and that the orators should pay the remainder, not exceeding \$30,000, the amount of the bond, and that the apportionment of this sum between the defendants should be considered a final decree. It turned out that there was no money in the hands of the receiver. *Held*, that the trustees, in defending the suit, must be regarded as acting for and in behalf of all the bondholders who did not assent to or aid in the prosecution of the suit, and no others. *Sturges v. Knapp and Troy and Boston R. R. Co.*, 36 Vt., 439, 1863. (See *Same Case*, 31 ib., 1; 33 ib., 486; 36 ib., 721).

60. — The act of the orators, in causing damages, was not the act of all the bondholders. *Id.*

61. — As the damages assessed to the trustees was solely for the rent they would have received as representatives for all the bondholders, but for the injunction, the true rule of apportionment is a *pro rata* distribution upon the sum assessed to the lessees on the one hand, and the share of the rent assessed to the trustees on the other hand, which would have belonged to and been received by

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the innocent bondholders, had no injunction been granted. *Ib.*

62. — Previous to said lease, three of the bondholders executed a power of attorney to S. and R. to act in their behalf in relation to the leasing or operating of said road. S. and R. opposed the leasing of the road, and subsequently S. signed a paper for himself and others not named, authorizing the commencement of said suit, and took an active part in its prosecution and claimed to represent said three bondholders. S. told them he had done nothing to bind them, but they knew this suit was being prosecuted and did not dissent. *Held*, that they thereby participated in its prosecution. *Same v. Same*, 36 ib., 721. 1864.

63. — Previous to the commencement of the suit, P., who assented to its prosecution, owned bonds to the value of \$4,500, and passed them to the L. Bank as collateral security for a loan of \$5,000. When P. had paid up said loan to within a few hundred dollars, after said suit was instituted, the S. Bank entered into an arrangement with the L. Bank to pay up the balance of said loan and take the bonds as collateral security for a loan of \$7,000, that the S. Bank had against P. and also for what it had paid to the L. Bank. *Held*, that the S. Bank, as it did not purchase said bonds, but took them as collateral, took its title from P., and must stand in his place as to the injunction fund, although neither bank knew of P.'s participation in the prosecution of said suit. *Ib.*

64. — M. executed and sent to the committee a power of attorney authorizing them to act for him, but the power of attorney left blank the names of the committee; *held*, notwithstanding, that M. thereby participated in the injunction suit. *Ib.*

65. — C. was not in favor of the suit, but being absent, appointed an attorney to act for him, who took part in the suit, and when C. learned of that fact, he did not apprise the committee of his disapproval. *Held*, that he had no right to a distributive share by virtue of his bond, having taken part in said suit. *Ib.*

66. — K. and B., as trustees of the bondholders of a railway, made a lease thereof to a railway company. The orators, who owned one quarter of the bonds, brought a bill, for themselves and all other bondholders who

should choose to come in and prosecute, against K. and B. and the lessees, to set aside the lease; and an injunction was granted against the use and occupation of the road by the defendants, the court, however, first requiring a bond to be filed by the orators to pay to the defendants such damages as they should sustain from the injunction, if it should be decided that it had been improperly granted.

Held, the bill having been dismissed, that the relation of the orators to the trustees was such as to excuse the lessees from paying rent to the trustees during the time the road was kept out of their hands by the injunction; and, therefore, that the orators must pay to the trustees as damages that proportion of the rent, during such time, which the bondholders, not participating in the prosecution of the bill, were entitled to. *Sturges v. Knapp*, 33 Vt., 486. 1860.

67. — That on the question of the amount of damages sustained by reason of the injunction, evidence of the earnings of the road for a period immediately preceding the injunction and immediately after its dissolution was competent to show the value of its use; and that also the opinion of witnesses who were acquainted with the business and expenses of the road were competent for such purpose. *Ib.*

68. *Streets.* Upon a bill charging that the Lexington and Ohio railroad, within the city of Louisville, and the steam cars, etc., there used, were a nuisance, the chancellor granted an injunction, restraining the company from running cars there; without requiring of the complainant any bond to pay any damages which the defendant might sustain by reason of the injunction. The company answered, denying the charge, and making its answer a cross bill, praying for damages occasioned by the suspension of its privileges and business. The complainants having failed to sustain their case by proof, their bill was to be dismissed, by the mandate of this court, but as no bond was required of the complainants, and it does not appear that they instituted or prosecuted their suit maliciously or without believing that they had good cause, they are not liable for damages, and the decree dismissing the cross bill is affirmed. The complainants can only be made liable, in such a case, by showing that their

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suit was malicious, as well as groundless; and then the remedy, it seems, would be at law, not in chancery. *Lexington and Ohio R. R. Co. v. Applegate*, 8 Dana (Ky.), 289. 1839.

VI. APPEALS.

69. What orders may be appealed from.

In a case which is purely an injunction cause, the parties having had time to prepare the case, and having taken testimony to support their respective pretensions, and it not being probable that any other facts can be brought into the cause which will affect its principles, a motion was made in vacation to dissolve the injunction, on the ground that it was improvidently awarded, and upon the cause as it then stood. The hearing of the motion was objected to: 1st, because a foreign corporation, which was a party, had not answered; 2d, because exceptions had been filed to the sufficiency of the answers of the defendant, which were still pending and undetermined; 3d, because the answer of the defendant, a corporation, was not verified by affidavit. The judge heard the motion but refused to dissolve the injunction, and continued it until further order or decree. *Held*, that the refusal of the judge to dissolve the injunction adjudicated the principles of the cause to the extent that the injunction had not been improvidently awarded, and that the cause, as it then stood, ought to be continued. It is, therefore, such an order as may be appealed from; and it is a proper case for appeal at once. *Baltimore and Ohio R. R. Co. v. Wheeling*, 13 Grattan (Va.), 40. 1855.

70. — From an order to show cause, granted *ex parte* returnable at a future day, and granting a temporary injunction pending the motion, no appeal will lie to the general term, until a hearing has been had on the original order to show cause, or on a motion to vacate or modify such order. *Bloodgood v. Erie R. R. Co.*, 51 Barbour (N. Y.), 273. 1868.

71. — An appeal may be taken from an order made in vacation, overruling a motion to dissolve an injunction when the principles of the cause are thereby adjudicated. *Richmond and York River R. R. Co. v. Wicker*, 13 Grattan (Va.), 375. 1856.

72. — An appeal lies in all cases from an interlocutory decree where an irreparable in-

jury will follow its enforcement. An appeal was therefore held to lie from an order dissolving an injunction restraining the city of New Orleans from removing the depot of a railway company. *State v. Judge*, *Eighth District*, 23 La. An., 51. 1871.

73. — On appeal from an order dissolving an injunction, the chancellor granted an order staying the proceedings to restrain which the injunction had issued until the next sitting of the court of errors and appeals. A motion was made in that court, at its next sitting, for an order extending the stay until the hearing of the appeal. *Held*, that the court of errors and appeals had power to make such an order; but that the granting or refusing it rested in the sound discretion of the court. It was denied in this case. *Doughty v. Somerville and Easton R. R. Co.*, 3 Halstead Ch. (N. J.), 629. 1848.

74. — The judgment dissolving an injunction and dismissing the bill of the plaintiff, is not a final judgment from which an appeal lies. *Pacific R. R. Co. v. Burger*, 32 Mo., 578. 1862.

75. — An appeal to the supreme court does not lie from an *ex parte* order made at the chambers by a judge of the district court. *Scharmeier v. St. Paul and Pacific R. R. Co.*, 12 Minn., 351. 1867.

76. — An appeal will not lie to the supreme court from the action of the court or judge below, in granting a temporary restraining order. *Cincinnati and Chicago R. R. Co. v. Huncheon*, 16 Ind., 436. 1861.

VII. GENERAL MATTERS.

77. Charter. The act granting aid to the Air Line R. R. Co. construed, and held not to entitle any individual to bring suit under that act against any other railway company in the state in the manner in which the present action was brought. *Jones v. Macon and Brunswick R. R. Co.*, 39 Ga., 138. 1869.

78. County judge. An injunction order which forbids a railroad company from leasing or selling any part of its property is an injunction which suspends the "general and ordinary business of a corporation," within § 224 of the Code, and 1 Laws of 1870, ch. 151, § 1, and cannot be granted by a county judge. *Middletown v. Rondout and Oswego R. R. Co.*, 12 Abbott's Pr., N. S. (N. Y.), 276. 1872.

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79. — A county judge has no power or jurisdiction, on granting an injunction *ex parte*, to grant an order to show cause, returnable before himself, why such injunction should not be continued. *Middletown v. Rondout and Oswego R. R. Co.*, 43 Howard's Pr. (N. Y.), 481. 1872.

80. **Discontinuance of suit.** Selectmen of a town may discontinue a suit in equity to restrain a railway company from unlawfully and dangerously running cars on its road; although a temporary injunction has been issued; and although some of the inhabitants of the town move to come in and prosecute the suit. *Mears v. Boston and New York Central R. R. Co.*, 5 Gray (Mass.), 371. 1855.

81. **Decree.** A decree dissolving an injunction previously granted to restrain a sale under a deed of trust, and directing a sale according to the deed of trust, and the bringing of the proceeds into court, is a final decree. *Railroad Co. v. Bradleys*, 7 Wallace, 575. 1868.

82. **Doubtful right; streets.** It is not error to sustain an injunction until the trial, where the injunction is asked to restrain a city from opening an embankment of a railway, where the right of the city is doubtful. *Mayor of Atlanta v. Georgia R. R. Co.*, 40 Ga., 471. 1869.

83. **Irregularity.** An injunction order issued by the court to restrain proceedings in another suit in the same court, is irregular, but is entitled to obedience, after service, until set aside. *Erie R. R. Co. v. Ramsey*, 3 Lansing (N. Y.), 178. 1870.

84. **Judgment — release of errors.** The injunction of proceedings upon a judgment does not operate as a release of errors in the proceedings at law prior to the judgment. *St. Louis, Alton and Terre Haute R. R. Co. v. Todd*, 40 Ill., 89. 1865.

85. **Jurisdiction.** The power of the court of common pleas to grant injunctions rests mainly if not entirely on the clause of the act giving that court equity jurisdiction. *Moore v. Green Street, etc., R. R. Co.*, 3 Philadelphia Rep. (Penn.), 210. 1858.

86. — In courts of equity, injunctions are allowed by the judge in vacation solely under the authority of a statute. *Gray v. Chicago, Iowa and Nebraska R. R. Co.*, 1 Woolworth (U. S. D. C.), 63. 1864.

87. — The circuit court of the United States,

may, in a proper case, enjoin the agents or officers of a state, whatever may be their grade, and this although the state may be the real party in interest; this doctrine applied in this case against the governor of Missouri acting as the special agent of the state in the foreclosure of a mortgage lien upon a railway, for the benefit of the state. *Murdock v. Woodson, Governor*, 2 Dillon (U. S. C. C.), 188. 1873.

88. — A citizen of another state owning property in Ohio, has a right to come into the circuit court of the United States, asking an injunction to restrain the wrongful acts of a corporation incorporated under the laws of Ohio. *Works v. Junction R. R. Co.*, 5 McLean, 425. 1853.

89. — A court of equity in Vermont may enjoin parties from proceeding in a court of law in another state; but the mere preference of the orators to have the matter determined by their own domestic tribunals is not a sufficient ground for the interference of a court of equity; and the inability of the court to enforce the injunction is a good reason for refusing to grant it. *Bank of Bellows Falls v. Rutland and Burlington R. R. Co.*, 28 Vt., 470. 1856.

90. — The supreme court, sitting at Philadelphia, will not hear a motion for an interlocutory injunction, unless the judge at *nisi prius* regards the case as of such importance as to request the other judges to sit with him for that purpose. *Philadelphia and Reading R. R. Co. v. Green and Coates Street R. R. Co.*, 33 Penn. St., 82. 1859.

91. — The court of common pleas has no jurisdiction to enjoin the execution of process issued out of the circuit court. It would seem that the statute, properly construed, requires that the circuit court and the court of common pleas shall respectively enjoin, control and litigate with reference to their own process. *Indiana and Illinois R. R. Co. v. Williams*, 22 Ind., 198. 1864.

92. **Notice.** A bill was filed by a railroad company, and a motion for an injunction to restrain another company from building a road; the motion was denied and an answer put in under the rule. *Held*, that the defendants had actual notice that its title was disputed, and that it went on with the road at its peril before the final hearing. *Warren and*

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Franklin R. R. Co. v. Clarion Land Co., 54 Penn. St., 28. 1867.

93. Nuisance. Preliminary injunction refused to stop a railroad company from completing a tunnel through a city authorized by the civil authorities of the place, on an allegation of nuisance by an owner of adjoining property on the same line. *Hodgkinson v. Long Island R. R. Co.*, 4 Edward's Ch. (N. Y.), 411. 1847.

94. Parties. In an action by injunction when the petition alleges that a county court had made an unlawful subscription for railroad stock, and had delivered a quantity of bonds issued to pay such subscription into the hands of an agent to be negotiated, and had levied a tax to pay said bonds and the interest thereon; and the petition prayed that the subscription be canceled, and that the county court, and that the justices thereof, and said agent be restrained from commission of said acts; *held*, that the railroad company and the agent for the negotiation of the bonds as well as the county court and its justices were proper parties to the action. *State ex rel. v. Callaway County Court*, 51 Mo., 395. 1873.

95. Pleading. If the plaintiff state any charge in his bill, which, if charged singly, would be followed by injunction, the bill should not be dismissed for mispleading. *Cumberland Valley R. R. Co's Appeal*, 62 Penn. St., 218. 1869.

96. — An injunction will not ordinarily be granted under a prayer for general relief, but must be specially asked for. *Ib.*

97. — The court will not decree the plaintiff more than he asks in his bill, whatever he may prove. *Ib.*

98. — Several causes of injunction, where they spring from a common cause, and there is privity between the plaintiffs and defendants, may be joined. *Ib.*

99. — A preliminary injunction will not be refused for error in the bill which is amendable, though the amendment has not been actually made. *Packer v. Sunbury and Erie R. R. Co.*, 19 Penn. St., 211. 1852.

100. — verification. The sufficiency of the verification to a bill for an injunction — determined. *Chesapeake and Ohio R. R. Co. v. Huse*, 5 W. Va., 579. 1872.

101. — An answer filed upon a notice for a special injunction will be treated as an affida-

vit. *Deschamps v. Second and Third Streets R. R. Co.*, 3 Phila. Rep. (Penn.), 279. 1858.

102. Preliminary. To entitle a party to a preliminary injunction, his right to the subject matter in dispute, and to the remedy applied for, must be clear to the court, and free from reasonable or serious doubt, or established by proceedings at law. *Hackensack Improvement Commission v. New Jersey Midland R. R. Co.*, 7 C. E. Green's Ch. (N. J.), 94. 1871.

103. — A preliminary injunction is never granted to enforce a mere right, but only to prevent irreparable mischief. *Mocanagua Coal Co. v. Northern Central R. R. Co.*, 4 Brewster (Penn.), 158. 1873.

104. — Where the allegations of the petition are clearly rebutted by affidavits, no temporary injunction will be allowed. *Atchison and Nebraska R. R. Co. v. Troy*, 10 Kans., 513. 1872.

105. — Preliminary injunctions are never awarded except when the equity of the complainant is clear, supposing the facts of which he gives *prima facie* evidence to be ultimately established. *Audenried v. Philadelphia and Reading R. R. Co.*, 68 Penn. St., 370. 1871.

106. — The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it was when the order was made. It cannot be used to take property from one person and put it into the possession of another. This can only be done on the final decree. *Farmers' R. R. Co. v. Reno, Oil Creek and Pothole R. R. Co.*, 53 Penn. St., 224. 1866.

107. Stockholder. Although a stockholder in a corporation may enjoin it from employing the property or powers of the corporation for a purpose wholly or materially different from that which was designed by the act of incorporation, yet he has no right to enjoin it from doing what is in direct furtherance of the object of its creation, and is for the benefit of all the stockholders as such, though it may be injurious to such stockholders in another character; or the interest of some other person, or the public may be injuriously affected by the work about to be executed. *Baltimore and Ohio R. R. Co. v. Wheeling*, 13 Grattan (Va.), 40. 1855.

108. Supersedeas. An injunction in our practice is a prohibitory writ, and its office is to restrain and not to compel performance. It

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does not authorize any act to be done, and there can be no proceeding under it, that may be stayed by a *supersedeas*. *McMinnville and Manchester R. R. Co. v. Huggins*, 7 Coldwell (Tenn.), 217. 1869.

INJURIES TO CARS BY CATTLE.

1. **Liability of owner of cattle.** The owner of cattle or horses in Missouri is not liable for injuries done to railway trains by reason of such animals going upon the track and being run over, unless the animals are willfully driven on the track by him. *Tamwater v. Hannibal and St Joseph R. R. Co.*, 42 Mo., 193, 1868; *Vickers v. Same*, ib., 198; *Hannibal and St. Joseph R. R. Co. v. Kenney*, 41 ib., 271. 1867.

2. — If the owner of cattle knowingly permits them to wander at large in the vicinity of a railway crossing of a public highway, the road being properly fenced, and they wander upon the track and are run over by a train of cars, without any fault on the part of the servants of the company, and the train is damaged thereby, the owner of the cattle is liable to the company for the injury done. *Sinram v. Pittsburgh, Ft. Wayne and Chicago R. R. Co.*, 28 Ind., 244. 1867.

3. — That the board of county commissioners have, under the statute, passed an order allowing cattle to run at large in the county, does not affect the rights of the parties. *Ib.*

INJURIES TO CROPS.

1. **Double damages.** Double damages for injury to crops will not be allowed in a case where a train of cars loaded with live stock is wrecked in a field, and the animals are turned out in the field to extricate them from the wreck. (W. S., 310-11.) *Grau v. St. Louis, Kansas City and Northern R. R. Co.*, 54 Mo., 240. 1873.

2. — In a suit against a railroad company before a justice of the peace, the statements filed stated the cause of action and claimed \$50 damages, and afterwards asked double damages "in accordance with the statute in such cases made and provided." *Held*, that

the request for double damages might be disregarded as surplusage, and that the justice had jurisdiction of the case. *Ib.*

INJURIES TO DOMESTIC ANIMALS.

See APPEAL; DAMAGES; LIMITATIONS; NEGLIGENCE; PLEADING; PROCESS; RECEIVER.

I. COMMON LAW RULES.

1. *Negligence.*
2. *Stock running at large.*
3. *Trespassing animals.*

II. DAMAGES.

III. HIGHWAYS.

IV. CITIES AND TOWNS.

V. DEPOT GROUNDS.

VI. PLEADING AND PRACTICE.

VII. ROADS OPERATED JOINTLY, OR BY LESSEES OR RECEIVERS.

VIII. FENCES AND CATTLE GUARDS.

1. *Generally.*
2. *Contract.*

IX. EVIDENCE.

X. SIGNALS.

XI. PRIVATE WAYS AND FARM CROSSINGS.

XII. STATUTORY LIABILITY AND DECISIONS UNDER VARIOUS STATUTES.

XIII. GENERAL MATTERS.

I. COMMON LAW RULES.

1. *Negligence.*

1. **Acts of Negligence.** Where there was nothing to obstruct the view of the engine driver for half a mile in advance, it was *held* to be negligence to run into cattle upon the track, without making any signal or any attempt to slacken the speed of the train. *Chicago and Northwestern R. R. Co. v. Barrie*, 55 Ill., 226. 1870.

2. — The leaving of cars upon an inclined plane insecurely fastened, with a full knowledge of the danger of such a practice, constitutes gross negligence. *Battle v. W. and W. R. R. Co.*, 66 N. C., 343. 1872.

3. **Accidents.** A railroad company is not responsible for the value of a mule, which passed through a gap in the fence near the railway, jumped on the track, only about fifty

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yards ahead of the locomotive, and was killed by an inevitable collision, there being no proof of negligence, unskillfulness, defective machinery, or recklessness. *Louisville and Nashville R. R. Co. v. Waincott*, 3 Bush. (Ky.), 149. 1867.

4. — Had the mule been on the railroad track far enough ahead to enable the engineer, by proper means, to stop the locomotive before it reached the animal, or to have enabled him to retard the train's progress until the mule could have been driven out of all danger of collision, it was his duty to see and save the mule, and for failing to do so, the railroad company would have been responsible for its value. *Ib.*

5. — Where animals were killed while galloping along the track at night, the night being foggy, the engine having a good headlight, the alarm whistle being blown, and the speed of the train being reduced from fifteen to seven and a half miles an hour, it was held that the company was not liable. *Raiford v. Mississippi Central R. R. Co.*, 43 Miss., 233. 1870.

6. — Where the engineer stopped his train to prevent a collision with a horse, and when the horse was apparently out of danger, started the train, and the horse suddenly turned again upon the track and was killed, it was held, that the jury erred in finding that the engineer was guilty of negligence. *Watson v. Railroad Co.*, 7 Phil. Rep. (Penn.), 249. 1869.

7. — Plaintiff's mare strayed upon a highway and took fright at an approaching train and ran down the track ahead of the train, the railway being fenced. After proceeding a short distance on the track she fell upon a trestle bridge, her legs hanging down between the ties. The train was stopped, and after several efforts to remove her, the employes of the company sawed the ties off and let her fall through, the bridge being about seven feet high. Held, that under these circumstances the employes acted with ordinary prudence and the owner could not recover. *Needham v. San Francisco and San Jose R. R. Co.*, 37 Cal., 409. 1869.

8. **Comparative negligence.** In this class of actions, the jury may compare the degrees of negligence. *Illinois Central R. R. Co. v. Middlesworth*, 43 Ill., 64. 1867.

9. — The plaintiff alone is in fault, or if both parties are equally in fault in committing an injury, the aggrieved party cannot recover. *Aurora Branch R. R. Co. v. Grimes*, 13 Ill., 585. 1852.

10. — If stock is injured by a railroad company, when the injury might have been prevented by the use of ordinary care, the company will be held liable although the owner of the stock was also in some degree negligent. *Central R. R. Co. v. Davis*, 19 Ga., 437. 1856.

11. — The question of the degree of negligence of the two parties is one for the determination of the jury. *St. Louis, Alton and Terre Haute R. R. Co. v. Todd*, 36 Ill., 409, 1865; *Illinois Central R. R. Co. v. Wren*, 43 ib., 77, 1867.

12. **Contributory negligence.** Where there is mutual negligence, if the defendant cannot avoid the accident by reasonable care and skill, the plaintiff cannot recover; nor can he recover when his negligence is proximate, and directly and materially contributes to the result, if the defendant could not have avoided the accident by ordinary care. *Indianapolis and Cincinnati R. R. Co. v. Wright*, 22 Ind., 376. 1864.

13. — In case of injuries to cattle, though there be negligence upon the part of the plaintiff, remotely connected with the injury, yet, if the defendant's fault or negligence was the immediate and proximate cause of the injury, the plaintiff may maintain his action for damages. *Vicksburg and Jackson R. R. Co. v. Patton*, 31 Miss., 156. 1856.

14. — In an action against a railroad company for the negligent killing of animals belonging to the plaintiff, the court instructed the jury that "proximate negligence is negligence at the time of the happening of the injury complained of;" that "remote negligence is that which does not occur at the time of the injury;" that he thought "the plaintiff, in suffering his animals to go at large in the vicinity of the railroad, was only guilty of remote negligence;" that if so, and if the defendant was guilty of gross negligence, the latter was liable for the damage. Held, that the instruction was erroneous, and that the plaintiff's right to recover depended on the degree of negligence on his part contributing to the injury, as well as upon the time of its

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happening. *Chicago and Northwestern R. R. Co. v. Goss*, 17 Wis., 428. 1863.

15. — If the conduct of the owner is of such a character as to justify the belief that he desired the injury to happen, the railroad company will not be liable, though the road is not fenced. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Dunlap*, 29 Ind., 426. 1868.

16. Degree of care required. A railway company is not liable for injuries done to cattle by its trains, unless the trains doing the injury were run without proper care. *Williams v. Michigan Central R. R. Co.*, 2 Mich., 259. 1851.

17. — Railway companies are responsible for the value of animals killed by reason of the negligence of their employes. *Lapine v. New Orleans, Opelousas and Great Western R. R. Co.*, 20 La. An., 158. 1868.

18. — In an action for an injury to the plaintiff, resulting from the negligence of the defendant, the care required of the plaintiff, is that degree of care which may reasonably be expected from one in his situation — *i. e.*, reasonable care; and if this degree of care be exercised by him, the want of a greater degree will not preclude him from a recovery for the negligence of the defendant. *Beers v. Housatonic R. R. Co.*, 19 Conn., 566. 1849.

19. — What will be deemed reasonable care in any case, will depend on the peculiar circumstances of that particular case. *Id.*

20. — Reasonable care upon the part of railway companies is such care and prudence in running their cars, as a prudent man, engaged in the same business, would use to prevent such injury, having regard to the means and instruments employed. *Mississippi Central R. R. Co. v. Miller*, 40 Miss., 45, 1866; *Gorman v. Pacific R. R. Co.*, 26 Mo., 441, 1868; *Tarwater v. Hannibal and St. Joseph R. R. Co.*, 42 ib., 193, 1868; *Vickers v. Same*, ib., 198; *McPheeters v. Same*, 45 ib., 22, 1869.

21. — The only justification to a railroad company for injury to cattle upon its track is that, in the prosecution of its ordinary and lawful business, the act could not be avoided by the use of such care, prudence and skill as a discreet man would put forth to avoid it. *New Orleans, Jackson and Great Northern R. R. Co. v. Field*, 46 Miss., 573. 1872.

22. — A railway company is bound to have in charge of its engines men of reasonable skill and judgment, and the engineers thus in charge must exercise such judgment and skill in avoiding injury to cattle on the track, having due regard to the safety of the train and passengers, in order to exonerate the company from liability. *Parker v. Dubuque S. W. R. R. Co.*, 34 Ia., 399. 1872.

23. — There is no distinction between railroads and ordinary highways in regard to the degree of care which the law requires, on the part of those who have the direction or management of vehicles upon them. *Beers v. Housatonic R. R. Co.*, 19 Conn., 566. 1849.

24. — Railway companies are liable for injuries done to cattle on their track, where the injury could have been prevented by use of ordinary care. *Richmond v. Sacramento Valley R. R. Co.*, 18 Cal., 351, 1861; *Illinois Central R. R. Co. v. Baker*, 47 Ill., 295, 1868; *Cincinnati and Zanesville R. R. Co. v. Smith*, 22 Ohio St., 227. 1871.

25. — Where a beast on a railroad would not be driven off from the track by a person trying to do so, and could not be scared off by the steam whistle, the engineer striving to arrest the progress of the train, before it reached it, but it was run over and killed; it was *held*, not to be negligence so as to subject the company. *Montgomery v. Wilmington and Welden R. R. Co.*, 6 Jones' Law (N. C.), 464. 1859.

26. — Where the engineer in charge at the time, could, by use of ordinary care and skill, without danger, have stopped the train in time to avoid the collision, although the animals were wrongfully upon the track, the company is nevertheless liable. *Toledo, Peoria and Warsaw R. R. Co. v. Bray*, 57 Ill., 514. 1871.

27. — Although an injury has occurred at a point where the railway company is not required to fence, the company is liable if the injury might have been prevented by the use of ordinary care. *Rockford, Rock Island and St. Louis R. R. Co. v. Lewis*, 58 Ill., 49, 1871; *Toledo, Peoria and Warsaw R. R. Co. v. Ingraham*, ib., 120.

28. — To support trespass for an injury done by a party in the exercise of his lawful rights, it must appear that no neglect or want of care on the part of the plaintiff coöperated in producing the injury. *Waldron v. Portland, Saco and Portsmouth R. R. Co.*, 35 Me., 422. 1853.

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29. — In such suit, it is for the plaintiff to show the exercise of ordinary care on his part, and the omission of some duty, or the commission of some wrong, on the part of the defendant, by which the injury was produced. *Ib.*

30. Evidence. The plaintiff may either prove negligence or show facts from which negligence will be inferred. *Calvert v. Hannibal and St. Joseph R. R. Co.*, 38 Mo., 467. 1866.

31. — The mere killing of an animal by a railroad train is not evidence of negligence upon the part of the company. *Walsh v. Virginia and Truckee R. R. Co.*, 8 Nev., 110, 1872; *Scott v. Wilmington and Raleigh R. R. Co.*, 4 Jones' Law (N. C.), 432, 1857.

32. — Before the owner of stock can recover for its injury, he must first show negligence on the part of the railway company. The fact of the injury raises no presumption of negligence. *Bethje v. Houston and Texas Central R. R. Co.*, 26 Tex., 604. 1863.

33. — The absence from the trial of the employes who were on the train when the animal was killed, raises a strong presumption against the company. *Murray v. South Carolina R. R. Co.*, 10 Richardson's Law (So. Car.), 227. 1857.

34. — It makes a *prima facie* case of negligence for the plaintiff to show that his cattle were injured while pasturing upon his own land. *Danner v. South Carolina R. R. Co.*, 4 Richardson's Law (So. Car.), 329. 1851.

35. — The fact of killing does not make out a *prima facie* case of negligence where the animal killed is a dog. *Wilson v. Wilmington and Manchester R. R. Co.*, 10 Richardson's Law (So. Car.), 52. 1856.

36. — In order to recover against a railway company for injury to stock, it is incumbent on the owner to show that such injury resulted from the negligence of the railway company. *Georgia R. R. Co. v. Anderson*, 33 Ga., 110. 1861.

37. — time. Evidence of a want of reasonable and proper care upon the part of the defendant should be confined to the time of the injury. *Mississippi Central R. R. Co. v. Miller*, 40 Miss., 45. 1866.

38. Fences. The law in Ohio does not require railroad companies to fence their roads, but when they leave their roads uninclosed, they take the risk of intrusions thereon by animals running at large, the same as other

proprietors who leave their land uninclosed; so that the owner of domestic animals, in allowing them to be at large, takes the risk of their loss, or of injury to them by unavoidable accident; and the company, in leaving its road unprotected by an inclosure, runs the risk of animals at large getting upon the road, without any remedy against the owner of the animals. *Kerwhacker v. Cleveland, Columbus and Cincinnati R. R. Co.*, 3 Ohio St., 172, 1854; *Central Ohio R. R. Co. v. Lawrence*, 13 Ohio St., 66, 1861.

39. — Having left its railroad uninclosed through a country where domestic animals are allowed to be at large, and thus exposed to the casualties of the animals accidentally getting upon the railroad track, it is the duty of the railroad company, acting through its agents, to use at least ordinary and reasonable care and diligence to avoid unnecessary injury to the animals, when found in the way of a train on the road. *Ib.*

40. — The first and highest object of the attention of the employes of the company, is due regard for the safety of the persons and property in their charge on the train, for which they are held to a high degree of care; and so far as consistent with this paramount duty, they are bound to the exercise of what, in that peculiar business, would be reasonable and ordinary care to avoid unnecessary injury to animals straying upon their uninclosed road; and for any injury to animals arising from a neglect of such care, the company is liable in damages to the owner. *Ib.*

41. — A railroad company is bound to exercise ordinary care and prudence in running its trains, and is liable for injuries to cattle on its track occasioned by the negligence or misconduct of its agents or servants. When the track is properly inclosed, the company is only liable for gross negligence. *Alger v. Mississippi and Missouri R. R. Co.*, 10 Ia., 268. 1859.

42. — It appeared that the plaintiff's horse escaped in the night from his pasture on the railroad track on account of the want of a proper fence along the same, and was found in the morning a mile from the plaintiff's land in a rocky pasture, seriously injured in the leg, and there was some evidence tending to show that this injury was received in the pasture where he was found. The court

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charged that if the jury were satisfied from the evidence "that there was a clear connection between the escape of the horse and the injury received, the plaintiff would be entitled to recover." *Held*, that the charge was erroneous in not instructing the jury to distinguish between a *direct* and a *remote* connection between the want of fence and the injury, and that if there was not a direct connection the plaintiff could not recover. *Holden v. Rutland and Burlington R. R. Co.*, 30 Vt., 297. 1858.

43. — Railway companies are not bound to fence their tracks. *Memphis and Charleston R. R. Co. v. Orr*, 48 Miss., 279. 1870.

44. Gross negligence and wanton injuries. Railway companies are liable for gross negligence or wanton malfeasance of their servants, whereby an injury results to cattle upon their track. *Pritchard v. La Crosse and Milwaukee R. R. Co.*, 7 Wis., 232. 1859.

45. — It is gross negligence in an engine driver not to have observed stock upon or near the track at a road crossing for eighty or one hundred yards before reaching that point, when he could readily have done so. *Chicago, Burlington and Quincy R. R. Co. v. Caruffman*, 38 Ill., 424. 1865.

46. — In an action against a railway company to recover damages for the killing of the plaintiff's cattle by the train of defendant, the negligence of the company must be shown. If the killing was entirely accidental or was the willful act of the engineer, the company is not liable. *Danner v. South Carolina R. R. Co.*, 4 Richardson's Law (So. Car.), 329. 1851.

47. — The rule in case of *Danner v. South Carolina R. R. Co.*, 4 Rich. L., 329, applies to a case of the killing of a horse at night. *Murray v. South Carolina R. R. Co.*, 10 Richardson's Law (So. Car.), 227. 1857.

48. — A railway company will be liable for either recklessness or want of common care, at the time and after cattle are discovered by its employés on the track, or for wanton injury. *Jackson v. Rutland and Burlington R. R. Co.*, 25 Vt., 150. 1853.

49. Injuries upon farms. In an action for killing a cow, it appeared that the railroad divided plaintiff's farm into two parts, and it did not appear that there was any highway or ordinary passway that enabled him to get from one side of his farm to the other, without crossing the railroad. *Held*, that the rail-

road company held its easement subject to the plaintiff's right to cross and recross to and from different sections of his farm, provided such right was reasonably exercised; that it was the duty of the jury to ascertain if either party had been guilty of negligence; if the plaintiff saw his cow on the track about the ordinary train time, or if his cattle were turned upon land adjoining said track, and were loitering along near the track, such facts might be evidence of negligence which it was proper for the jury to consider. *Housatonic R. R. Co. v. Waterbury*, 23 Conn., 101. 1854.

50. — Though one who grants a right of way through his field for running a railroad, is not bound to inclose his field, it does not follow that the company is not responsible for injury done to stock on the road by the train, in no case; nor is the company under legal obligation to inclose the railroad. *Louisville and Frankfort R. R. Co. v. Milton*, 14 B. Monroe (Ky.), 75. 1853.

51. Management of trains — pleading. An allegation in the pleading of negligence in the management of the train, is not supported by proof that too heavy a train was fastened to the locomotive. *Central Military Tract R. R. Co. v. Rockafellow*, 17 Ill., 541. 1856.

52. Negligence a question of fact. In an action wherein damages are sought to be recovered on account of injuries resulting to property from the negligence of defendant, the question of negligence is one of fact for the jury, and their finding thereon, under proper instructions, will not be disturbed, unless clearly against the weight of testimony. *Boggs v. Chicago and Northwestern R. R. Co.*, 29 Ia., 577. 1870.

53. — Whether the circumstances attending the transaction constitute negligence, will not, though admitted, be decided by the court, as matter of law, but will be left to the jury, as evidence for them to pass upon. *Beers v. Housatonic R. R. Co.*, 19 Conn., 566. 1849.

54. Rate of speed. Whether under all the circumstances of a particular case, a railroad company is guilty of negligence in running its train at a certain rate of speed, is a question for the jury. *Morse v. Rutland and Burlington R. R. Co.*, 27 Vt., 49. 1854.

55. — Railway companies have the right to run their trains at such a rate of speed as the

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exigencies of travel and freights require, without regard to the liability of stock to wander upon the track. *Raiford v. Mississippi Central R. R. Co.*, 43 Miss., 233. 1870.

56. — In determining the rate of speed at which a railway company may run its trains, it is not bound to consider the increased risk to cattle running at large in the vicinity of its track. *Central Ohio R. R. Co. v. Lawrence*, 13 Ohio St., 66, 1861; *New Orleans, Jackson and Great Northern R. R. Co. v. Field*, 46 Miss., 573. 1872.

57. — Where it appeared that a train was running at a greater than the usual speed, upon a straight part of the road, in the day time, and that one of several cattle, that were feeding near, and crossing the road, was killed by the locomotive, it was *held*, to be a negligence that the speed of the train was not lessened, nor the usual mode of driving off stock by the blowing of a steam whistle resorted to. *Aycock v. W. and W. R. R. Co.*, 6 Jones' Law (N. C.), 231. 1858.

2. Stock running at large.

58. Animals escaping from inclosures. A railroad company is not liable for negligently running an engine upon and killing the plaintiff's cattle, which have escaped from his inclosure and strayed upon the track. *Munger v. Tonawanda R. R. Co.*, 4 N. Y., 349. 1850.

59. — Where cattle enter from a highway, where it crosses a railroad, upon the track of such railroad, such entry is a trespass, although there is no obstacle to prevent such entry, and the town has made regulations requiring fences of a particular kind, and allowing cattle to run at large on the highways. *Tonawanda R. R. Co. v. Munger*, 5 Denio (N. Y.), 255. 1848.

60. — common law. Every unwarrantable entry by a person or his cattle on the land of another, is a trespass. *Ib.*

61. — This is so at common law, though the entry be by cattle coming from the highway, and the land be unfenced; and it is no excuse that the owner exercised care and prudence to keep them in his own inclosure. *Ib.*

62. — Cattle escaping from the owner's inclosure, into a highway, against his will, are not "lawfully going at large," within the meaning of the statute, though there be a

town regulation authorizing cattle to run at large. *Ib.*; *Munger v. Tonawanda R. R. Co.*, 4 N. Y., 349. 1850.

63. — A party whose cattle, without fault on his part, escape from his inclosure and wander upon a railroad track, and are there killed by alleged carelessness in not slackening the speed of the locomotive, cannot recover for their loss from the railroad company. *Price v. New Jersey R. R. Co.*, 2 Vroom (N. J.), 229, 1865; *Same v. Same*, 3 ib., 19, 1866.

64. — The plaintiff had driven his cows after dark and left them in the highway in front of his house, intending to milk them there, and then put them into his inclosure, and while they were so left, went into his house for a short time. While he was gone they strayed away and he searched for them until eleven o'clock at night. About ten o'clock at night, they were run over by the defendant's cars. The railroad was about a mile from the plaintiff's house, and he had not searched in that direction. The suffering of cattle to run at large was forbidden by statute. The judge charged the jury that the plaintiff had a right to place his cows in the highway for the temporary purpose of milking them, and that if he left them there, intending to milk them within a reasonable time and then to put them into his inclosure, and exercised ordinary care for the purpose of keeping them, he was not to be regarded as having suffered them to go at large within the meaning of the statute, and was not guilty of such negligence as would prevent his recovery. *Held*, on motion of the defendant for a new trial, that the question of negligence was properly one of fact for the jury, but that, so far as it could be treated as involving any legal question, the law was properly stated in the charge. *Bulkley v. New York and New Haven R. R. Co.*, 27 Conn., 479. 1858.

65. — Plaintiff's horses escaped from the pasture into the highway, and went from the highway through a defective cattle guard maintained by defendant, upon defendant's railway track, where they were killed by a passing train. *Held*, that defendant was liable for the value of the horses. The defendant was bound to guard against animals wrongfully as well as those rightfully in the highway; and the negligence of plaintiff in permitting the horses to escape would not bar a

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recovery. *Sheaf v. Utica and Black River R. R. Co.*, 2 N. Y. Sup. Ct., 388. 1873.

66. — A distinction should be made between the case of an owner whose cattle escape from his inclosure and stray upon a railroad against his will, and that of one who voluntarily permits them to go there, or to range in places where it is probable that they will do so. *Chicago and Northwestern R. R. Co. v. Goss*, 17 Wis., 428. 1863.

67. — An owner of mules, killed upon the track of a railroad by an engine and cars, cannot recover damages therefor, though they escape from a properly fenced inclosure without his knowledge, and were on the highway at its intersection with the track, at the time of the accident. *North Pennsylvania R. R. Co. v. Rehman*, 49 Penn. St., 101. 1865.

68. Highways. If a party is guilty of negligence, and allows stock to run in a highway near a railway crossing, he cannot recover for injuries received by such stock, although the servants of the railway company may also have been guilty of negligence. *Chicago, Burlington and Quincy R. R. Co. v. Cauffman*, 23 Ill., 513, 1862; *Clark v. Syracuse and Utica R. R. Co.*, 11 Barbour (N. Y.), 112, 1851.

69. Local regulations. In a suit against a railroad company for killing a cow, the injury was alleged to have been caused by the negligence of the servants of the company. The evidence showed that the county board had passed an order allowing such animals to run at large; that the cow was killed at the crossing of a public highway; that the whistle was not sounded nor the bell rung, and that the train was running at an unusual speed. It was storming at the time, making it difficult to see or hear at any great distance. *Held*, that the defendant was not liable. *Michigan Southern and Northern Indiana R. R. Co. v. Fisher*, 27 Ind., 96. 1866.

70. — Cattle are not presumed to be lawfully at large. There must be proof that the town gave permission. *Perkins v. Eastern R. R. Co. and Boston and Maine R. R. Co.*, 29 Me., 307. 1849.

71. Male animals. The statute prohibiting stallions from running at large was not intended to apply to colts until they were of such an age as to be troublesome to mares or dangerous to run at large. *Aylesworth v. Chi-*

cago, Rock Island and Pacific R. R. Co., 30 Ia., 459. 1870.

72. — Whether a railway company is liable under § 6, ch. 169 of the Laws of 1862, for killing a bull running at large in violation of law, even in case of gross negligence, *quare*? But inasmuch as it was conceded by counsel that it would, the judgment in this case was affirmed. *McCool v. Galena and Chicago Union R. R. Co.*, 17 Ia., 461. 1864.

73. Negligence of owner. Where there was no order of the commissioners shown authorizing cattle to run at large, and the plaintiff permitted his cattle to run at large in the vicinity of a railway where fencing was not required, he was held guilty of such negligence as to prevent a recovery for their injuries. *Indianapolis, Cincinnati and Lafayette R. R. Co. v. Harter*, 38 Ind., 557. 1872.

74. — The owner of cattle, permitting them to run at large, assumes some of the risk of their injury by trains of cars, and it is incumbent upon him to show that they were injured by some mismanagement of the company. *Memphis and Charleston R. R. Co. v. Blakeney*, 43 Miss., 218, 1870; *Raiford v. Mississippi Central R. R. Co.*, 43 Miss., 233, 1870; *O'Bannon v. Louisville, Cincinnati and Lexington R. R. Co.*, 8 Bush (Ky.), 348, 1871; *Louisville and Frankfort R. R. Co. v. Milton*, 14 B. Monroe (Ky.), 75. 1853.

75. — A person is guilty of negligence who permits his animals to go upon a railroad track at a place where the company is not required by law to fence. *Illinois Central R. R. Co. v. Phelps*, 29 Ill., 447, 1862; see *Great Western R. R. Co. v. Geddis*, 33 ib., 304, 1864; *Illinois Central R. R. Co. v. Goodwin*, 30 ib., 117. 1863.

76. The owner of cattle is bound to keep them in his own close at his peril; and nothing but willfulness on the part of a locomotive engineer would make him liable for the loss of a cow, exposed by the fault of the owner upon the track of a railroad. *Vandegrift v. Rediker*, 2 Zabriskie (N. J.), 185. 1849.

77. Rules in the several states — Georgia. Live stock have the right to run at large in Georgia. *Macon and Western R. R. Co., v. Lester*, 30 Ga., 911, 1860; *Macon and Western R. R. Co. v. Baber*, 42 ib., 300. 1871.

78. — Illinois. The fact that the animal injured was running at large will not excuse the

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company if there was no law prohibiting such animals from running at large. *Toledo, Wabash and Western R. R. Co. v. Fergusson*, 42 Ill., 449, 1867; *Chicago, Burlington and Quincy R. R. Co. v. Cauffman*, 38 Ill., 424. 1865.

79. — **Iowa.** In Iowa, cattle have the right to run at large. (See *Wagner v. Bissel*, 3 Iowa, 396, 1856; *Heath v. Coltenback*, 5 ib., 490, 1857;) *Alger v. Mississippi and Missouri R. R. Co.*, 10 Iowa, 268, 1859; *Evans v. Burlington and Missouri River R. R. Co.*, 21 Iowa, 374. 1866.

80. — **Kansas.** Ordinarily, when a person allows his cattle to run on another's land, the owner of the land is not liable for injuries received by the cattle while there, unless the injury is occasioned by his wanton act or gross neglect. It was held error to charge the jury that a railway company was liable for the killing of cattle on its road through negligence or want of ordinary care. *Union Pacific R. R. Co. v. Rollins*, 5 Kansas, 168. 1869.

81. — Although in Kansas, cattle are free commoners, the defendant was not liable unless the injury was the result of gross negligence. *Ib.*

82. — **Maryland.** The owner of cattle is bound to keep them in an inclosure, or in custody. *Baltimore and Ohio R. R. Co. v. Lamborn*, 12 Md., 257. 1858.

83. — **Michigan.** The fact that cattle, etc., are free commoners, by a vote of a township, does not confer upon individuals the right to graze horses and cattle upon a railway, the road being in law neither a highway or public common. *Williams v. Michigan Central R. R. Co.*, 2 Mich., 259. 1851.

84. — **Minnesota.** The common law rule in relation to cattle is in force in Minnesota, and where a cow was killed by a railway train while running at large, it was held, that the owner of the animal was guilty of contributory negligence. *Locke v. St. Paul and Pacific R. R. Co.*, 15 Minn., 350. 1870.

85. **Mississippi.** The common law, so far as it relates to the right of permitting cattle to run at large, is not in force in Mississippi. *Vicksburg and Jackson R. R. Co. v. Patton*, 31 Miss., 156, 1856; *New Orleans, Jackson and Great Northern R. R. Co. v. Field*, 46 Miss., 573, 1872.

86. — Railway companies are liable for injuries done to cattle upon their uninclosed roads, where such injury is caused by a want

of reasonable care and prudence in running their trains. *Ib.*

87. — They are bound to keep their machinery and road in good order, and to have a sufficient number of faithful and trustworthy employes to manage and control their trains. *Ib.*

88. — **Missouri.** The owner of cattle is under no obligation to keep them on his own premises; if, however, he should permit them to roam at large and they should go upon the track of a railroad and be injured unavoidably, through no want of care on the part of the employes of the company, he would be without redress. *Gorman v. Pacific R. R. Co.*, 26 Mo., 441, 1858; *Tarwater v. Hannibal and St. Joseph R. R. Co.*, 42 ib., 193, 1868; *Vickers v. Same*, ib., 198; *McPheeters v. Same*, 45 ib., 22. 1869.

89. — If the road is not fenced, that fact should be considered in estimating the degree of care required of the company. *Ib.*

90. — **Ohio.** Cattle have the legal right to run at large in the state of Ohio. *Cleveland, Columbus and Cincinnati R. R. Co. v. Elliott*, 4 Ohio St., 474, 1855; *Cranston v. Cincinnati, etc., R. R. Co.*, 1 Handy (Ohio), 193. 1854.

91. — **Pennsylvania.** An owner of cattle cannot recover for an injury done by a train to the cattle while running at large. On the contrary, he is liable for any injury done by them to the company or passengers. *Railroad Co. v. Skinner*, 19 Penn. St., 298. 1852.

92. — A railway company has the right to the exclusive possession of its right of way. *Ib.*

93. — **South Carolina.** Cattle are free commoners in South Carolina, and it is no trespass for them to go upon an uninclosed railway. *Murray v. South Carolina R. R. Co.*, 10 Richardson's Law (So. Car.), 227. 1857.

94. — It is not negligence, therefore, for the owner of a horse to permit it to run at large. *Ib.*

95. **Streets.** A person who voluntarily suffers his horse to go at large upon the public streets, and stray upon the railroad, cannot recover for injuries to the horse, happening through the negligence of a railroad company. *Halloran v. New York and Harlem R. R. Co.*, 2 E. D. Smith (N. Y.), 257. 1853.

3. Trespassing animals.

96. **Duty of railway companies.** The paramount duty of a railroad company, through

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its agents entrusted with the conduct of a train, is to look to the safety of the persons and property thereon; subordinate to which is the duty to avoid unnecessary injury to animals straying upon the road. *Louisville and Frankfort R. R. Co. v. Ballard*, 2 Metcalfe (Ky.), 177. 1859.

97. Fences. Where the land owner is under an obligation to fence the track of a railway through his premises, and fails to do so, and his horses stray upon the track in consequence and are injured, nothing short of intentional wrong or gross carelessness would render the railway company liable. *Cincinnati, Hamilton and Dayton R. R. Co. v. Watson*, 4 Ohio St., 424. 1854.

98. Gross negligence and willful acts. If an animal is wrongfully on the track of a railroad, but is injured, while on the same, by the gross negligence or willful misconduct of the company's agents, the company is liable. *Lafayette and Indianapolis R. R. Co. v. Shriner*, 6 Ind., 141, 1855; *Northern Indiana R. R. Co. v. Martin*, 10 ib., 460. 1858.

99. — Even where cattle are trespassing upon the track, the company is liable for their injury, if it appears that no means were used to avoid the killing of the cattle, and the employés showed such an inattention and disregard of consequences, such a degree of rashness or wantonness as evinced a total want of care for the safety of the cattle, or a willingness to destroy them, though the destruction may have been unintentional. *Stucke v. Milwaukee and Miss. R. R. Co.*, 9 Wis., 202. 1859.

100. — The circuit judge in his charge to the jury read the entire syllabus of the case of *Clark v. The Utica and Syracuse R. R. Co.*, 11 Barb., 112, and instructed the jury that that was the law of this case. *Held*, that because the facts were dissimilar, the instruction was calculated to mislead the jury, and therefore erroneous. *Id.*

101. — In the case cited in 11 Barb., the court stated that where cattle were trespassers upon a railway, the company was not liable for their killing, even though it was occasioned by gross negligence on the part of the company. *Held*, that an instruction embracing such statement was erroneous. *Id.*

102. Liability of railway companies. The plaintiff cannot succeed if it appears that the injury complained of was received by him

while he was trespassing upon the defendant, without proving that such injury was willful and intentional, on the part of the defendant. *Terry v. New York Central R. R. Co.* 22 Barbour (N. Y.), 574. 1855.

103. — If the plaintiff's cattle are wrongfully on the track of the railroad, the company is not liable for negligently running an engine upon and killing them. *Talmadge v. Rensselaer and Saratoga R. R. Co.*, 13 Barbour (N. Y.), 498. 1852.

104. — If the owner of sheep negligently suffers them to stray on a railroad, where they are killed by a passing train, the railroad company is not liable in damages. *Emmes v. Salem and Lowell R. R. Co.*, 98 Mass., 560. 1868.

105. — Where cattle are trespassing upon the track, a railway company is not liable for their injury unless such injury occurs through a want of ordinary care upon the part of the employés. Engineers are required to use the ordinary means, the bell and whistle, to remove animals from the railway track; but when such means fail, then the question whether the engineer should stop the train, check or increase the speed, if in his power, would depend upon what the safety of the passengers and train required, and whatever is required in this respect, under the circumstances, would be allowable as to animals wrongfully on the track. *Bemis v. Connecticut and Passumpsic R. R. Co.*, 42 Vt., 375. 1869.

106. Owner not at fault. Where cattle are at large without the fault of the owner, and go upon the track of a railroad, and are there killed through the negligence of the railroad company in the management of its train, the owner is not precluded from the right to recover damages by the fact that the cattle were trespassers on the railroad. *Isbell v. New York and New Haven R. R. Co.*, 27 Conn., 393. 1858.

107. Right of way lands — title. Railroad companies have an absolute ownership in fee of the land on which their roads are built, and if cattle graze upon these lands, it must be as a favor, not as a right. *Chicago and Mississippi R. R. Co. v. Patchin*, 16 Ill., 198, 1854; *Great Western R. R. Co. v. Thompson*, 17 ib., 131, 1855; *Central Military Tract R. R. Co. v. Rockafellow*, ib., 541, 1856.

Damages.

II. DAMAGES.

108. Double damages — appeal. Where, in an action for double damages for killing stock, the court below erroneously excluded certain evidence which was necessary to the recovery of such damages, and the verdict and judgment were only for actual damages, the supreme court will not, on reversing the ruling of the court below, enter judgment for double damages. *Mendell v. Chicago and Northwestern R. R. Co.*, 20 Ia., 9. 1865.

109. — constitutional law. The legislature has the power to fix the consequences attending the failure of a railroad company to pay the simple or actual value of property injured or destroyed as contemplated by the statute, ch. 169, acts of 1862, § 6, is not unconstitutional. *Jones v. Galena and Chicago Union R. R. Co.*, 16 Ia., 6. 1864.

110. — Lessees. A statute requiring railway companies to fence their roads, and providing that in case they fail to do so, they shall be liable for damages done to live stock, does not apply to the lessees of such companies operating the roads. *Liddle v. Keokuk, Mt. Pleasant and M. R. R. Co.*, 23 Ia., 378. 1867.

111. — But the lessees, though not liable under the statute, would still be liable in case of negligence. *Id.*

112. — notice. Proof of the service of the notice of injury and affidavit, on the station agent may be proven by the return of the sheriff or his deputy, verified by affidavit of the officer. *Brandt v. Chicago, Rock Island and Pacific R. R. Co.*, 26 Iowa, 114. 1868.

113. — To render a railroad company liable for double damages, it must have been served with a written notice of the killing or injury, accompanied by the original of the affidavit of loss; a copy of the affidavit is not sufficient. Ch. 169, Laws of 1862. *McNaught v. Chicago and Northwestern R. R. Co.*, 30 Iowa, 336. 1870.

114. — parties. In a suit against a railroad company for double damages for injuries to cattle, brought under the statute (W. S., 310, § 43), the party injured is the proper plaintiff. *Fickle v. St. Louis, Kansas City and Northern R. R. Co.*, 54 Mo., 219. 1873.

115. — tender. A tender, made within thirty days, in order to avoid the liability for double damages, must be an amount equal to

the full value of the stock. A tender of nearly the amount will not be sufficient. *Brandt v. Chicago, Rock Island and Pacific R. R. Co.*, 26 Iowa, 114. 1868.

116. Evidence. In a suit against a railroad company for damages for injuring cattle, the witnesses estimated the value of the property variously, from \$30 to \$40. *Held*, that the court might find the value to be \$37. *Madison and Indianapolis R. R. Co. v. Herod*, 10 Ind., 2. 1857.

117. Exemplary damages. In case of gross negligence or wanton and willful mischief by defendant's agents, exemplary damages may be allowed. *Vicksburg and Jackson R. R. Co. v. Patton*, 31 Miss., 156. 1856.

118. Measure of damages. The measure of damages is the value of the property destroyed. *Toledo, Peoria and Warsaw R. R. Co. v. Arnold*, 43 Ill., 418. 1867.

119. Value. Where an animal is so badly injured by a passing train of cars upon a railroad track that it must soon die from the injury, and the railroad company is liable therefor, and the owner kills the animal, but receives no benefit from it after the injury, evidence of the value of the animal after the injury is not admissible for the purpose of reducing the damages. *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Mustard*, 34 Ind., 50. 1870.

120. — Where it appears that the weather was warm and the cattle when found were swollen and unfit for beef, the plaintiff is entitled to a verdict for their full value. *Toledo, Peoria and Warsaw R. R. Co. v. Sweeney*, 41 Ill., 226. 1866.

121. — It cannot be objected that the owner failed to perform his duty in the premises, in not disposing of the stock to some profit, where, on the evening of the day when the injury occurred, the stock was taken possession of and buried by the employes of the defendant. *Toledo, Peoria and Warsaw R. R. Co. v. Parker*, 49 Ill., 385. 1868.

122. — It is for the jury to say what was a reasonable time in which the owner should have taken possession of the injured stock. *Id.*

123. — Where it appears that animals fit for beef are not killed, nor so injured but that they are of value for food, it is the duty of the owner to dispose of them to the best

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advantage. *Illinois Central R. R. Co. v. Finnigan*, 21 Ill., 646. 1859.

124. — Where the company is liable under the statute, the owner may abandon the injured animal, and the railroad company will be liable for the value of the animal when injured. *Ohio and Mississippi R. R. Co. v. Hays*, 35 Ind., 173. 1871.

III. HIGHWAYS.

125. **Burden of proof.** In an action for killing cattle by a train at a crossing of a highway, in the absence of any evidence that the cattle were lawfully upon the road, the burden of proof is upon the plaintiff of further proving negligence on the part of defendant. *Galpin v. Chicago and Northwestern R. R. Co.*, 19 Wis., 604. 1865.

126. **Fences.** Railroad companies are required by statute to fence their roads, and construing this law as a police regulation, for the safety of the public, the fact that a railroad runs along side of a public highway would seem to require peculiar care on the part of the company in complying with the law. *Indianapolis and Cincinnati R. R. Co. v. Guard*, 24 Ind., 222. 1865.

127. — Where cattle are injured at a highway crossing, the test of the liability of the company is, whether, at the time of the accident, reasonable and proper care was exercised to avoid the injury, the cattle not being on the track by the negligence of the plaintiff. *Balcom v. Dubuque and Sioux City R. R. Co.*, 21 Ia., 102. 1866.

128. — In the absence of proof of negligence in such a case, a railroad company is not liable for the killing of cattle which had strayed upon the track at a highway crossing. *Logansport, Peoria and Burlington R. R. Co. v. Caldwell*, 38 Ill., 280. 1865.

129. — When a railroad company is duly authorized to lay its track in one of the streets of a city, it is not, at all events and without proof of negligence or want of skill and reasonable care, liable for accidents, which may be caused thereby. Proof of such negligence or want of care or skill in the manner of constructing or maintaining the track, are necessary, as between the company and persons exercising the common right of passing and repassing through or across the street. *Ma-*

zetti v. New York and Harlem R. R. Co., 3 E. D. Smith (N. Y.), 98. 1854.

130. — The fact that a horse was frightened and not under the control of any one, at the time when it was struck by a railroad train on a highway crossing, is not conclusive, as a matter of law, of such a want of care on the part of its owner as to defeat his right to recover for the injury. *Southworth v. Old Colony and Newport R. R. Co.*, 105 Mass., 342. 1870.

131. **Signals.** A party lawfully crossing a railroad at grade with a drove of cattle is not bound to signal the approaching train. If necessary, it is the duty of the company to employ a person to give signals. *Reeves v. Delaware, Lackawanna and W. R. R. Co.*, 30 Penn. St., 454. 1858.

132. — A person approaching a crossing with a drove of cattle has a right to presume that the company's servants will take all reasonable and proper precautions to avoid injuring those who are lawfully on the road. *Id.*

133. — It is negligence to approach such highway with a train at a speed of 25 or 30 miles an hour. *Id.*

134. **Statutes.** A railroad company had authority by its charter to take a right of way sixty feet wide, with the limitation that where the track was built upon or along a preëxisting highway, it was required that the highway should be left thirty feet wide. *Held*, in a suit against a company to recover the value of animals killed by a passing train at a place where there was a space of from forty-five to fifty-five feet between the track and the further side of such a highway, that the company was required to fence at such place. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Sweeney*, 32 Ind., 430. 1869.

135. Where the outer line of a railway and that of a highway running parallel with each other, intersected several hundred feet before the highway crossed the track of the railway, it was *held*, that the company was, under ch. 169, Laws of 1862, liable for stock killed on the track between cattle guards which were erected at the points where the right of way of the railroad and the highway intersected and where the highway crossed the track, and to which the company had erected fences. It seems that, in order for the company to protect itself from liability, its fences should be built to, and its cattle guards erected at

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the crossing. *Andre v. Chicago and Northwestern R. R. Co.*, 30 Ia., 107. 1870.

136. — A railway company is not liable, under ch. 169, Laws of 1862, for stock killed at a crossing of a road, used and traveled as a public road, though the route thus traveled was in fact outside of the survey or line of a highway, as established by the county authorities. *Soward v. Chicago and Northwestern R. R. Co.*, 33 Iowa, 386. 1871.

137. — Where an animal goes upon a railroad track at the crossing of a public street or highway, or other place where, from any cause it would be improper that the railroad should be fenced, and is killed by the locomotive or cars, the company is not liable, except for the negligence or misconduct of those having charge of the train. *Indianapolis and Cincinnati R. R. Co. v. McKinney*, 24 Ind., 283. 1865.

138. — A recovery cannot be had under the statute for the killing of stock at a highway crossing. Negligence must be shown in such case. *Jeffersonville, etc., R. R. Co. v. Huber*, 42 Ind., 173. 1873.

139. — But where the animal was killed ten feet beyond the line of the highway, the company was held liable. *Indianapolis, Cincinnati, etc., R. R. Co. v. Bonnell*, 42 Ind., 539. 1873.

140. — A railroad company is not liable, under ch. 169, Laws of 1862, for stock killed on its track at a point where it has no right to fence the same, as at the crossing thereof by a public highway. *Soward v. Chicago and Northwestern R. R. Co.*, 30 Ia., 551. 1870.

141. Stock running at large. Plaintiff's horse escaped from his stable at night, and fell into a cut in the public highway through which the railroad track of the defendant passed. Held, that it was the plaintiff's duty so to secure his horse that he could not stray into the public streets, and that, if he escaped and any accident occurred to him in consequence of such escape, the plaintiff must suffer the consequences. *Mentges v. New York and Harlem R. R. Co.*, 1 Hilton (N. Y.), 425. 1857.

142. — Where cattle are running at large upon a public highway, the owner being guilty of no negligence, and they are killed by a locomotive, the railroad company is liable for their injury through negligence. *Rehman v. R. R. Co.*, 5 Philadelphia Rep. (Penn.), 450. 1864.

IV. CITIES AND TOWNS.

143. Cattle guards. If cattle guards are constructed by railway companies within the limits of towns, they should keep them in repair. *Chicago and Rock Island R. R. Co. v. Reid*, 24 Ill., 144. 1860.

144. — The provision in the Statute of 1848, requiring railroad companies to construct and maintain cattle guards at all road crossings, does not apply to streets in cities and villages. *Vanderkar v. Rensselaer and Saratoga R. R. Co.*, 13 Barbour (N. Y.), 390. 1851.

145. — The statute makes an obvious distinction between streets and roads. Cattle guards in the streets of a city or village would be a nuisance. *Ib.*

146. Crossings. Where streets in a town or city have been laid out on the plat and dedicated to public uses, they become public highways, whether they be used as such or not, and a railroad company is not liable for animals killed at the crossing of such streets, under R. C., 1855, p. 649, § 5, if there be no actual negligence. *Meyer v. North Missouri R. R. Co.*, 35 Mo., 352. 1864.

147. — For injuries occurring at public crossings, no recovery can be had without proof of actual negligence. *McPheeters v. Hannibal and St. Joseph R. R. Co.*, 45 ib., 22. 1869.

148. — Where the council of a city, having exclusive control of the streets of the city, specifies by ordinance the general character and extent of the work to be done by railroad companies where the streets are crossed by their railway tracks, in order that such tracks may be crossed with more safety and convenience by the public, such work and the repairs thereof to be done and maintained to the satisfaction of a specified agent of the city, without, however, furnishing detailed specifications as to the particular manner in which the work shall be executed, or requiring it to be done under the supervision, control, and direction of an authorized agent of the city; the fact that such work is done and maintained by a railroad company to the satisfaction of such specified agent, does not relieve the company from liability for an injury to a horse driven without fault or negligence over such crossing, such injury being occasioned by the work having been done or maintained in an unskillful and improper manner, rendering the

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crossing unsafe. *Delzell v. Indianapolis and Cincinnati R. R. Co.*, 32 Ind., 45. 1869.

149. **Cities and towns; Evidence.** The killing of stock within the corporate limits of a town does not raise a legal presumption that the train was running at a rate of speed prohibited by the ordinances of such town. *Chicago and Alton R. R. Co. v. Engle*, 58 Ill., 381. 1871.

150. **Fences.** In an action against a railroad company for the killing of a cow upon its track, where the proof showed that the accident occurred within the limits of a town, as shown by the paper plat of the town, but in fact away from any street, and in an open prairie, and in case where the town corporation had been dissolved or suspended, the railroad company would be responsible, under the act of 1855 (Wagn. Stat. 310-11, § 43), for actual damages arising from failure to fence its track at the point of the accident, without proof of other negligence. The same action might also be brought under § 5, p. 520, Wagn. Stat. *Iba v. Hannibal and St. Joseph R. R. Co.*, 45 Mo., 469. 1870.

151. — The statute applies to such places within the limits of a city where it would not be illegal or improper to maintain a fence. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Parkhurst*, 34 Ind., 501. 1870.

152. **Limits of village.** The presumption is, that the houses compose a village; and if an animal is killed beyond the houses the presumption is, that it is killed beyond the village; if the town extends beyond the houses, the defendant should show the fact. *Ohio and Mississippi R. R. Co. v. Irvin*, 27 Ill., 178. 1862.

153. **Stock running at large.** One who voluntarily suffers his cow to go at large in the public street of a city, and to stray upon a railroad track therein, at a time when cars are passing, is guilty of carelessness, and hence cannot recover for injuries to the cow, happening through the negligence of the railroad company, not amounting to gross negligence. *Bowman v. Boston and Troy R. R. Co.*, 37 Barbour (N. Y.), 516. 1862.

V. DEPOT GROUNDS.

154. — The act of 1862, requiring railroad companies to fence their roads, or to be absolutely liable for all stock killed where they

have the right to fence, does not apply to depot grounds, and in the absence of negligence, they are not liable for stock killed thereon. *Davis v. Burlington and Missouri River R. R. Co.*, 26 Iowa, 549, 1869; *Rogers v. Chicago and Northwestern R. R. Co.* ib., 558; *Durand v. Same*, ib., 559; *Packard v. Illinois Central R. R. Co.*, 30 ib., 474, 1870; *Smith v. Chicago, Rock Island and Pacific R. R. Co.*, 34 Iowa, 506. 1872.

155. — It is not the abstract right to fence meant by the act, but only where it is fit, proper and suitable that a fence should be built. *Id.*

156. — Railway companies are bound to use reasonable and ordinary care to avoid injuring cattle upon their tracks on their depot grounds, and are liable, in the absence of such care on their part, for injuries done to cattle at such points, the owners of the cattle being free from negligence. *Whitbeck v. Dubuque and Pacific R. R. Co.* 21 Iowa, 103. 1866.

157. — Railway companies are not liable for injuries done to cattle by their trains upon their depot grounds, unless through the gross negligence or willful act of their agents. *Bennett v. Chicago and Northwestern R. R. Co.*, 19 Wis., 145. 1865.

158. — Proof that ordinary trains must run to a certain point beyond a switch near a depot, in order to switch off to a side track on the depot grounds, held not to be conclusive that the track from said switch to said point was within the "depot grounds," so as to justify a court in setting aside a contrary verdict. *Fowler v. Farmer's Loan and Trust Co.*, 21 Wis., 77. 1866.

159. — The question under the statute is, were the grounds used for depot purposes, and a deed conveying the ground for such purpose is not admissible in evidence. *Id.*

160. — While a railroad company is under no obligations to fence its depot grounds in order to protect it from liability for stock killed, such is not the case where it has a switch merely, unless the same is upon a part of a station ground; and the burden is upon the company to show this. *Comstock v. Des Moines Valley R. R. Co.* 32 Iowa, 376. 1871.

VI. PLEADING AND PRACTICE.

161. **Action cannot be divided.** One substantive and complete cause of action arising

Pleading and Practice.

out of the same tort, cannot be divided into several suits. *Brannenburg v. Indianapolis, Pittsburg and Cleveland R. R. Co.*, 13 Ind., 103. 1859.

162. — Thus, if A. have two horses killed by the cars of a railroad company, at the same time and place, and he sue and recover for the value of one of them, he cannot afterwards recover in an action for the value of the other. *Ib.*

163. **Crossings.** The declaration need not negative the possibility that the animals may have been killed at a farm crossing. If the road is not properly fenced at such a point, that is a matter to be set up in defense. *Great Western R. R. Co. v. Helm*, 27 Ill., 198. 1862.

164. — The petition alleged that the defendant negligently and carelessly ran over and killed some of the cattle of the plaintiff, and that such act was done at a point upon the road that was not inclosed by a lawful fence, and that such point was not a public road crossing. *Held*, that the petition set out a good cause of action. *Aubuchon v. St. Louis and Iron Mount R. R. Co.*, 52 Mo., 522. 1873.

165. — But to render the company liable, it must appear that the animal injured entered upon the road in consequence of the absence of fences or cattle-guards at a point on the line of the road which the company was bound to secure in that manner. *Cecil v. Pacific R. R. Co.*, 47 ib., 246. 1871.

166. — But before a justice of the peace, the statement of the cause of action will be deemed sufficient if it advise the opposite party of the nature of the claim, and if it be sufficiently specific to make the judgment bar another suit, although it fail to set forth the averments above mentioned. *Norton v. Hannibal and St. Joseph R. R. Co.*, 48 ib., 387. 1871.

167. **Fences.** In a suit against a railroad company to recover damages for stock killed, the allegation that the road was not fenced is a material one, and must be proved, where such fact is an element in the right to recover. *Indianapolis and Cincinnati R. R. Co. v. Wharton*, 13 Ind., 509. 1859.

168. — The fact that the company is not bound to fence at the place where the killing or injury occurs is purely a matter of defense, and need not be negatived in the complaint. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Brevoort*, 30 Ind., 324. 1868.

169. — It is not sufficient to allege that the road was "not fenced according to law." *Indianapolis, Cincinnati and Lafayette R. R. Co. v. Robinson*, 35 Ind., 380. 1871.

170. — Where an action was brought before a justice upon a complaint for "one cow, killed by your locomotive, in Clinton township, Cass county, Indiana," it was held inadmissible to prove that the road of the company was not fenced. *Toledo and Wabash R. R. Co. v. Reed*, 23 Ind., 101. 1864.

171. — Where the complaint alleged that the fence along the road took fire, and the servants of the company, to extinguish the fire, threw down a gap in the fence, which was negligently left open, etc., it was *held*, that the circumstances alleged were equivalent to an averment that the railroad fence was not properly maintained. *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Truitt*, 24 Ind., 162. 1865.

172. — In an action for injury to cattle by reason of want of proper fences and cattle guards, the petition failed to allege that the defendants were a corporation, but only described them as being in the possession of a railway as individuals, without stating that they were the agents of a railroad corporation, or in what capacity they were operating the road. *Held*, that the allegations were insufficient to bring the cause within the provisions of the statute, G. S., ch. 28. *Cooley v. Brai-nerd*, 38 Vt., 394. 1866.

173. — But as it was alleged that defendants by their servants so carelessly, etc., drove, etc., their locomotive, etc., that by and through carelessness, etc., the locomotive ran against and killed plaintiff's cattle; it was *held*, that this showed a good cause of action at common law. *Ib.*

174. — Suit was brought against a railroad company for the value of stock killed on its track by a passing train, the complaint averring "that at the time and place when and where said stock was run over and killed as aforesaid, the said railroad was not securely fenced as required by law." *Held*, that this averment sufficiently implied that the road was not securely fenced where the animals entered upon it. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Chenoweth*, 30 Ind., 366. 1868.

175. — An averment that defendant's road

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was not fenced as required by law, was held bad on demurrer. Such averment is a mere conclusion of law. *Indianapolis, Peru and Chicago R. R. Co. v. Bishop*, 29 Ind., 202. 1867.

176.—In a suit against a railroad company, to recover for animals killed, the complaint averred "that the railroad aforesaid was not securely fenced in, and the fence properly maintained." Held, after verdict, to be sufficient. *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Petty*, 30 Ind., 261. 1868.

177.—It is not sufficient to aver, generally, that the road was not securely fenced, without connecting the want of such fence with the injury, by an averment that the road was not so fenced at the place where the animals entered upon it. *Bellefontaine R. R. Co. v. Suman*, 29 Ind., 40. 1867.

178. Joinder of actions. Claims for damages for stock killed at different times by the cars of a railroad company cannot be joined, under the act of 1863, so as to give jurisdiction to the court. If the injury done at one time does not exceed \$50, justices of the peace have exclusive jurisdiction. *Toledo, Burlington and Logansport R. R. Co. v. Tilton*, 27 Ind., 71. 1866.

179.—All animals killed at any one time constitute a separate and indivisible cause of action, and where their value exceeds \$50, the circuit court or court of common pleas has original jurisdiction, but not otherwise, under the statute of 1859. *Indianapolis and Cincinnati R. R. Co. v. Elliott* 20 Ind., 430. 1863.

180.—Animals killed or injured at different times constitute separate and distinct causes of action, each of which should be stated in a separate paragraph of the complaint, and where the complaint indicates but one cause of action, the plaintiff should be confined, in his evidence, to a single transaction. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Brevoort*, 30 Ind., 324. 1868.

181.—Where several persons sue for injury to property belonging to them jointly, they can recover only for such property as they prove thus belonged to them. *St. Louis, Alton and Terre Haute R. R. Co. v. Linder*, 39 Ill., 433. 1866.

182. Negligence. In a complaint for damages, alleged to have been the result of the

negligence of defendant, there must be an averment that the plaintiff was without fault. *Toledo, Wabash and Western R. R. Co. v. Bevin*, 26 Ind., 443. 1866.

183.—A complaint for stock killed by a railroad before the act of 1859, must show that the animals sued for were killed through the negligence of the railroad company, and without the immediate fault of the plaintiff. *Wright v. Indianapolis and Cincinnati R. R. Co.*, 18 Ind., 168, 1862; *Terre Haute and Richmond R. R. Co. v. Smith*, 19 Ind., 42, 1862.

184.—A complaint against a railroad company for stock killed by the machinery of the company, will be bad, even after verdict, if it fail to aver negligence, or that the road was not fenced. *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Brucy*, 21 Ind., 215, 1863; *Toledo and Wabash R. R. Co. v. Lurch*, 23 ib., 10, 1864; *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Sparr*, 15 ib., 440, 1860; *Same v. Williams*, ib., 486.

185.—Action was brought in the court of Common Pleas against a railroad company for killing a horse. The complaint contained two paragraphs, the first founded on the act of March 1, 1853, and the second, a common count, in the nature of trespass at common law, alleging that the killing occurred through the "fault, misconduct and negligence" of the employés of the company. A single demurrer to the whole complaint, and separate demurrers to both paragraphs, were overruled. Answer was filed, pleading, 1. The general denial. 2. Several paragraphs, all going to show that the horse was killed without the fault of the company. Demurrer was filed to the latter paragraphs and sustained. The defendant then withdrew the general denial. Damages were assessed and judgment rendered for the plaintiff. Held, I. That the single demurrer to both paragraphs of the complaint was rightly overruled. II. That the separate demurrer to the first paragraph of the complaint should have been sustained; that the paragraph contained no cause of action, the court having no jurisdiction under the statute. III. That the second paragraph of the complaint was good on demurrer. *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Taffe*, 11 Ind., 458. 1858.

186.—To render a railway company liable for injuries to cattle, something beyond the mere killing must be shown; there must be

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some evidence of negligence on the part of the company. *Brown v. Hannibal and St Joseph R. R. Co.*, 33 Mo., 309. 1868.

187. — An allegation setting forth facts rendering the company liable under the statute (R. C., 1855, p. 649), is equivalent to an allegation of negligence. *West v. Hannibal and St. Joseph R. R. Co.*, 34 ib., 177. 1863.

188. — A petition against a railroad company which states that the defendant, whilst running its locomotive, etc., negligently, struck the cattle of the plaintiff, etc., shows a good cause of action at common law. If the petition set forth a good cause of action at common law, other irrelevant allegations may be disregarded, or stricken out as surplusage. *Garner v. Hannibal and St. Joseph R. R. Co.*, 34 Mo., 235. 1863.

189. — Either negligence or a violation of the statute must be averred and proved. *Calvert v. Hannibal and St. Joseph R. R. Co.*, ib., 243.

190. **Ownership of track.** Where, in an action on the case, against a railroad company, for killing the plaintiff's cow, by carelessly and unskillfully running its locomotive against her, the declaration contained no averment that this was done on the defendant's railroad track; it was held, that such averment was not necessary. *Housatonic R. R. Co. v. Waterbury*, 23 Conn., 101. 1854.

191. **Ownership of train.** It is necessary to allege that the train that caused the injury belonged to the railway company, or that it was being run over its road. *Toledo, Wabash and Western R. R. Co. v. Weaver*, 34 Ind., 298. 1870.

192. **Particular cases.** The sufficiency of the pleadings determined in actions for injuries to stock in particular cases. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Underhill*, 40 Ind., 229, 1872; *Same v. Vancant*, ib., 233; *St. Louis, Jacksonville and Chicago R. R. Co. v. Hamilton*, 46 Ill., 450, 1868; *Same v. Thomas*, 47 ib., 116, 1868; *Same v. Winter*, ib., 120; *Toledo, Wabash and Western R. R. Co. v. Cole*, 50 ib., 184, 1869; *Toledo, Peoria and Warsaw R. R. Co. v. Darst*, 51 ib., 365, 1869; *Same v. Same*, 52 ib., 89, 1869; *Same v. Bookless*, 55 ib., 230, 1870; *Same v. Webster*, ib., 338, 1870; *Great Western R. R. Co. v. Hanks*, 36 Ill., 281, 1865.

193. **Separate counts.** In a complaint to recover the value of stock killed by a railroad

company, in one count whereof the stock is described as common stock, and in another as stock of the full blood, such difference is sufficiently material to sustain and render proper separate counts. *Toledo and Wabash R. R. Co. v. Daniels*, 21 Ind., 256. 1863.

194. **Statutes.** In an action under the statute (R. C., 1855, p. 649, § 5), a petition which neither avers negligence or misfeasance, nor states facts which would render such an averment unnecessary, is deficient. The ground of liability should be distinctly stated, and the place where the accident occurred should be stated. *Quick v. Hannibal and St Joseph R. R. Co.*, 31 Mo., 399, 1861; *Miles v. Same*, ib., 407; *Brown v. Same*, 33 ib., 309, 1862; *Dyer v. Pacific R. R. Co.*, 34 ib., 127. 1863.

195. — A suit brought in the Common Pleas against a railroad company for killing cattle, is not governed by the statute of 1853, but by the common law rules. *Jeffersonville R. R. Co. v. Martin*, 10 Ind., 416. 1858.

196. — Hence, the complaint must charge negligence, unskillfulness or willful misconduct on the part of the company or its agents, and that such negligence, etc., was the proximate cause of the injury. *Id.*

197. **Statutory notice.** In an action before a justice of the peace against a railway company for double damages for stock killed, under § 6 of ch. 169, Laws of 1862, it is not necessary to plead the fact of the notice and affidavit, in order to make them admissible in evidence on the trial. *Brandt v. Chicago, Rock Island and Pacific R. R. Co.*, 26 Iowa, 114. 1868.

198. **Towns and villages.** In an action under the statute, the road being unfenced, the plaintiff should aver that the animals were not injured within the limits of a village. *Chicago, Burlington and Quincy R. R. Co. v. Carter*, 20 Ill., 390. 1858.

199. — Trespass *vi et armis* is not the proper form of action for injuries resulting from the negligence of the servants of a corporation; trespass on the case is the proper action, of which a justice of the peace has not jurisdiction. *Illinois Central R. R. Co. v. Reedy*, 17 Ill., 580. 1856.

200. **Unimproved lands.** The words "unimproved land" are sufficient in a pleading based upon a statute using the words "uninclosed lands." *Illinois Central R. R. Co. v. Wade*, 46 Ill., 115. 1867.

Roads Operated Jointly or by Lessees or Receivers.

VII. ROADS OPERATED JOINTLY OR BY LESSEES OR RECEIVERS.

201. Joint liability. Where a complaint against two railroad companies charged that "the defendants, by their locomotives and cars, then by them run upon their road, at said county and state, run over and upon one colt belonging to the plaintiff," etc. *Held*, that regarding the action as in the nature of a tort, it was sufficient to charge that the act was done by the defendants, without showing what relation they sustained to each other, and a recovery might be had against the one shown by the evidence to be liable; or that there might, under the statute, be a joint or several liability of the defendants as lessees, assignees, receivers, or as running or controlling a railroad. *Indianapolis, Cincinnati and Lafayette R. R. Co. v. Warner*, 35 Ind., 515. 1871.

202. — Where a railroad company, by an arrangement with another company, runs its cars over the road of the latter company, and an animal is injured by such cars, not from any negligence in the running of the cars, but in consequence of the omission to erect cattle guards or fences, the company owning the locomotive is not liable. *Parker v. Rensselaer and Saratoga R. R. Co.*, 16 Barbour (N. Y.), 315. 1853.

203. — Where the company owning an unfenced railroad, by contract, allows another company to run trains over such road, by one of which trains stock is injured, the company running the train is liable for such injury, even though the same was a result of the unfenced condition of the road. *Illinois Central R. R. Co. v. Kanouse*, 39 Ill., 272. 1866. So also is the company owning the track. *Toledo, Peoria and Warsaw R. R. Co. v. Rumbold*, 40 Ib., 143. 1866.

204. Lessees. In a suit brought against two railroad companies, the complaint charged that a horse was killed on the road of one of the companies, where the track was not securely fenced, by the cars of the other company, passing over the road in charge of the officers of the latter company: *held*, that the averments were not sufficient to charge either one of the companies with liability under the statute, as the railroad company owning the track was not shown to have

authorized the use of its road; nor was the company owning the cars alleged to have been controlling or running the road in the corporate name of the corporation owning the road, either as lessee, assignee, receiver or otherwise. *Cincinnati and Martinsville R. R. Co. v. Paskins*, 36 Ind., 380. 1871.

205. — The lessee of a railway, while operating such road, is liable if the fences are not maintained. *Tracy v. Troy and Boston R. R. Co.*, 38 N. Y., 433, 1868; *Same v. Same*, 55 Barbour (N. Y.), 529, 1867.

206. — A company running and operating a railway under an exclusive lease for fifty years is liable for injuries to stock on such road at such places as it has the right to fence. The case of *Liddle v. Keokuk, Mt. Pleasant and M. R. R. Co.*, 23 Ia., 378, distinguished from the present case. *Stewart v. Chicago and Northwestern R. R. Co.*, 27 Ia., 282. 1869.

207. — Lessees are not liable under the act of 1862. They are not embraced in the terms of the statute. They would however be liable in cases of their negligence. *Liddle v. Keokuk, Mt. Pleasant and M. R. R. Co.*, 23 Ib., 378. 1867.

208. — Where animals are killed by the train of another corporation, running in its own name and in its own behalf, and under its control, over a part of the track of the defendant, the company owning the road is liable under the statute. *Indianapolis and Madison R. R. Co. v. Solomon*, 23 Ind., 534. 1864.

209. — The defendant was running a rail road belonging to another corporation, under a written agreement with the owners, and for a period of time only fixed by the terms of a lease made to another corporation, and assigned to the defendant, who agreed to pay the rent reserved in said lease. *Held*, that the defendant was a lessee of such road, and liable for the value of a cow killed by its engine upon the track, in consequence of the defendant's neglect to maintain fences and cattle guards. Act of 1850, § 44. *Burchfield v. Northern Central R. R. Co.*, 57 Barbour (N. Y.), 589. 1870.

210. Receiver. A railroad company is liable for stock killed by the cars, in such case, although the road is at the time operated by a receiver duly appointed by a competent court. *McKinney v. Ohio and Mississippi R. Co.*, 22 Ind., 99. 1864.

Fences and Cattle Guards.

VIII. FENCES AND CATTLE GUARDS.

1. *Generally.*

211. Negligence; fire; fences. Where a fence, between a railway and the adjoining farms, which it is the duty of the land owners to keep in repair, is destroyed by fire communicated by the engines used upon the railroad, and the railroad company neglects to rebuild such fence, this will not render the company liable for the damages to a horse which strays upon the track of the road from an adjoining pasture where it is kept, through the open fence, and is killed by the engine. *Terry v. New York Central R. R. Co.*, 22 Barbour (N. Y.), 574. 1855.

212. Partition fences. No one but the adjoining owner or possessor of land has any interest in the duty or obligation of another to erect or maintain a division fence. *Ryan v. Rochester and Syracuse R. R. Co.*, 9 Howard's Pr. (N. Y.), 453. 1854.

213. Snow in cattle guards. Where a railroad company permits its cattle guards to remain filled with snow, so that cattle which have gotten upon the highway without any negligence on the part of the owner, pass over the guards, and in consequence of being thus upon the track are injured by a train, the company is liable for damages. *Dunnigan v. Chicago and Northwestern R. R. Co.*, 18 Wis., 28. 1864.

214. Stock running at large. When a railroad company is in default, for not repairing a gap in a fence, and a horse passes through the gap, upon the railroad track, and is there killed, the mere negligence of the owner in permitting the horse to run at large, will not excuse the railway company. *Munch v. New York Central R. R. Co.*, 29 Barbour (N. Y.), 647. 1859.

2. *Contract.*

215. A verbal agreement with a property owner, through whose field a railroad passed, that if the company would erect certain cattle guards, it need not fence the sides of its road, and he would not claim damage for injury done to his stock getting thereon from the field, does not pass to or bind his grantee of the premises. *St. Louis, Alton and Terre Haute R. R. Co. v. Todd*, 36 Ill., 409. 1865.

216. Breach of contract. A railway company, in purchasing the right of way, bound itself by contract with the owner of the land to fence the road through his land. The company neglected to fence, and the plaintiff's cattle being upon his own land, went upon the road and were killed by the engines. *Held*, that the owner could not recover in an action of *tort*; whether he could do so on the contract, not decided. *Drake v. Philadelphia and Erie R. R. Co.*, 51 Penn. St., 240. 1865.

217. — Where, by contract with a railroad company, the owner of the land through which the road runs agrees to maintain the fence, no recovery can be had by him, or his tenant on the land, for injury to animals resulting from the failure to comply with such contract. *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Petty*, 25 Ind., 413. 1865.

218. — In a suit against a railroad company for injuries to sheep, arising from neglect of the company to build a fence, as it had contracted to do, the question is whether the neglect contributed to the injury. *Joliet and Northern Indiana R. R. Co. v. Jones*, 20 Ill., 221. 1858.

219. Covenants running with the land. D. hired pasture for his horse on a lot belonging to B., adjoining the defendant's railway. A horse strayed upon the track, the fence being defective, and was killed by a passing train. It appeared that the strip of land on which the track was laid had been purchased by B., and in the conveyance thereof to the railway company, B. had covenanted, for himself and his heirs, to erect and maintain, on both sides of the strip, during the continuance of the defendant's charter, good and sufficient fences. In an action by D. to recover the value of the horse, it was *held*, I. That the covenant ran with the land, and every occupation was subject to it. II. That D. acquired no greater rights, in respect to its occupation, than his landlord, B., had to confer, and was estopped by the covenant to the same extent as B. III. That, as B. could not recover in such a case, D. could not. *Duffy v. New York and Harlem R. R. Co.*, 2 Hilton (N. Y.), 496. 1859.

220. — T., by deed duly recorded, conveyed to a railroad company the right of way for its track as then located and constructed through certain lands, and covenanted for himself, his heirs and assigns, to erect and maintain a fence

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on each side of the right of way, and reserved the right to pass and repass over the same in such way and at such time as would not interfere with the running of the railroad trains. T. subsequently conveyed the land through which the right of way was thus granted, by deed in fee, without exception or reservation, to H. And E., a tenant holding under H., brought an action against the company for negligently killing his horse, being on the track where it passed through the land, and no fence having been erected; *held*, that the assignee of T. was so far affected by the covenant in the grant, that he could derive no advantage from its breach, and that he could not claim from the railroad company a higher degree of care to avoid injury to a horse, being on the track through the land, than if the covenant had been kept. *Easter v. Little Miami R. R. Co.*, 14 Ohio St., 48. 1862.

221. Lands occupied in common. Plaintiff's cows passed from his field to H.'s land, which was occupied by H. and the plaintiff in common, and thence upon a piece of land belonging to the plaintiff, but which he had leased to the defendant as a woodyard, which was not properly fenced, and thence on the defendant's track where they were killed. There was no agreement between plaintiff and defendant in regard to the exclusive occupancy by the latter of the woodyard, nor in regard to who should maintain the fence around it. *Held*, that under these circumstances the court should have left it to the jury to find whether the defendant was or was not to have the exclusive occupancy of the woodyard, and also whether the cows escaped from H.'s land into the woodyard through a defect in the fence which defendant was bound to repair. *Holden v. Rutland and Burlington R. R. Co.*, 30 Vt., 297. 1858.

222. Negligence. A landowner granted a railroad company the right of way for its road across his land, in part consideration of which the company agreed, that whatever damage might be done to the grantor's property by the running of the cars on said railroad should be reimbursed by the company. *Held*, that the railroad company was not liable for the consequences of the landowner's negligence. *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Brownensburg*, 32 Ind., 199. 1869.

223. — *Held*, also, that it was negligence on the part of the landowner to confine his animals in an inclosure embracing a portion of the railroad track, where it was crossed by a private lane, with no bars or other appliances to restrain them from loitering on the track; and that where being so confined, they were injured without carelessness of the persons running the cars, the company was not liable. *Ib.*

224. Release of liability. A landowner released to a railroad company the right of way through his land, and also released and relinquished to the company, "all damages and rights of damages, actions and causes of action, which he might sustain or be entitled to by reason of anything connected with or consequent upon the location or construction of said work, or the repairing thereof when finally established or completed." *Held*, that said release in no manner related to actions for damages for the injury or destruction of cattle by the running of cars along the railroad. *Cleveland, Columbus, etc., R. R. Co. v. Crossley*, 36 Ind., 370. 1871.

225. Statutory liability. An agreement between a railway company and an adjoining proprietor not to require the company to fence but one side of its road across his land, will not relieve the company from its statutory liability to any person not cognizant of or assenting to it. *Gilman v. European and North American R. R. Co.*, 60 Me., 235. 1872.

226. — Where an ox was killed on defendant's road, and defendant relies upon the defense that the ox was wrongfully there, and excepts to the instructions of the court upon that question, the exceptions will not be considered, unless there is evidence tending to show that the animal was wrongfully there. *Ib.*

227. — Plaintiff's cattle, having passed through a fence bordering defendant's railroad, upon the track, were killed by the cars. Defendant had covenanted, in the deed of its roadway, at the point where the accident occurred, to "make and maintain good and sufficient fences on both sides" of the strip of land taken. The court refused to charge "that a compliance by defendant with the statute as to fences exonerated it from liability irrespective of the covenant in the deed." *Held*, error. *Thompson v. New York and Harlem R. R. Co.*, 1 N. Y. Sup. Ct., 411. 1873.

Evidence.

IX. EVIDENCE.

228. Admissions. Proof that cattle were killed by a train, and that their owner applied for payment to the agent of the railroad company, who offered to pay for them at a price which the owner would not take, was *held*, sufficient to make a *prima facie* case against the company. *Georgia R. R. Co. v. Willis*, 28 Ga., 317. 1859.

229. Burden of proof. The burden of proof is upon the plaintiff to show negligence on the part of the railway company. *New Orleans, Jackson and Great Northern R. R. Co. v. Enoch*, 42 Miss., 603. 1869.

230. — In actions for damages, a party alleging negligence cannot shift the burden of proof to the other side, until he has proved facts, which are at least more consistent with negligence than with care. *Jones v. North Carolina R. R. Co.*, 67 N. C., 122. 1872.

231. — It is erroneous to instruct the jury "that the mere fact of a horse being killed on the track is evidence of negligence on the part of the company." *Chicago and Alton R. R. Co. v. Utley*, 38 Ill., 410. 1865. See also to the same effect, *Illinois Central R. R. Co. v. Reedy*, 17 ib., 580. 1856.

232. County boundaries. Suit was brought for the value of animals killed by the cars of a railroad company. The evidence showed that the animals were killed between two named geographical points, and upon some railroad, by the rolling stock thereof, but did not show, in terms, that they were killed in Shelby county, nor by the railroad company defendant. *Held*, that as the court below knew judicially the boundaries of the county, it will be presumed that the first point was correctly determined. *Indianapolis and Cincinnati R. R. Co. v. Moore*, 16 Ind., 43. 1861.

233. — And it was *held*, also, that as the evidence tends to support the finding in relation to the killing by the cars of defendant, the judgment will not be reversed. *Ib.*

234. Expert. In an action to recover damages for the killing of plaintiff's horses through the negligence of the servants of a railway company in the running and management of a locomotive and train, the engineer in charge of the locomotive at the time of such killing, who saw the horses when they came upon the track and who is shown to be

acquainted with the business of operating railroad locomotives and trains, and had been engaged in such business for five years, is competent to testify, as an expert, upon questions in respect to the management of locomotives and trains, and to give an opinion whether, in view of the distance between the engine and the horses when the latter came upon the track, it was possible to avoid the injury complained of. *Bellefontaine and Indiana R. R. Co. v. Bailey*, 11 Ohio St., 333, 1860; *Same v. Pfifer*, ib., 339.

235. — A person skilled in the running of railroad cars may be asked, as an expert, upon an assumed state of fact which the evidence tended to prove, whether or not, in the case assumed, the brakemen were in their proper places. *Cincinnati and Zanesville R. R. Co. v. Smith*, 22 Ohio St., 227. 1871.

236. Failure of proof. Where, in an action to recover damages for the killing of the plaintiff's horses, upon the defendant's railroad, through the carelessness of the servants of the defendant, the plaintiff examined but one witness as to the charge, and he effectually disproved it. *Held*, that the judge erred in refusing to charge the jury that the plaintiff had wholly failed to prove the charge of carelessness. *Underhill v. New York and Harlem R. R. Co.*, 21 Barbour (N. Y.), 489. 1856.

237. Husband and wife. In an action against a railroad company for causing the death of the plaintiff's cow, the fact that the plaintiff's wife was the only person who saw and knew the circumstances does not render her a competent witness under the provision of the St. of 1865, ch. 207, § 2, admitting a married woman to testify when the contract or cause of action in issue was made or transacted with her in the absence of her husband. *Baxter v. Boston and Worcester R. R. Co.*, 103 Mass., 383. 1869.

238. Inference. The jury may infer that an animal was killed by a railway train from the situation in which it is found dead. *Chicago and Northwestern R. R. Co. v. Dement*, 44 Ill., 74. 1867.

239. Interest. The Memphis and Ohio R. R. Co., was sued for killing the stock of the plaintiff; on the trial, the engineer who had charge of the locomotive, and was running at the time when the injury occurred, was offered as a witness for defendant, without a release

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from the company; he was properly rejected by the court. *Memphis and Ohio R. R. Co. v. Tugwell*, 1 Coldwell (Tenn.), 91. 1860.

240. — statute. Section 1169 is construed to exclude as witnesses, only such agents, employes, or engineers, whose tortious act or acts, carelessness and negligence are drawn in question in the case, and for which he or they would be liable, even to the railroad company, if the latter should be held responsible for the wrong or injury. *Horne v. Memphis and Ohio R. R. Co.*, 1 Coldwell (Tenn.), 72, 1860; *Nashville and Chattanooga R. R. Co. v. Fugett*, 3 ib., 402, 1866.

241. Particular case. The evidence in this particular case held sufficient to justify a recovery. *Toledo, Peoria and Warsaw R. R. Co. v. Pineo*, 56 Ill., 308. 1870.

242. — Where it appeared that the stock was found by the side of the road "badly smashed up," it was held that the jury were justified in finding that the injury was done by the cars or locomotive of the defendant. *Illinois Central R. R. Co. v. Whalen*, 42 Ill., 396. 1866.

243. Value. On the trial of an action for damages for killing a horse, the plaintiff introduced a witness who testified that he was acquainted with the value of horses, but had never seen the horse in controversy. The witness was then asked, "What, on the 10th day of May (the day of the killing), was the average price of a horse fifteen or sixteen hands high, three or three and one-half years old, and sound, except the ring bone on the hind foot, which had been killed?" Held, that the court erred in permitting the witness to answer the question. *Toledo and Wabash R. R. Co. v. Smith*, 25 Ind., 288. 1865.

244. — A jury need not fix the value of personal property at the exact sum testified to by any one witness or by any two, but may find an intermediate sum. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Tull*, 37 Ind., 341. 1871.

245. — In fixing the value of property, it is competent for a witness to testify as to sales of similar property in the vicinity of that in question. *White v. Concord R. R. Co.*, 30 N. H., 188. 1855.

246. — It is not necessary to have a drover or butcher to prove the value of a cow; every

one is supposed to know the value of such property. *Ohio and Mississippi R. R. Co. v. Irvin*, 27 Ill., 178. 1862.

X. SIGNALS.

247. Contributory negligence. When it appears that no bell was rung or whistle sounded, as required by law, but that the plaintiff, then in charge of the stock, was told by his son, that he thought he heard a train coming, but decided to rush the stock over without looking, and in doing, so three of them were killed, the plaintiff cannot recover. *Ohio and Mississippi R. R. Co. v. Eaves*, 42 Ill., 288. 1866.

248. Effect of failure to make signals. A failure to comply with the requirements of the statute relative to sounding the whistle or ringing the bell at public road crossings, is *prima facie* evidence of negligence. *St. Louis, Jacksonville and Chicago R. R. Co. v. Terhune*, 50 Ill., 151. 1869.

249. — The mere omission to make the signal required by the statute at a crossing will not render a railway company liable, unless such neglect was the cause of the injury. *Memphis and Charleston R. R. Co. v. Bibb*, 37 Ala. N. S., 699. 1861.

250. — It should appear that the ringing of the bell or sounding of the whistle would have prevented the injury. *Illinois Central R. R. Co. v. Phelps*, 29 Ill., 447, 1862; see *Great Western R. R. Co. v. Geddis*, 33 ib., 304, 1864; *Illinois Central R. R. Co. v. Goodwin*, 30 ib., 117. 1863.

251. — An animal was run over and killed by a locomotive, at a crossing, where the statute requires a bell to be rung or a whistle sounded. The duty was not performed, and the jury found that the accident was the result of that neglect. Held, that the company was liable to the owner for the damages to the animal. *Great Western R. R. Co. v. Geddis*, 33 Ill., 304. 1864.

252. Illinois. The bell of a locomotive, or the whistle thereof, should be sounded at a reasonable distance, before approaching a road crossing, under the statutes of Illinois. *Chicago and Rock Island R. R. Co. v. Reid*, 24 Ill., 144. 1860.

XI. PRIVATE WAYS AND FARM CROSSINGS.

253. Farm crossings. If the employés, seeing a gate at a farm crossing open and do not close it, when not opened by a person to whom an injury afterward results, the company is liable for such injury. *Illinois Central R. R. Co. v. McKee*, 43 Ill., 119. 1867.

254. — The provision of the act of 1850, requiring railroad companies to erect and maintain, at farm crossings, bars or gates to prevent cattle, etc., from getting upon the railroad, is for the benefit and protection of the land owner; and if he refuses to have bars or gates erected, and desires the corporation not to put them up, or undertakes, with the corporation, to erect them himself, the omission of the company to perform the duty imposed by the statute does not render it responsible for the resulting damages to the land owner. *Tombs v. Rochester and Syracuse R. R. Co.*, 18 Barbour (N. Y.), 583. 1854.

255. Private way. A railroad company may lawfully fence across a private way, maintained by the owner of the land for his own private use, and failing to do so, is liable for killing stock at such a crossing. *Indianapolis and Cincinnati R. R. Co. v. Lowe*, 29 Ind., 545. 1868.

256. — This would not be so in the case of a private way established under the statute for the use of one over the lands of another. *Ib.*

257. — Where a railroad company has securely fenced its road, except at certain places where the owner of the land is permitted to erect draw bars or gates, for his own convenience in crossing said road, and by reason of the neglect of such land owner to maintain such bars or gates, his stock passes upon the railroad track and is killed, the company is not liable for the damages sustained. *Indianapolis, Pittsburgh and Cleveland R. R. Co., v. Shimer*, 17 Ind., 295. 1861.

258. — The tenant of the land owner, occupying the lands and using the crossing, would be subject to the same rule. *Ib.*

259. — If stock is killed by the cars of a railroad company, at a mere private road crossing, which was not securely fenced by the corporation, but which it might legally have fenced, it will be liable under the act of March 1, 1853, for the value of the stock. *Indiana Central R. R. Co. v. Leamon*, 18 Ind., 173. 1862.

XII. STATUTORY LIABILITY AND DECISIONS UNDER VARIOUS STATUTES.

[For other decisions under statutes, see, under title of Injuries to Domestic Animals, the following subdivisions: Highways III, Cities and Towns IV, Fences and Cattle Guards VIII, Signals X, Private Ways and Farm Crossings XI.]

260. Alabama. Railroad companies in Alabama are liable for damages for killing or injuring stock by their locomotives and cars, if they fail to comply with the requirements of caution prescribed in the revised code, when such compliance is within the power of their engineers or agents. *Mobile and Ohio R. R. Co. v. Malone*, 46 Ala., N. S., 391. 1871.

261. — Under the act of 1852, it is only necessary for plaintiff to prove property in the stock killed, their value, and that they were killed by defendant's cars or locomotives. *Nashville and Chattanooga R. R. Co. v. Peacock*, 25 Ala., N. S., 229. 1854.

262. — A railroad company, in order to exonerate itself from such liabilities as are imposed by the statute, must show that the injury complained of did not result from a failure on the part of its servants to comply with the requirements of section 1399 of the Revised Code, or from any negligence on the part of the company or its agents (Rev. Code, § 1401). *Nashville and Decatur R. R. Co. v. Comans*, 45 Ala. N. S., 437. 1871.

263. — The act of 1852 (Pamph. acts, 1851-2, p. 45), "to regulate and define the liability of railroad companies," does not conflict with the act of 1850 (Pamph. Acts, 1849-50, p. 171), granting the right of way through Jackson county to the Nashville and Chattanooga R. R. Co. *Nashville and Chattanooga R. R. Co. v. Peacock*, 25 Ala. N. S., 229. 1854.

264. — Proof that the auditor of the company had frequently acted as depot agent, there being no proof that there was any depot agent at the place where the claim was presented, shows a sufficient compliance with the revised code, requiring claims for stock killed to be presented in writing in sixty days to the president, treasurer, superintendent or some depot agent of the corporation. *Mobile and Ohio R. R. Co. v. Malone*, 46 Ala. N. S., 391. 1871.

265. California. A railway company which continues to run its cars upon an open track,

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undertakes at its peril, that no harm shall come to stock running in the field, through which the road runs, for want of a proper fence. *McCoy v. California Pacific R. R. Co.*, 40 Cal., 532. 1871.

266. — The killing of cattle by a train in a field through which an unfenced railway passes, is *prima facie* evidence of negligence. *Ib.*

267. — The owner of the stock is not guilty of contributory negligence, from the fact that he knew the road was not fenced when he turned the cattle in the field. *Ib.*

268. — Railway companies are not required to fence their roads in this state. *Richmond v. Sacramento Valley R. R. Co.*, 18 ib., 351. 1861.

269. Connecticut. In an action against a railroad company for running over cattle that had got upon the track of the road in consequence of the neglect of the company to make cattle guards, the defendant, for the purpose of showing that the railroad commissioners were of opinion that the cattle guards were unnecessary, offered evidence, which it claimed to be conclusive on the subject, that the commissioners had frequently passed over that part of the road in the cars, on their official examination of the road, and had never directed or advised that the cattle guards be made; it appearing however that their attention had never been specially called to the crossing in question. The court admitted the evidence and instructed the jury that they might consider it, but that it was not conclusive as to such opinion of the commissioners. *Held*, on a motion of the defendant for a new trial, that the evidence was scarcely admissible, and the charge more favorable to the defendant than it had a right to demand. *Bulkeley v. New York and New Haven R. R. Co.*, 27 Conn., 479. 1858.

270. — The act of 1850, § 3, with regard to railroads (Comp. 1854, p. 753), which provides that all railroad companies shall construct cattle guards at highway crossings, unless in the opinion of the railroad commissioners it shall be unnecessary, applies to railroad companies incorporated before the passage of the act, as well as to those incorporated after. *Ib.*

271. Georgia. The fifth section of the act of 1847, "defining the liability of railway companies for injuring stock," is repealed by

the act of 1854. *Jones v. Central R. R. Co.*, 21 Ga., 104. 1857.

272. — The statute providing for actions against railway companies for injury to stock is only cumulative. *Wallace v. Cason*, 42 ib., 435. 1871.

273. — The act of 1843, amending the act of 1840 in relation to the liability of railway companies for killing stock, cannot be held to apply to cases arising before its passage. *Girtman v. Central R. R. Co. of Georgia*, 1 ib., 173. 1846.

274. — The act of Feb. 20, 1854, "defining the liability of railway companies" for injuring stock is constitutional. *Davis v. Central R. R. Co.*, 17 ib., 323. 1855.

275. Illinois—bars. Leaving down the bars of a fence for three months is negligence upon the part of the company erecting the fence. *Illinois Central R. R. Co. v. Arnold*, 47 Ill., 173. 1868.

276. — cattle guards. 'If a horse takes fright and runs away, and gets upon a railroad at a point where the company is bound to fence, and is killed upon the track, the fact that the fence or cattle guard was insufficient at that point will alone render the company liable. *Chicago and Alton R. R. Co. v. Utley*, 38 Ill., 410. 1865.

277. — constitutional law. The act approved 14th Feb., 1855, requiring all railroads then completed and open for use, to be fenced, and imposing as a penalty for noncompliance, the payment of all damages which may result to cattle thereby, although such requirement was not expressed in their charters, does not conflict with § 17, art. 13 of the constitution. *Ohio and Mississippi R. R. Co. v. McClelland*, 25 Ill., 140. 1860.

278. — The act to regulate the duties and liabilities of railroad companies, passed in 1855, applies to companies previously incorporated. *Galena and Chicago Union R. R. Co. v. Cranford*, 25 Ill., 529. 1861.

279. — construction of statutes. The statute which requires railroad companies to erect and maintain fences is not a penal statute, but remedial, and will receive a liberal construction. *Ohio and Mississippi R. R. Co. v. Brubaker*, 47 Ill., 462. 1868.

280. — depot grounds. A railroad company is not required to fence its track upon its depot grounds in a town. *Galena and Chi.*

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ago Union R. R. Co. v. Griffin, 31 Ill., 303. 1863.

281. — embankments. The necessity of fencing a railroad at a given point is not avoided by there being an embankment at the place from twelve to twenty feet in height, it not appearing that the embankment was sufficient to prevent stock from getting upon the track. *Toledo, Peoria and Warsaw R. R. Co. v. Sweeney*, 41 Ill., 226. 1866.

282. — failure to erect fences. Where cattle are injured upon a railroad at a place where the company is required by law to fence its road, it is liable for the damages resulting from such neglect of duty. *Toledo, Peoria and Warsaw R. R. Co. v. Wickery*, 44 Ill., 76. 1867.

283. — It is error to instruct that, if the defendant did not fence the road as required by statute, and cattle were killed by its cars, it is liable, whether the killing resulted from negligence or not. *Terre Haute, Alton and St. Louis R. R. Co. v. Augustus*, 21 Ill., 186. 1859.

284. — gates. Where an animal passes upon a railway track and is injured, and it appears that it passed through an open gate, the company is not liable unless it is shown that the gate was open so long as to raise a presumption that the employes of the company knew it. *Chicago, Burlington and Quincy R. R. Co. v. Magee*, 60 Ill., 529. 1871.

285. — insufficient fences. The fact that plaintiff's horses entered the close of another, through an insufficient fence upon the public highway, and passed thence upon defendant's road, will not affect his right of recovery. *Chicago and Northwestern R. R. Co. v. Harris*, 54 Ill., 528. 1870.

286. — pleading. In an action under the statute, it is necessary to aver and prove that the injury did not occur at any of the places excepted from the operation of the statute. *Ohio and Mississippi R. R. Co. v. Brown*, 23 Ill., 94, 1859; *Galena and Chicago Union R. R. Co. v. Sumner*, 24 ib., 631, 1860; *Illinois Central R. R. Co. v. Williams*, 27 ib., 48, 1861; *Ohio and Mississippi R. R. Co. v. Taylor*, ib., 207, 1862; *Great Western R. R. Co. v. Bacon*, 30 ib., 347, 1863; *Same v. Morthland*, ib., 451, 1863; see *Same v. Hants*, 36 ib., 281, 1865; see *Toledo, Peoria and Warsaw R. R. Co. v. McClannon*, 41 ib., 238, 1866.

287. — It should be averred that the road had been opened more than six months prior

to the happening of the injury. *Ib.*; *Ohio and Mississippi R. R. Co. v. Meisenheimer*, 27 ib., 30, 1861; *Same v. Jones*, ib., 41, 1861; *Chicago and Alton R. R. Co. v. Taylor*, 40 ib., 280, 1866; see also *Chicago and Northwestern R. R. Co. v. Diehl*, 52 ib., 441, 1869.

288. — repairs of fences. Where a railway fence has become defective, and the owner of cattle repairs it with temporary materials, without notifying the company, and his cattle afterwards pass upon the railway through such defective fence, and are injured, he is guilty of negligence, and cannot recover. *Chicago, Burlington and Quincy R. R. Co. v. Seirer*, 60 Ill., 295. 1871.

289. — To neglect to repair a breach in a fence for a week or more, is a neglect of duty that will ordinarily render a railway company liable for an injury ensuing therefrom. *Chicago and Northwestern R. R. Co. v. Harris*, 54 Ill., 528. 1870.

290. — A railroad company will not be liable in case of a casual breach in its fence, unless it has had a reasonable time to discover such breach, or has been notified and failed to repair, before the injury occurred. *Illinois Central R. R. Co. v. Swearingen*, 47 Ill., 206, 1868; *Chicago and Northwestern R. R. Co. v. Barrie*, 55 ib., 226, 1870.

291. — When a fence along the railroad has been sufficient, and from accident, over which the company had no control, it becomes insufficient to turn stock, it has a reasonable time within which to repair it. *Illinois Central R. R. Co. v. Swearingen*, 33 Ill., 289. 1864.

292. — A railroad company is not required to keep a patrol at night along the road, to see that the fence is not broken down. *Illinois Central R. R. Co. v. Dickerson*, 27 Ill., 55. 1861.

293. — The duty imposed by the act of 1855 upon railroad companies, to keep in repair the fences required to be erected along their roads, is not transferred to the owner of lands over which the roads may run, by the simple employment of such owner by the company, as its agent. *Illinois Central R. R. Co. v. Swearingen*, 33 Ill., 289. 1864.

294. — time for erection of fences. Where the company had not been in operation six months, but had constructed a fence, it is under no obligation to keep it in repair, the duty to fence not having attached. *Toledo, Peoria and Warsaw R. R. Co. v. Miller*, 45 Ill., 42. 1867.

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295. — In case of a transfer of a railway, the new owner is not entitled to a period of six months after the change of ownership, within which to comply with the law. *Toledo, Peoria and Warsaw R. R. Co. v. Arnold*, 51 Ill., 241. 1869.

296. — where railway companies are not bound to fence. Where stock gets upon the track at a place where others than the company are bound to erect and maintain the fence, and is killed at that place or another, the company is liable only in case of gross negligence. *St. Louis, Alton and Terre Haute R. R. Co. v. Linder*, 39 Ill., 433. 1866.

297. *Indiana — appeals.* On appeal to the circuit court from a judgment by a justice of the peace, against a railroad company for killing stock, a judgment for double damages and a docket fee, under § 3 of the act of March 1, 1853, is erroneous. *Indiana Central R. R. Co. v. Gapen*, 10 Ind., 292, 1858; *Madison and Indianapolis R. R. Co. v. Kane*, 11 ib., 375. 1858.

298. — *bar ways.* If bars are erected in the line of a railroad fence, at the instance and for the accommodation of the land owner, the responsibility of keeping them up devolves on him; and if he neglect to do so, and the stock pass through the bar way upon the line of railroad and is killed, he cannot recover therefor against the company. And if, in such case, the animal of a third person should trespass on the lands and inclosure of such owner, and pass through the bars so erected upon the track of the railroad, and be killed by the train, the owner of such animals could not recover. *Indianapolis and Cincinnati R. R. Co. v. Atkins*, 23 Ind., 340, 1864; *Same v. Same*, ib., 345.

299. — *adjoining proprietors.* A railway company, after it has obtained the right of way for its road, is entitled to the exclusive possession of such way, and stands to adjoining proprietors (where no statute has changed the relation), in the common relation existing between proprietors of lands bordering on each other. *Williams v. New Albany and Salem R. R. Co.*, 5 Ind., 111, 1854; *Smith v. Terre Haute and Richmond R. R. Co.*, 7 ib., 553, 1856; *Terre Haute and Richmond R. R. Co. v. Jones*, 8 ib., 183, 1856.

300. — At common law, proprietors of land are not bound to fence against each other, but

each is bound to keep his stock upon his own land. *Id.*

301. — *blind horse.* The owner of a blind horse turned him out upon the common of a town, through which a railroad ran, where he was killed by a passing train. The injury did not occur on any street or alley, and the track was not fenced. *Held*, that the owner could not recover, and that he was guilty of gross negligence, amounting to a willingness to suffer the injury complained of. *Knight v. Toledo and Wabash R. R. Co.*, 24 Ind., 402. 1865.

302. — *burden of proof.* The burden of proof is upon the railway company to show that a fence at a certain point on its road would be improper. *Jeffersonville, Madison and Indianapolis R. R. Co. v. O'Connor*, 37 Ind., 95. 1871.

303. — *cattle guards.* The fencing contemplated by the act of 1863, includes the putting in of cattle guards to prevent animals from passing from streets and highways upon the track at each side of such streets or highways. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Ehrhart*, 36 Ind., 118. 1871.

304. — The duty of placing suitable cattle guards at highway crossings, etc., results from the requirement that a railroad shall be "securely fenced," if the company would avoid liability for animals killed. *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Irish*, 26 Ind., 268. 1866.

305. — When the usual and ordinary cattle pit has been constructed, as near the highway as can conveniently be done, the company is not liable, unless there is proof of negligence, for an injury happening to an animal between the highway and the pit. *Id.*

306. — *collision.* To render a railway company liable, under the statute, for injuries to animals by its cars, locomotives, or other carriages, there must be actual collision of the cars, locomotives, or other carriages with such animals. *Ohio and Mississippi R. R. Co. v. Cole*, 41 Ind., 331. 1872.

307. — A railroad company is not liable under the statute of 1853, for an injury to stock resulting from fright at its cars, where the animal was not touched by any car, locomotive, or other carriage belonging to the company. *Id.*; *Peru and Indianapolis R. R. Co. v. Hasket*, 10 Ind., 409. 1858.

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308. — constitutional law. The act of March 4, 1863 (Acts 1863, p. 25), providing for the enforcement of judgments against railroad companies for stock killed, are not repugnant to §§ 22 and 23 of article 4 of the constitution. *Toledo, Logansport and Burlington R. R. Co. v. Nordyke*, 27 Ind., 95. 1866.

309. — The statutes providing compensation to the owners of animals killed or injured by the cars of railroad companies are police regulations which the legislature had the right to impose upon existing corporations, as well as those thereafter to be formed. *Indianapolis and Cincinnati R. R. Co., v. Kercheval*, 16 Ind., 84, 1861; *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Marshall*, 27 Ind., 300. 1866.

310. — There is nothing peculiar in the charter of the Indianapolis and Cincinnati Railroad Company which would prevent the legislature from requiring it to pay for the killing of animals upon its road, in default of keeping it fenced. *Ib.*

311. — The cost of making and keeping the fences in repair, or the amount paid in the way of damages for stock killed, does not "detract from or affect the profits of the corporation," in the sense intended by its charter. *Ib.*

312. — The whole of the act of 1853, entitled "An act to provide compensation to the owners of animals killed or injured by the cars, locomotives or other carriages of any railroad company" in Indiana, is not void for inconsistency with its title. The immediate purpose of the act is expressed in the title; and the exception as to railroads that are fenced, is so properly connected with the subject matter of the act designated in the title as rightly to appear in it under the title. *Madison and Indianapolis R. R. Co. v. Whiteneck*, 8 Ind., 217, 1856; *Same v. Burnett*, *ib.*, 277; *LaFayette and Indianapolis R. R. Co., v. Martin*, *ib.*, 251; *Jeffersonville R. R. Co. v. Hardy*, 9 *ib.*, 495. 1857.

313. — Nor is the act void simply because it is special. *Ib.*

314. — Section 3 of the act is unconstitutional and void, so far as it inflicts a penalty, for appealing and failing to reduce the judgment 20 per cent. *Ib.*

315. — Section 1 of the act is also void so far as it gives, as to amount, unlimited jurisdiction to justices of the peace. *Ib.*

316. — The legislature did not transcend its powers, or violate private right, in enacting that railroad companies shall fence their roads, or pay for the cattle they kill or injure. *Ib.*

317. — construction of statute. The act of March 1, 1853 (Acts, p. 113), which provides compensation to the owners of animals killed or injured by the cars, etc., of railroad companies, is more for the benefit of the public — to guard against injury to passengers — than for the benefit of the owner of the animal. *New Albany and Salem R. R. Co., v. Maiden*, 12 Ind., 10. 1859.

318. — Under the statute, the liability of the company is based solely upon its failure to fence its track. *Toledo Wabash and Western R. R. Co. v. Cory*, 39 Ind., 218. 1872.

319. — The liability under the statute extends to all kinds of animals that would be kept from the track by an ordinary fence, without regard to the question whether they are large enough to throw a train off the track when run over by it. *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Marshall*, 27 Ind., 300. 1866.

320. — The act of 1859 (Acts 1859, p. 105), is prospective only in its operation, and applies to animals killed or injured after the taking effect of the law. *Indianapolis and Cincinnati R. R. Co. v. Elliott*, 20 Ind., 480. 1868.

321. — A statute in derogation of common right, and highly penal in its character, is not to be applied to cases not clearly within its provisions. *Indianapolis and Cincinnati R. R. Co. v. Kinney*, 8 Ind., 402. 1856.

322. — The statute of 1853, in relation to the liability of railroad companies whose roads are not fenced, for killing stock, does not apply to actions commenced in courts of common pleas and circuit courts. *Toledo, Wabash and Western R. R. Co. v. Hibbert*, 14 Ind., 509, 1860; *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Fisher*, 15 *ib.*, 203; *Evansville and Crawfordsville R. R. Co. v. Ross*, 12 *ib.*, 446. 1859.

323. — The act of 1852, provided that when any animal should be killed or injured by any vehicle run upon a railroad in Indiana, the owner might recover for his loss in a suit against the company, without proof of negligence, where the injury occurred upon a part

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of the road left by the company without a fence, etc. The act did not designate any tribunal in which the remedy should be sought. On the 1st of March, 1853, another act was passed, authorizing the prosecution in such cases to be instituted before a justice of the peace, and prescribing the mode of proceeding. The second section enacted, that on the hearing of the cause, the justice or jury trying the same should give judgment for the plaintiff for the value of the animal destroyed or the injury inflicted, without regard to the question whether the injury or destruction was the result of willful misconduct or negligence, or of unavoidable accident. The latter act expressly repealed the former, saving, however, pending suits. *Held*, that the acts were *in pari materia*, were enacted to effect the same object, and were to be construed together. *Williams v. New Albany and Salem R. R. Co.*, 5 Ind., 111, 1854; *Smith v. Terre Haute and Richmond R. R. Co.*, 7 ib., 553, 1856; *Terre Haute and Richmond R. R. Co. v. Jones*, 8 ib., 183, 1856.

324. — contributory negligence. The act of March 1, 1853, relative to compensation for animals killed or injured by railroad machinery (Laws of 1853, p. 113), is in the nature of a police regulation designed to promote the security of persons and property passing upon the road; and hence, though the owner of the animal be not an adjoining proprietor, and be guilty of negligence in permitting it to stray upon lands adjoining the road, he may recover, if the company has failed to comply with the requirements of the statute. *Indianapolis and Cincinnati R. R. Co. v. Townsend*, 10 Ind., 38, 1857; *Same v. Paramore*, 12 ib., 406, 1859; *Same v. Meek*, 10 ib., 502; *Jeffersonville R. R. Co. v. Applegate*, ib., 49; *Same v. Dougherty*, ib., 549, 1858; *Hart v. Indianapolis and Cincinnati R. R. Co.*, 12 ib., 478, 1859; *Indianapolis and Cincinnati R. R. Co. v. McAhren*, 12 ib., 552; *New Albany and Salem R. R. Co. v. Beeler*, 12 Ind., 560, 1859; *Same v. Fix*, ib., 485; *Same v. Collins*, ib., 526; *Same v. Aston*, 13 ib., 545; *Same v. Bishop*, ib., 566; *Indianapolis and Cincinnati R. R. Co. v. Case*, 15 ib., 42, 1860.

325. — The fact that the animals injured were permitted to run at large by the owner, with a knowledge that the fences of the railway were defective, will not relieve the com-

pany from liability. *Bellefontaine R. R. Co. v. Reed*, 33 Ind., 476, 1870.

326. — An instruction, that in case the owner of the cattle turns them out, at a place where they must pass along a railway track, when trains are passing, he cannot recover for their injury, is erroneous as applied to a case where the road should be securely fenced, and is not so fenced. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Ross*, 37 Ind., 545, 1871.

327. — Suit was brought against a railway company to recover for cattle killed by its engines. The right to recover was rested on the following facts: near where the stock was killed, there was a small brook over which the company had built a culvert. Below the culvert, the plaintiff had a pasture in which he kept his cattle. Across the stream, below the culvert, he had made a fence of long poles. A flood came and floated driftwood through the culvert, against the fence. To prevent the accumulation of drift above the culvert in such quantities as to endanger its safety, the company aided in its passage. At sunset, the plaintiff knew of the exposed situation of his fence, but would not remove his cattle. At night, the fence being borne away, the cattle passed upon the road and were killed. *Held*, that the plaintiff could not recover. *Indianapolis and Cincinnati R. R. Co. v. Wright*, 13 Ind., 213, 1859.

328. — crossing. Where an animal was killed by the cars of a railroad company at a point where the road was properly fenced to within ten feet, on one side of the track, and within twenty steps, on the other, of a public crossing, "but the fences did not extend to the cattle guard at the public crossing; if they did, it would stop the cattle going on the track;" it was *held*, that the company was not relieved from liability by the fact that the road was securely fenced at the point where the animal was killed. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Avery*, 31 Ind., 277, 1869.

329. — evidence. Suit was brought to recover damages for killing stock under the statute. It was alleged that the railway was unfenced, but there being no evidence in support of such allegation, the judgment in favor of the plaintiff was reversed. *Indianapolis and Cincinnati R. R. Co. v. Stallman*, 16 Ind., 205, 1861.

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330. — fence — by whom maintained. The fact that the owner of the land has for a long period, without any contract to that effect, maintained a sufficient fence, does not, so far as the public is concerned, relieve the company from the duty imposed by the statute. While the fence is so maintained, the company is not liable to the penalty provided by law, but that penalty is incurred whenever the failure to maintain the fence as required may happen. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Nichols*, 30 Ind., 321. 1868.

331. — A railway company cannot divest itself of responsibility by making private contracts with the landholders along its road, by which the latter separately agree to make and keep up fences. *New Albany and Salem R. R. Co. v. Maiden*, 12 Ind., 10. 1859.

332. — Where the land owner, through whose land a railway runs, has received from the company in the assessment of damages, an agreed compensation for erecting and maintaining fences between the road and his land, and fails to maintain such fences, he cannot, if by reason of such failure an animal is killed by the cars of the company, recover for the same, without proof of negligence. *Terre Haute and Richmond R. R. Co. v. Smith*, 16 Ind., 102, 1861; *Toledo, Wabash and Western R. R. Co. v. Brown*, 17 ib., 353. 1861.

333. — fence — repairs. Where the fence is out of repair, and the company relies upon the defense that a reasonable time to repair the same has not elapsed, such fact must be pleaded or proved. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Sullivan*, 38 Ind., 262. 1871.

334. — If a railway company permit an opening to be made in its fence and left insecure, it cannot be said that the road is properly fenced. *Cleveland, Columbus, etc., R. R. Co. v. Swift*, 42 Ind., 119. 1873.

335. — fire — destruction of fence. Where a railroad is kept securely fenced by the company, and the fence is destroyed by unavoidable accident, as by fire, and is repaired by the company within a reasonable time after its destruction, but before it is so repaired, stock gets upon the track and is injured, the company will not be held liable therefor. *Toledo and Wabash R. R. Co. v. Daniels*, 21 Ind., 256. 1863.

336. — freight trains. The statute awarding damages to the owners of animals killed

or injured by the rolling stock of any railroad company applies to animals killed by freight, as well as passenger, trains. *Indianapolis and Cincinnati R. R. Co. v. Snelling*, 16 Ind., 485. 1861.

337. — highways. In a suit against a railroad company to recover damages for stock killed by its cars, at a point on its road where a highway had been established, which highway, though shown to have been abandoned by the public for two years, was not shown to have been vacated, the plaintiff must prove misconduct or negligence on the part of the company or its agents. *Indiana Central R. R. Co. v. Gafen*, 10 Ind., 292. 1858.

338. — The act of 1852 is not applicable to a case where the injury is done by the cars at the crossing of a public street in a city, the company having no right to erect a fence thereon. *Lafayette and Indianapolis R. R. Co. v. Shriner*, 6 Ind., 141. 1855.

339. — jurisdiction. A cow and heifer, together worth \$110, standing at the same time near together, upon a railroad track, were killed by a passing train. The value of the heifer did not exceed \$50. *Held*, that there was but one cause of action, of which the common pleas court had jurisdiction. *Lafayette and Indianapolis R. R. Co. v. Ehnman*, 30 Ind., 83. 1868.

340. — lawful fences. A railroad company is only required to make and keep up a lawful fence, such a one as good husbandmen generally keep. *Toledo and Wabash R. R. Co. v. Thomas*, 18 Ind., 215. 1862.

341. — Where such a fence is maintained by the company, it is not liable for stock killed, except as at common law, for negligence. *Ib.*

342. — negligence. The simple killing of an animal by the cars of a railroad company, is not *prima facie* evidence of negligence on the part of its employés. *Indianapolis and Cincinnati R. R. Co. v. Means*, 14 Ind., 30. 1850.

343. — A party cannot have the benefit of the statute of 1853, making railroad companies liable for animals killed without negligence, unless he prove that the road was not fenced as prescribed by the statute. *Ib.*

344. — The statute of 1853 excludes from the consideration of the jury in a suit against a railway company for the destruction of

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stock by its cars, any consideration of the question whether the injury was the result of willful misconduct or negligence, or of unavoidable accident. *Lafayette and Indianapolis R. R. Co. v. Shriner*, 6 Ind., 141. 1855.

345. — Under the acts of 1852 and 1853, companies, whose roads were not fenced in, were liable for the value of all stock straying without the owner's fault from adjoining lands, killed or injured by the cars, without regard to the question of negligence, misconduct or inevitable accident. *Williams v. New Albany and Salem R. R. Co.*, 5 Ind., 111, 1854; *Smith v. Terre Haute and Richmond R. R. Co.*, 7 ib., 553; *Terre Haute and Richmond R. R. Co. v. Jones*, 8 ib., 183, 1856.

346. — negligence need not be proven. Where a railroad is not securely fenced, the company is liable for stock killed by its cars, without reference to the question of negligence. 1 G. & H., 522. *McKinney v. Ohio and Mississippi R. R. Co.*, 22 Ind., 99. 1864.

347. — notice. *It seems*, that in an action against a railroad company for killing cattle, ten days' service is not sufficient notice under the act of March 4, 1853. *New Albany and Salem R. R. Co. v. Welsh*, 9 Ind., 479, 1857; *Cincinnati and Chicago R. R. Co. v. Calvert*, 13 ib., 489, 1859.

348. — order of county commissioners. A railroad company is liable for cattle killed where its road is unfenced, although the county commissioners may not have made any order in regard to cattle running at large in the county. *Jeffersonville, Madison and Indianapolis R. R. Co. v. O'Connor*, 37 Ind., 95. 1871.

349. — places where a fence would be illegal and improper. The statute does not apply to injuries done at points where it would be illegal or improper for the railroad company to maintain fences. *Indianapolis and Cincinnati R. R. Co. v. Parker*, 29 Ind., 471, 1868; *Same v. Kinney*, 8 Ind., 402. 1856.

350. — The open space in front of a mill, necessary for the convenience of shipment, is such a place. *Indianapolis and Cincinnati R. R. Co. v. Kinney*, 8 Ind., 402. 1856.

351. — Proof that the killing or injury occurred at or near the mill, brings the case *prima facie* within this rule, and puts it upon the plaintiff to show that it occurred at a place where a fence would not be improper. *Id.*

352. — A railroad company is not required by the statute to fence its road, where such fencing would result in cutting itself off from the use of its own land, or leased property or buildings or wood sheds, although the buildings or sheds may not be in present use. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Beatty*, 36 Ind., 15. 1871.

353. — If cattle come upon a railroad where there ought to be a sufficient fence, but there is not, and wander upon the road to a point where the road is not fenced, and cannot lawfully be fenced, and are there injured, the company is liable, and an answer to an action for such injury, under the statute, must show that they did not thus enter upon the road. *Toledo, Wabash and Western R. R. Co. v. Howell*, 38 Ind., 447. 1872.

354. — A railroad company is not required to fence its track in the immediate vicinity of its engine house, machine shops, car house, and wood yard, and the company therefore is not liable, under the statute, for stock killed by it in such places. *Indianapolis and Cincinnati R. R. Co. v. Oestel*, 20 Ind., 231. 1863.

355. — Where animals running at large are killed by a railroad engine, at a point on the road not required by law to be fenced, the rights and liabilities of the parties must be determined by common law principles. *Indianapolis and Cincinnati R. R. Co. v. Caldwell*, 9 Ind., 397. 1857.

356. — venue. Actions against railway companies for injuries to domestic animals must, under the statute, be brought in the county where the injury was done, and the place of the injury, being denied, must be proved or there can be no recovery. *Indianapolis and Cincinnati R. R. Co. v. Renner*, 17 Ind., 135, 1861; *Same v. Wilsey*, 20 Ind., 229, 1863; *Same v. Brinkman*, ib., 230.

357. — villages. An animal was killed by the freight train of a railroad company, at a place where a small town was being built up, and used as a station. The road had been fenced at this point, but a gap had been opened by some one in front of the town. It was not clearly shown whether the town was laid out up to, and along the railroad, or at some distance back. *Held*, that this court is not authorized to say, in opposition to the finding of the court below, that the railroad company was not in fault in not closing up

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the fence. *Indianapolis and Cincinnati R. R. Co. v. Snelling*, 16 Ind., 435. 1861.

358. — wanton acts. It is no defense to an action for injuring a horse, if it was wantonly killed, that it occurred at a point where the road was properly fenced; nor that the company had paid the owner of the land, on which it was killed, for fencing the road, as a part of the consideration for the right of way through the farm. *New Albany and Salem R. R. Co. v. McNamara*, 11 Ind., 543. 1858.

359. Iowa. A railroad company is liable under ch. 169, Laws of 1862, for stock killed upon its track that have escaped there from the inclosure of the owner (through which the road runs), by reason of the failure of the company to maintain a sufficient fence along its road at that point. When thus on the track they are held to be "running at large" within the meaning of the statute. *Hinman v. Chicago, Rock Island and Pacific R. R. Co.*, 28 Ia., 491, 1870; *Swift v. North Missouri R. Co.*, 29 ib., 243, 1870.

360. — animals prohibited from running at large. A railroad company is liable for killing stock at a point where it has the right to fence, unless the injury was occasioned by the willful act of the owner or his agent. Ch. 169, Laws of 1862. But the permitting of a bull to run at large does not constitute such willful act. *Stewart v. Burlington and Missouri R. Co.*, 32 Ia., 561. 1871.

361. — A railroad company is liable for swine killed upon its track, while running at large at a point where it has the right to fence its road, although swine are prohibited from running at large by a vote of the legal voters of the county where the injury occurs, unless it be shown that such injury occurred by reason of the willful act of the owner or his agent. Ch. 169, Laws of 1862. *Spence v. Chicago and Northwestern R. R. Co.*, 25 Ia., 139, 1868; *Fernow v. Dubuque and S. W. R. R. Co.*, 22 ib., 528, 1867; *Stewart v. Chicago and Northwestern R. R. Co.*, 27 ib., 282, 1869; *Fritz v. Milwaukee and St. Paul R. R. Co.*, 34 ib., 337, 1872.

362. — A railroad company is liable for swine killed upon its road, that came upon it from the inclosure of the owner, through which the right of way was granted to the company on condition that it should fence the road which it has failed to do. *Fernow*

v. Dubuque and S. W. R. R. Co., 22 Ia., 528. 1867.

363. — burden of proof. The burden of proof is upon the plaintiff to show that the stock was killed at a point where the railway company had a right to fence and had not done so, or that the company was guilty of negligence in causing the injury. *Comstock v. Des Moines Valley R. R. Co.*, 32 Ia., 376. 1871.

364. — cattle not running at large. Under ch. 169, laws of 1862, a railway company is only liable for injuries done to cattle running at large, and if the cattle are being driven in charge of the owner or his agent, and escape and run upon the track and are injured, the company is not liable. *Smith v. Chicago, Rock Island and Pacific R. R. Co.*, 34 Ia., 96. 1871.

365. — double damages. It is not necessary that the "notice of loss" contemplated in § 6 of ch. 169, Laws of 1862, shall be separate from the affidavit of loss. If the notice embraced all the essentials of the affidavit, and is sworn to, it is sufficient. *Mendell v. Chicago and Northwestern R. R. Co.*, 20 Ia., 9. 1865.

366. — The statute does not require service of such notice by reading the original and delivering a copy to the parties served. It is sufficient if the original is delivered to the party. *Ib.*

367. — private crossing. There is nothing in §§ 3 and 4 of ch. 169, Laws of 1862, requiring railway companies to make cattle guards at private crossings. The failure to do so might, under some circumstances, be evidence of negligence; but it can in no case create the liability contemplated in these sections. *Bartlett v. Dubuque and Sioux City R. R. Co.*, 20 Ia., 188. 1866.

368. — The fact that bars at such crossing were left down by the land owner, and not by the employes of the company, does not discharge the latter from liability for injuries resulting therefrom, if it have not used due care to keep them closed. *Ib.*

369. — As to third persons, it is the duty of railway companies not only to fence their roads, but to keep the gates at private crossings in repair and closed; but where a road is properly fenced and the company uses the necessary care and caution in keeping it up or in good condition, and it is thrown and left down by the act of a third person, without

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fault of the company, the liability for the injury is upon the party thus leaving down the fence, and not upon the railway company. *Russell v. Hanley*, 20 Ia., 219. 1866.

370. — repairs of fence. A railroad company is required to use only ordinary and reasonable care and diligence in maintaining and keeping in repair a fence which it has constructed along the line of its road; and it will not be liable for stock killed on its road, unless it has failed to exercise such ordinary care in the repair of the fence where the stock came through on to the road. *Lemmon v. Chicago and Northwestern R. R. Co.*, 32 Ia., 151. 1871.

371. — A railway company is liable for stock killed on its track by reason of its failure to keep in repair the fences which it has erected on the line of its road; but, before such liability will attach, it must have knowledge, either actual or implied, that the fence is out of repair, and a reasonable time thereafter to put it in proper condition. This rule applies where bars or gates have been left open by third parties. *Aylesworth v. Chicago, Rock Island and Pacific R. R. Co.*, 30 Ia., 459. 1870.

372. Kentucky. A railway company which is not bound to fence its track is not liable for injuries to cattle straying thereon, unless such injury was caused by the wanton and reckless negligence of the company or its agents or servants. *Louisville and Frankfort R. R. Co. v. Ballard*, 2 Metcalfe (Ky.), 177. 1859.

373. Louisiana. There being no law requiring it, a railway company is not bound to fence its road, and it is not liable for cattle killed on its track unless great negligence and want of care upon its part are proved. *Knight v. New Orleans, Opelousas and Great Western R. R. Co.*, 15 La. An., 105. 1860.

374. Maine — defective fences. Where the plaintiff has failed to erect a sufficient fence between his lot and that of another, and the defendant had failed to fence its road as required by law, and by reason of the defect in the fence of defendant, the plaintiff's ox escaped upon the track and was killed, it was held, that the company was liable for the injury, the defect in its fence being the proximate cause of the injury. *Gilman v. European and North American R. R. Co.*, 60 Me., 235. 1872.

375. — Where the fence was originally imperfectly built by the plaintiff for defendant, and the plaintiff's horse escaped from his pasture upon the track by reason of such defect, and was injured by the engine, the railroad company was held responsible for the damages. *Norris v. Androscoggin R. R. Co.*, 39 Me., 273. 1855.

376. — negligence. A railroad company is not bound to fence its road except where it passes through improved land. *Perkins v. Eastern R. R. Co. and Boston and Maine R. R. Co.*, 29 Me., 307. 1849.

377. — It is therefore not liable for killing cattle upon its road unless in case of negligence, willful or otherwise. *Ib.*

378. — penalties. Railroad corporations, under ch. 41, acts of 1853, are liable to a penalty of \$100 per month for a failure to erect sufficient fences on their roads. *Norris v. Androscoggin R. R. Co.*, 39 Me., 273. 1855.

279. — Said act applies to corporations existing before its passage. *Ib.*

380. — road operated by contractors or lessees. Where a railway company has commenced the running of cars upon its road before the road is fenced, it will not be exonerated from the resulting damages by proof that the road is then being operated by certain persons under an agreement by which they received all the earnings, when it was further stipulated that trains "should be run under the direction of the company." *Wyman v. Penobscot R. R. Co.*, 46 Me., 162. 1858.

381. — The Atlantic and St. L. R. R. Co. had not released itself from its statutory liability by leasing its road to another company. *Whitney v. Atlantic and St. Lawrence R. R. Co.*, 44 Me., 362. 1857.

382. Maryland — burden of proof. Under the statutes of Maryland the injury of stock by a railway company raises a presumption of negligence upon its part. *Keech v. Baltimore and Ohio R. R. Co.*, 17 Md., 32. 1860.

383. — construction of statute. At common law, a plaintiff cannot recover where his own fault or negligence has directly contributed to the injury, and this principle is not changed by the acts of 1838, ch. 244, and 1846, ch. 346, in relation to the liability of railroad companies in Maryland for injuries to cattle and stock on their roads. *Baltimore and Ohio R. R. Co. v. Lamborn*, 12 Md., 257. 1858.

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384. Massachusetts — animals escaping from inclosures. In an action against a railroad company for killing a horse which ran upon the track from adjoining land which defendant had negligently omitted to fence, it appeared that the proprietor of this land gave the plaintiff leave to put the horse in a stable thereon; that "the only traveled access to the land and stable" was by a path from the street; and that the horse escaped from the stable, was pursued, and ran upon the land, and thence upon the track, but not by the path. *Held*, that the evidence warranted a finding that the horse was lawfully on the land from which it ran upon the track. *Sawyer v. Vermont and Massachusetts R. R. Co.*, 105 Mass., 196. 1870.

385. — bar-ways. Where a railroad is fenced and bars placed by the company therein for the use of the land owner, and an injury to cattle occurs through such bars being left down, the company is not liable unless it is at fault. *James v. Boston and Worcester R. R. Co.*, 14 Allen (Mass.), 151. 1867.

386. — construction of statute. The St. of 1846, ch. 271, requiring railroad companies to erect and maintain fences upon both sides of any railroad which they might thereafter build, does not apply to a railroad which was located and partially constructed at the time of its passage. *Stearns v. Old Colony and Fall River R. R. Co.*, 1 Allen (Mass.), 493. 1861.

387. — culvert. A railway company, which was required by law to maintain a fence along its line of railway, was in this particular case held liable for injury to cattle occasioned by their escape through the neglect of the company to fence the mouth of a culvert. *Keliher v. Connecticut River R. R. Co.*, 107 Mass., 411. 1871.

388. — defective fences. A railroad company, which is not bound to construct and maintain a fence, is not liable in damages if an animal, feeding in an adjacent pasture, escapes through a defect in the fence, and is run over and killed by the cars, without proof of due care on the part of the owner to prevent such an escape. *Stearns v. Old Colony and Fall River R. R. Co.*, 1 Allen (Mass.), 493. 1861.

389. — The contrary doctrine will prevail where a railway company is bound to erect and maintain sufficient fences. *Rogers v. Newburyport R. R. Co.*, 1 Allen (Mass.), 16. 1861.

390. — A railroad company, which is obliged by statute to make all needful fences and cattle guards on the sides of its road, is liable for injuries by its engines to cattle straying at large through the land of a stranger upon its road, by reason of its negligence in placing such fences and guards. *Browne v. Providence, Hartford and Fishkill R. R. Co.*, 12 Gray (Mass.), 55. 1858.

391. Michigan — fences. Session Laws of 1847, p. 181, does not require individuals to fence their lands, but simply precludes them from recovering damages for trespass thereon unless they are fenced. *Williams v. Michigan Central R. R. Co.*, 2 Mich., 259. 1851.

392. — The act refers to such lands as are usually fenced, which cannot be entirely done in the case of a railway. *Ib.*

393. Missouri. In actions to recover damages for injuries sustained through the omission of a railroad company to fence its road as required by § 51 of the act of February 24, 1853, the question of care and diligence on the part of the railway company cannot arise. The highest care will not excuse the company if its road is not fenced. *Gorman v. Pacific R. R. Co.*, 26 Mo., 441, 1858; *Burton v. North Mo. R. R. Co.*, 30 ib., 372, 1860; *Trice v. Hannibal and St. Joseph R. R. Co.*, 35 ib., 188, 1864; *Bigelow v. North Mo. R. R. Co.*, 48 ib., 510, 1871.

394. — If the animals are killed upon a portion of the road not inclosed by a lawful fence, and not at the crossing of a public highway, actual negligence need not be shown. (R. C. 1855, p. 649, § 5). *Powell v. Hannibal and St. Joseph R. R. Co.*, 35 ib., 457. 1865.

395. — cities or towns. A railway company is not excused from fencing its track through a town or city merely because of its passage through such locality, without reference to the question whether it crosses the public highways of a town or city. *Ells v. Pacific R. R. Co.*, 48 Mo., 231. 1871.

396. — collision must be shown. Section 43, ch. 63, Gen. Stat. 1865, contemplated a direct or actual collision between the train and the animal injured. In such case only, the company should be responsible for the penalty given by the statute. The act was intended not only for the benefit and protection of owners of stock, but also as a public regulation for the safety of passengers and the traveling

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public, who are exposed to danger and peril in case of collision. *Lafferty v. Hannibal and St. Joseph R. R. Co.*, 44 Mo., 291. 1869.

397. — constitutional law. The legislature has power to require railway companies to erect and maintain cattle guards and fences or to respond in damages for all injuries arising from an omission to do so, although their charters contained no reservation of such a power. *Gorman v. Pacific R. R. Co.*, 26 Mo., 441. 1858.

398. — contract. One who had contracted with a railroad company to fence his land along the line of the road, cannot set up the failure of the company to fence that part of its track as ground of action for damages for the killing of stock, even though the statute makes it imperative on the company to fence. *Ellis v. Pacific R. R. Co.*, 48 Mo., 231. 1871.

399. — crossings. The law will not presume negligence from the killing of stock within the corporate limits of a town or city, especially where the accident happened at a crossing long used as a public highway. (*Wagn. St.*, 520). *Wier v. St. Louis and Iron Mt. R. R. Co.*, 48 Mo., 558, 1871; *Lloyd v. Pacific R. R. Co.*, 49 Mo., 199, 1872.

400. — uninclosed lands. When it appears from the evidence, that cattle were killed by a railroad company where its track passed through uninclosed prairie land, and where the track was not fenced, and where there was no road crossing, the law presumes negligence on the part of the company. *Lantz v. St. Louis, Kansas City and Northern R. R. Co.*, 54 Mo., 228, 1873; *Fickle v. Same*, *ib.*, 219.

401. Nevada. The statutes of Nevada do not require fences to be constructed by railway companies where their roads run through public lands. *Walsh v. Virginia and Truckee R. R. Co.*, 8 Nev., 110. 1872.

402. New Hampshire — contract as to fences. Where the plaintiff gave a railway company a deed of part of the road which contained the clause: "Said corporation to fence the land and prepare a crossing with cattle guards at the present traveled path, on a level with the track;" and it appeared that the railroad divided plaintiff's pasture into two parts; *held*, that the clause was not a settlement between the parties as to crossings required by the statute, and that their legal position was not changed by this stipulation.

Held, also, that where the plaintiff turned his cattle into the pasture, the company was liable for their injury while crossing the track, unless it was done by accident, or by some fault of the plaintiff. *White v. Concord R. R. Co.*, 30 N. H., 188. 1855.

403. — Ordinary care would not require the land owner to keep a "look out" at the crossing, or an attendant to watch the cattle. *Id.*

404. — crossings. The plaintiffs' mare escaped from their pasture into an adjoining highway, which was crossed by a railroad, in land not owned by the the plaintiffs, and went thence upon the track at a place where it crossed the highway and where there was no cattle guard or fence, and was killed by the engine: *held*, that the corporation was not liable. *Towns v. Cheshire R. R. Co.*, 1 Foster (N. H.), 363. 1850.

405. — The plaintiff's farm was divided by the defendant's railroad, and fences were made along the sides of the road, and also two farm crossings, but no gates were put up at the crossings. The plaintiff with the knowledge that there were no gates at the crossings, turned his sheep into his field, and afterwards, in attempting to pass over the road at one of the crossings, they were killed by the defendant's engine; *held*, that the company was liable for the damages, as it was bound to erect the fences and to put gates at the crossings. *Horn v. Atlantic and St. Lawrence R. R. Co.*, 35 N. H., 169. 1857.

406. — A railway company is not only required to erect fences, but to keep them in repair, or suffer the consequences. *Smith v. Eastern R. R. Co.*, *ib.*, 357.

407. — The killing of cattle at a private crossing by a railway company is *prima facie* evidence of its negligence. *White v. Concord R. R. Co.*, 30 N. H., 188. 1855.

408. — division fences. Where a railroad company owned a piece of land adjoining its railway, and the plaintiff owned a tract adjoining the company's piece, and there was no fence between the plaintiff's land and the land of the company, and no steps had been taken to have any division of fence between them, and there was no fence between the company's piece of land and the railway, and the plaintiff turned his sheep upon his own land, from which they strayed upon the land

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of the corporation, and thence upon the railroad track and were killed; *held*, that the plaintiff could not sustain an action against the company for the loss of the sheep, although the statute requires railways to be fenced. *Cornwall v. Sullivan R. R. Co.*, 28 N. H., 161. 1854.

409. — fences. By the Rev. Stat. ch. 142, § 6, railroad companies are not bound to erect or keep fences, except against the land of persons adjoining the railroad, nor are they bound to erect cattle guards. *Towns v. Cheshire R. R. Co.*, 1 Foster (N. H.), 363. 1850.

410. — A railroad company is not liable for damages done to cattle which escape from the highway to the railroad, nor through fences between the railroad and land of the owner of such cattle. *Woolson v. Northern R. R. Co.*, 19 N. H. 267. 1848.

411. — A railway company is not bound to maintain a fence on the line of its road against cattle unlawfully in a pasture adjoining. *Mayberry v. Concord R. R. Co.*, 47 ib., 391. 1867.

412. New York. Under the provisions of the general railroad act, railroad companies are required to fence both sides of their track, and are liable for damages done to cattle so long as such fences are not made and kept in good order. *Shepard v. Buffalo, N. Y. and Erie R. R. Co.*, 35 N. Y., 641, 1866. *Tracy v. Troy and Boston R. R. Co.*, 38 ib., 433. 1868.

413. — Where a railroad company neglects to maintain fences and cattle guards along its road, as required by the general railroad act (Laws of 1850, p. 233, § 44), and cattle get upon the track and are injured by its engines or cars, the company is liable to the owner in damages, although he is not an adjoining proprietor, and it does not appear how or whence the cattle came upon the land. *Corwin v. New York and Erie R. R. Co.*, 13 N. Y., 42. 1855.

414. — The statute protects corporations from liability for damages after the fences and cattle guards are constructed and maintained, only where the damages are not done negligently or willfully. *McDowell v. New York Central R. R. Co.*, 37 Barbour. (N. Y.), 195. 1862.

415. — cattle guards. When a railroad company has constructed and maintains proper fences and cattle guards, as required by statute, its absolute liability for damages to

cattle upon its track ceases; and though guilty of negligence in permitting the cattle guards to remain full of snow, it is not responsible to the owner of cattle who is himself chargeable with negligence in allowing them to get upon the track. *Hance v. Cayuga and Susquehanna R. R. Co.*, 26 N. Y., 428. 1863.

416. — constitutional law. The provisions of the railroad acts requiring the erection and maintenance of suitable fences, gates, bars, etc., is a police regulation, and is not inconsistent with the special charter of the Hudson River R. R. Co. *Staats v. Hudson River R. R. Co.*, 3 Keyes (N. Y.), 196, 1866; see *Same v. Same*, 39 Barbour. (N. Y.), 298, 1862; *Same v. Same*, 23 Howard's Pr. (N. Y.), 463, 1862; *Same v. Same*, 33 ib., 139, 1866; *Waldron v. Rensselaer and Saratoga R. R. Co.*, 8 Barbour. (N. Y.), 390, 1850.

417. — contributory negligence. The statutes of 1848 and 1850, requiring railroad companies to fence their roads, render the companies responsible when they omit to make the fences, etc., if the damages are caused by them; but they are not responsible where the owner's negligence contributes to the injury. *Marsh v. New York and Erie R. R. Co.*, 14 Barbour (N. Y.), 364. 1852.

418. — covenant to maintain fences. It is no defense that the party whose cattle were killed was legally bound to build such fence, under a covenant between his assignor and the company. It was the duty of the company to see the fence built. *Shepard v. Buffalo, New York and Erie R. R. Co.*, 35 N. Y., 641, 1866; *Tracy v. Troy and Boston R. R. Co.*, 38 ib., 433. 1868.

419. — crossings. Where a railroad company neglects to erect and maintain fences and cattle guards at road crossings, as required by the general railroad act of March 27, 1848, and cattle are injured by reason of such neglect, the company is liable to the owner, in damages, without any proof of negligence. *Suydam v. Moore*, 8 Barbour (N. Y.), 358, 1850; *Waldron v. Rensselaer and Saratoga R. R. Co.*, ib., 390. 1850.

420. — The failure of a railroad company to erect cattle guards at road crossings does not make it liable for damages to cattle which have entered on the railroad from the owner's land, through the want of a fence which the owner was bound to build and keep in repair.

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(Laws of 1848, p. 221.) *Talmadge v. Rensselaer and Saratoga R. R. Co.*, 13 Barbour (N. Y.), 493. 1852.

421. — The provision in the general railroad act of 1848, requiring railway companies to construct cattle guards at all road crossings, does not apply to streets in cities or villages. *Parker v. Rensselaer and Saratoga R. R. Co.*, 16 Barbour (N. Y.), 315. 1853.

422. — The fact that the road crossing is at or near the depot, and that, to make a cattle guard there, would inconvenience the company, will not excuse it from complying with the positive requirements of the statute. *Bradley v. Buffalo, New York and Erie R. R. Co.*, 34 N. Y., 427, 1866; *Tracy v. Troy and Boston R. R. Co.*, 38 ib., 433, 1868; *Same v. Same*, 55 Barbour (N. Y.), 529, 1867.

423. — defective fences. Railroad companies are not liable under the statute for injuries resulting from a casual defect in the fencing. They are not insurers. *Murray v. New York Central R. R. Co.*, 3 Abbott's Ct. of Ap. Dec. (N. Y.), 339. 1868.

424. — Railroad corporations, in order to secure the protection afforded by § 44 of the general railroad act, from liability for damages done to cattle, etc., must not only erect fences and cattle guards, but must keep them in good repair, so that at all times and in all places, they shall be of the description and in the condition required, and sufficient to answer the purposes intended. *Morrison v. New York and New Haven R. R. Co.*, 32 Barbour (N. Y.), 568, 1860; *McDowell v. New York Central R. R. Co.*, 37 ib., 195. 1862.

425. — To render a railroad company liable under the laws 1850, ch. 140, and 1854, ch. 282, for injuries to animals escaping through a railroad fence, temporarily out of repair, actual or constructive notice of such want of repair must be shown against the company, and its neglect to repair within a reasonable time proven. *Wheeler v. Erie R. R. Co.*, 2 N. Y. Sup. Ct., 634. 1874.

426. — The language of § 56 of the general railroad act, is not to be construed literally, so as to render a railroad company liable for injuries occasioned upon its road, at a time when such fence is temporarily out of repair, without fault or negligence in any manner imputable to the company. *Murray v. New York Central R. R. Co.*, 4 Keyes (N. Y.), 274. 1868.

427. — farm crossings. The failure to fence at a farm crossing will render a railway company liable for stock injured upon its track that has passed upon the track at that point. *Fanning v. Long Island R. R. Co.*, 2 N. Y. Sup. Ct., 585. 1874.

428. — gates or bars left open. Where the cattle of a stranger are upon the lands of another, adjoining a railroad, and from those lands they pass upon the railroad through a gate left open by the proprietor of such lands, and are killed by the cars, their owner cannot recover their value, although the railroad company has not complied with the general railroad act, in respect to fences, at other points on the railroad. *Brooks v. New York and Erie R. R. Co.*, 13 Barbour (N. Y.), 594. 1852.

429. — A railway company is liable for injury to domestic animals resulting from one of its employes' negligence in leaving down the bars of the fence along the side of the track. *Chapman v. New York Central R. R. Co.*, 33 N. Y., 369, 1865; *Same v. Same*, 31 Barbour (N. Y.), 399, 1860.

430. — Hudson River R. R. Co. By the charter of the Hudson River R. R. Co., the corporation is relieved from any obligation to maintain fences, where its railroad is constructed in the river, and this exemption is not changed or removed by the provisions of the general railroad act of 1848. *Schermerhorn v. Hudson River R. R. Co.*, 38 N. Y., 103. 1868.

431. — kind of fence required. The failure of the statute to specify the kind of a fence to be built by a railway company cannot operate as an excuse for the entire failure of the company to erect a fence. *Tallman v. Syracuse, Binghamton and New York R. R. Co.*, 4 Keyes (N. Y.), 128. 1868.

432. — trespassing animals. It seems that a railroad company, which omits to comply with the statute by erecting and maintaining suitable fences and cattle guards, is liable to the owner of cattle which stray upon the track from an adjoining close, or from the highway, and are there injured by the engines or cars of the company, although they were not lawfully in such close or highway. *Corwin v. New York and Erie R. R. Co.*, 13 N. Y., 42. 1855.

433. North Carolina — negligence. The

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presumption of negligence raised by the statute, can only be rebutted by showing that the agents of the railroad company used all proper precautions to guard against damage. It is not sufficient to prove that there was probably no negligence. *Battle v. Wilmington and Weldon R. R. Co.*, 66 N. C., 343. 1872.

434. — Where it appeared by the plaintiff's testimony that his horse had been injured on a railroad by the running of a train against it, and it was left doubtful from defendant's testimony, whether the brakes had been applied after the animal was discovered to be on the track, it was held that the *prima facie* case of negligence made by the act of 1856, ch. 7, was not repelled. *Clark v. Western North Carolina R. R. Co.*, Winston's Law (N. C.), 109. 1863.

435. Ohio. In an action by the owner, against a railway company, to recover damages resulting from an injury to his cow for want or insufficiency of fences (under act of March 25, 1859), when it appeared that the injury complained of was done subsequent to the taking effect of the act of April 13, 1865, restraining certain stock from running at large, it was held to be a sufficient answer, to allege that "the plaintiff did not live along the line of the road, nor was his cow grazing in any inclosed field adjacent thereto, and that plaintiff, knowingly and unlawfully permitted his cow to run at large." *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Methven*, 21 Ohio St., 586. 1871.

436. Pennsylvania. In Pennsylvania, a railway company is not bound to fence its road. It is not liable except for negligence or wanton injury. *Railroad Co. v. Skinner*, 19 Penn. St., 298. 1852.

437. Rhode Island. Where a railroad company, not obliged by its charter to fence the road against adjoining lands unless requested so to do by the owner, agreed with such owner that it should not fence the road against his lands, and a cow placed upon such lands having strayed upon the railroad, where it was killed by a train of cars, held, that the owner of the cow could not recover. *Tower v. Providence and Worcester R. R. Co.*, 2 R. I., 404. 1853.

438. Tennessee — burden of proof. When the plaintiff proves the killing or injury of his stock by a railroad company, the *onus* is cast upon the company to prove that the act

was unavoidable. *Nashville and Chattanooga R. R. Co. v. Fugett*, 3 Coldwell (Tenn.), 402. 1866.

439. — retrospective statute. In an action against a railroad company for killing stock, previous to the passage of the act of the 2d of March, 1858, ch. 44, Code, § 1169, the act has no such retrospective construction as to embrace this case. *Horne v. Memphis and Ohio R. R. Co.*, 1 Coldwell (Tenn.), 72. 1860.

440. Vermont — private crossings. Where a railway company is bound by law to erect bars or gates at a private crossing, and the company had agreed to erect gates, but instead of so doing proceeded to erect bars, and the land owner forbid the erection of such bars, the land owner cannot hold the company liable for injuries to cattle in consequence of the want of such gates or bars. The remedy of the land owner for the refusal to erect gates instead of bars is by an action for damages on the contract. *Hurd v. Rutland and Burlington R. R. Co.*, 25 Vt., 118. 1853.

441. — construction of railways. As soon as railway companies have opened the fields of an adjoining land holder for the purpose of constructing their roads, they are bound to use all reasonable and prudent means to restrain the cattle of the land holder from straying upon the track, and to prevent other cattle from going upon his lands. *Holden v. Rutland and Burlington R. R. Co.*, 30 Vt., 297. 1858.

442. — contributory negligence. It is the duty of the owner of cattle and horses, knowing the exposed situation of an unfenced railroad track, to exercise as much care and prudence in keeping his property from exposure to injuries therefrom, as is required of the corporation in guarding against their commission; and if in such case, he permits his cattle or horses to run in the highway, knowing that there is no obstruction to their passing thence upon the track, he is guilty of the same degree of negligence as that with which the corporation is chargeable in permitting the railroad to remain unfenced. *Trow v. Vermont Central R. R. Co.*, 24 Vt., 487. 1852.

443. — If the plaintiff were guilty of negligence or even positive wrong, in allowing his cattle or horses to run in the highway, whence, through the want of a fence, which

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it was the duty of the railway company to maintain, they strayed upon the track, the corporation is bound to the exercise of reasonable care and diligence in the use of its road and management of its engines and trains, and if, from want of that care the injury arose, it is liable. *Ib.*

444. — But in such case, if the company was guilty of no negligence in the management of its engine or train, it would not be liable for any injury resulting to such animals. *Ib.*

445. — degree of care required. The owner of cattle which stray upon a railroad track by reason of the insufficiency of a fence which the railroad company is under obligation to maintain, and who brings an action against the company for killing cattle, is entitled to have the degree of care required of the company defined in a more strict manner than by instructing the jury, that the company is bound to exercise such care as a man of ordinary prudence would use who was the owner of both the railroad and the cattle; but defendant cannot complain if such instruction is given. *Quimby v. Vermont Central R. R. Co.*, 23 Vt., 387. 1851.

446. — trespassing animals. Where animals are suffered to go astray and trespass upon a railway, their owner cannot recover for their destruction, unless there is negligence upon the part of the servants of the company, even where the company is under a statutory obligation to fence its road, and has omitted to do so. *Jackson v. Rutland and Burlington R. R. Co.*, 25 Vt., 150, 1853; *Morse v. Rutland and Burlington R. R. Co.*, 27 *ib.*, 49. 1854.

447. — The obligation to fence only extends to the owner or rightful occupier of the adjoining fields, and against cattle rightfully in such adjoining fields. *Ib.*

448. Wisconsin — constitutional law. Ch. 268, Laws of 1860, is constitutional, and the requirement for the erection of fences was chiefly intended to protect passengers. *Blair v. Milwaukee and Prairie du Chien R. R. Co.*, 20 Wis., 254. 1866.

449. — evidence. The owner of an animal injured by a railway train cannot recover damages under ch. 268, Laws of 1860, by merely showing that near the place where the injury happened, and near the depot of the

company, land occupied by the company for its track, other than its depot grounds, was unfenced; but he must show that the animal got upon the track at a point where the company was bound to maintain a fence, and had neglected to do so. *Bennett v. Chicago and Northwestern R. R. Co.*, 19 Wis., 145. 1865.

450. — fences. Where the owner of lands, across which a railway had been constructed prior to 1860, has recovered damages for the right of way, it will be presumed that he has recovered compensation for erecting and maintaining suitable fences along the line of the road where it crossed his land; and the company would not be liable for the erection of fences, nor for injuries done to the cattle of the landowner by reason of defects in the fences. Ch. 268, Laws of 1860. *Johnson v. Milwaukee and St. Paul R. R. Co.*, 19 Wis., 187. 1865.

451. — La Crosse and Milwaukee R. R. Co. Ch. 122, Laws of 1856, required the La Crosse and Milwaukee R. R. Co., to fence its road in parcels, each to be fenced in one year after it was put in operation. *Held*, that the object of this statute was not merely to regulate the division fences, as between the company and the adjoining landholders, but was to protect the public generally. *McCall v. Chamberlain*, 13 Wis., 637. 1861.

452. — lessees. The lessee takes the road subject to all the duties which the company owes to the public. *Ib.*

453. — If the company has neglected to make such fence within the time limited, it will be liable for all damages done to animals straying on the track through the want of such fence, without reference to whether there was negligence in managing the cars at the time of the injury, or whether such animals were rightfully or wrongfully on the adjoining land from which they escaped upon the track. *Ib.*

454. — repairs of fences. Under the statute which requires railroad companies to fence their tracks and makes them absolutely liable for injuries to stock straying thereon in case of their neglect to do so, such companies are bound to exercise a high degree of diligence in keeping their fences in a safe condition. *Antisdel v. Chicago and Northwestern R. R. Co.*, 26 Wis., 145. 1870.

455. — It was not error for the court to

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refuse to instruct the jury, that the company "was required to exercise only ordinary care and diligence in maintaining the fence along its road." *Ib.*

456. — It seems that if the company has a patrol passing along the track daily, and if, when informed of any defect in its fence, it at once makes the necessary repairs, this will discharge it from liability. *Ib.*

457. — Though under the statute, a railway company is required to fence its road, or be absolutely liable for injury to animals which get upon its track in consequence of such failure to fence, it will not, perhaps, be liable to such absolute liability in case its fence should be suddenly destroyed by unavoidable accident, in case immediate steps were taken to rebuild. *Brown v. Milwaukee and Prairie du Chien R. R. Co.*, 21 Wis., 89. 1866.

458. — Under the statute, railway companies are absolutely liable for all damages to cattle occasioned by their neglect to fence their roads; and it was so held in a case where plaintiff's cattle were placed in a close adjoining the track, after the fence separating it from the track had been partially destroyed by fire. *Sika v. Chicago and Northwestern R. R. Co.*, 21 Wis., 370. 1867.

459. — And it is no defense that the plaintiff had trespassed upon defendant's track in driving his cattle to said close; such trespass not being connected with the subsequent acts by which they were killed. *Ib.*

460. — **trespassing animals.** Where a railroad company erects and maintains proper fences and cattle guards along its road, keeping them in good condition, cattle escaping and straying upon the road are trespassers, and the law charges the owners with negligence, although not actually guilty of any carelessness in permitting them to escape. *Fisher v. Farmers' Loan and Trust Co.*, 21 Wis., 73. 1866.

461. — Where the negligence of the owner directly coöperates with that of the company's agents in causing the injury, he cannot recover without showing willful misconduct or gross carelessness on the part of the agents. *Ib.*

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462. **Accidental killing.** Where the engine, running on the road of the P. and R. R.

Co., killed a steer under such circumstances as showed that the killing was accidental; held, that the company was not responsible for the loss. *Garrie v. Portsmouth and Roanoke R. R. Co.*, 2 Iredell's Law (N. C.), 324. 1842.

463. **Action.** Damages cannot be recovered in an action for stock killed after suit is brought. *Toledo, Peoria and Warsaw R. R. Co. v. Arnold*, 49 Ill., 178. 1868.

464. **Assignment of claim.** Claims for mere personal torts, which die with the person, are not assignable; but claims for taking and converting personal property, or for injury to personal property, may be assigned, so as to pass an interest to the assignee which he can assert in his own name in a civil action under the code. *Butler v. New York and Erie R. R. Co.*, 22 Barbour (N. Y.), 110. 1856.

465. **Canal lands.** A railway company is bound to fence at a place where its road is situated on the tow path of a canal abandoned as a thoroughfare. *White Water Valley R. R. Co. v. Quick*, 30 Ind., 384. 1868.

466. — Where a railroad passes upon an embankment erected in the bed of a canal, such embankment must be guarded by fences. *Same v. Same*, 31 ib., 127. 1869.

467. **Charter.** The charter of the Vt. Cent. R. Co. provides that, on taking land for the use of the road, the company shall be "seized and possessed of the land." This does not make the company owner in fee of the land; hence the statute with reference to the obligation of adjoining land owners to maintain division fences does not apply, but the obligation rests primarily upon the company, and until it has done this, or paid the owner for so doing, a sufficient length of time having elapsed for erecting such fences, the mere fact that the cattle get upon the road from land adjoining, is no ground for imputing negligence to the owners of the cattle. *Quimby v. Vermont Central R. R. Co.*, 28 Vt., 387, 1851; *Trow v. Same*, 24 ib., 487, 1852.

468. **Consolidation of companies.** A complaint against the P., C. and St. L. R. R. Co., charging that a railroad corporation known as the C., C. and I. C. R. R. Co., killed an animal, belonging to the plaintiff, and after the killing, consolidated with another railroad company, and is now run and known as the P., C. and St. L. R. R. Co., is not supported by the evidence, if the evidence fails to show the

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consolidation charged. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Kain*, 35 Ind., 201. 1871.

469. Contractors operating railway. The corporators of a railroad company are liable, if its lessees should commit a trespass. The same rule applies where the road is operated by contractors, while constructing it. *Chicago and Rock Island R. R. Co. v. Whipple*, 22 Ill., 105. 1859.

470. Estrays. One who is in possession of an animal which he has taken up as an estray, may sue for and recover damages, in his own name, for injury to such property, *Peoria, Peekin and Jacksonville R. R. Co. v. McIntire*, 39 Ill., 298. 1866.

471. — Where the party taking up an estray, in attempting to comply with the law, failed to post the animal in the proper manner, yet he could recover against a railroad company for the wrongful injury to the property, and such recovery would be a bar to any subsequent action against the company, by the true owner, for the same injury. *Chicago and Northwestern R. R. Co. v. Shultz*, 55 Ill., 421. 1870.

472. Former adjudication. An action was brought at common law for the killing of an ox through the negligence of a railway company. The plaintiff failed and afterwards brought his action under the statute. *Held*, that the former action was no bar to the second. *Indianapolis and Cincinnati R. R. Co. v. Clark*, 21 Ind., 150. 1863.

473. Fright of animals causing injuries. Where a horse, while being led along the highway by its owner, is so frightened by a passing train that he bursts a blood vessel, and dies, no action will lie against the railroad company for the injury, unless it was the result of some wrongful act of the company. *Moshier v. Utica and Schenectady R. R. Co.*, 8 Barbour (N. Y.), 427. 1850.

474. — But where the charter of the company required it to purchase a turnpike road running parallel with the proposed railroad, and to assume the liabilities of that corporation before it should be permitted to run cars upon its own road, and gave it the right to lay its road track across and along the bed of the turnpike, but required it "to restore the road to its former state, or in a sufficient manner not to impair its usefulness," it was *held*, that

if the taking of a part of the bed of the turnpike, for the track of the railroad, rendered it dangerous to persons traveling with teams on the turnpike, and thus impaired its usefulness to the public, the railroad company was bound either to remove the two roads further from each other, or to separate them by protecting guards. *Ib.* But see *Coy v. Same defendant*, 23 ib., 643, 1855, in which the contrary doctrine is held to be the law.

475. Headlight. The operators of a railroad train have an unqualified right to carry a headlight upon the train at night, when necessary for the safety of the lives and property embarked upon the train. *Bellefontaine and Indiana R. R. Co. v. Schryhart*, 10 Ohio St., 117. 1859.

476. — It is error to instruct a jury that such right depends upon its exercise not endangering cattle that may stray upon the track. *Ib.*

477. Ownership. Where parties suing in case, for damages for killing cattle, claim as joint owners, they should be held to reasonably strict proof of ownership. *Illinois Central R. R. Co. v. Finnigan*, 21 Ill., 646. 1859.

478. Pasturage. Damages from the non-thriving of cattle, owing to the construction of a railroad through the pasture on which they were feeding, are not remote, contingent or speculative, but are recoverable in an action of trespass, *quare clausum fregit*. *Baltimore and Ohio R. R. Co. v. Thompson*, 10 Md., 76. 1856.

479. Railway yards. The yard of defendant was full of pitfalls, and was inclosed by a high fence with gates for the passage of cars, the gates being open by day and shut at night. The plaintiff's cow strayed into the yard, and was not discovered by the watchman who searched the yard before closing the gates. After the gates were closed, dogs were turned loose into the yard. The dogs chased the cow and she fell and was killed. *Held*, that the company was not liable for the injury. *Leseman v. South Carolina R. R. Co.*, 4 Richardson's Law (So. Car.), 413. 1851.

480. Watchman on locomotive. The act of 1856, ch. 94, § 8, requires all railroad companies in Tennessee to keep a special watchman upon the locomotive when in motion, to watch the track and give warning of any obstacle or obstruction. This is a special duty

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to be performed by one person, as his sole occupation while the train is in motion, and if in the absence of such special watchman, injury result to person or property by being overrun, the company is liable in damages, such omission being deemed negligence. *Memphis and Charleston R. R. Co. v. Dean*, 5 Snead (Tenn.), 291. 1858.

481. Wells. Where a well is dug upon the right of way of a railroad company, without its knowledge or consent, and a mule falls into it and is killed, the company cannot be held liable. *Illinois Central R. R. Co. v. Carraher*, 47 Ill., 338. 1868.

482. Where the company is a trespasser. Where a railway was built through plaintiff's pasture and without payment or securing of compensation, and a cow was killed by a train in the pasture, it was held, that these facts made a *prima facie* case against the company. *Matthews v. St. Paul and Pacific R. R. Co.*, 18 Minn., 434. 1872.

483. Willful acts of employes. A railroad company is liable for the careless and negligent acts of its agents in the course of the performance of their duties; but it is not liable for their criminal and willful acts. *De Camp v. Mississippi and Missouri R. R. Co.*, 12 Iowa, 348. 1861.

484. — A railroad company is not liable for stock killed or injured on its track, in consequence of the willful act of the engineer running the train. *Cooke v. Illinois Central R. R. Co.*, 30 Iowa, 202. 1870.

485. — Where an injury is alleged to have been willfully done, it is not necessary that it should appear that the plaintiff was free from contributory negligence. *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Petty*, 30 Ind., 261. 1868.

INJURIES TO EMPLOYEES.

See CONSTITUTIONAL LAW; DAMAGES; INDICTMENT; MEDICAL SERVICES; NEGLIGENCE; RECEIVER.

I. NEGLIGENCE OF CO-EMPLOYEES.

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a. Generally.

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2. What constitutes an employé.

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II. DEFECTIVE ROADWAY, MACHINERY AND MATERIALS.

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IX. GENERAL MATTERS.

I. NEGLIGENCE OF CO-EMPLOYEES.

1. Neglect of Employer.

a. GENERALLY.

1. Dispatching trains. Where an agent whose duty it was to make up and dispatch trains, and to hire and station brakemen, sent out a heavy freight train with but two brakemen when three were required, and the train broke in two, and in consequence of the want of necessary brakemen the rear part ran backward and collided with another train which had been dispatched five minutes after the first, killing the fireman thereof; it was held, that the railway company was liable. *Flike v. Boston and Albany R. R. Co.*, 53 N.Y., 549. 1873.

2. — The company should supply sufficient help to operate the train. *Id.*

3. Joint negligence. Where a servant receives an injury which is occasioned in part by the negligence of his master, and partly by that of a fellow servant, he can maintain an action against his master for such injury. *Paulmier v. Erie R. R. Co.*, 5 Vroom (N.Y.), 151. 1870.

4. Rank of employes. A corporation is liable to an employé for negligence in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent entrusted with their performance. *Flike v. Boston and Albany R. R. Co.*, 53 N.Y., 549, 1873.

b. IN THE SELECTION OF SERVANTS.

5. Degree of care required. A master is bound to use diligence in the selection of his

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servants, and for want of such care, he is liable to all other servants for any damage that may arise. But if the officers of a railroad company have made careful inquiry into the habits and competency of the employés, and upon such inquiry, believe and have reason to believe them sober, competent and careful, the company is not liable for injuries resulting from the negligence of a co-employé. *Moss v. Pacific R. R. Co.*, 49 Mo., 167, 1872; *Sizer v. Syracuse, etc., R. R. Co.*, 7 Lansing, (N. Y.) 67, 1872; *Union Pacific R. R. Co. v. Milliken*, 8 Kans., 647, 1871; *Frazier v. Pennsylvania R. R. Co.*, 38 Penn. St., 104, 1860; *O'Donnell v. Allegheny Valley R. R. Co.*, 59 Penn. St., 239, 1868.

6. — A railway company is bound to use ordinary care in the selection of its servants. *Rohback v. Pacific R. R. Co.*, 43 Mo., 187, 1869.

7. **Continuance of employment.** The same degree of negligence which unfits a party for employment in the first place will equally unfit him for a continuance therein, his negligent conduct being known to his employer. *Harper v. Indianapolis and St. Louis R. R. Co.*, 44 Mo., 488, 1869.

8. **Evidence of want of care.** For the purpose of showing that the officers of a railway company did not exercise proper care in the employment of, or in retaining in service, careful, prudent, and skillful persons to manage and operate its road, and for the purpose of charging such company with notice of the incompetency of its employés, specific acts of negligence or unskillfulness of such employés may be proved, and it may be proved that such acts were known to such officers before, the employment of such persons, or that such employés were retained in such service after notice of such acts. *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Ruby*, 38 Ind., 294, 1871.

9. — Character for care, skill, truth, etc., though growing out of the special acts of a party, cannot be established by proof of such acts, but by evidence of general reputation. *Frazier v. Pennsylvania R. R. Co.*, 38 Penn. St., 104, 1860.

10. — Mere proof of the particular act of negligence of the employé causing the injury is not sufficient to show negligence in his employment. So *held*, where a brakeman on a train was injured by the taking up of rails to repair the track, of which the trainmen

were not properly notified. *Cooper v. Milwaukee and Prairie du Chien R. R. Co.*, 23 Wis., 668, 1868.

11. **Exemplary damages.** A railway company impliedly warrants that its employés are persons of due skill, and are competent and faithful. And in case of the willful misconduct or gross neglect of its employés, it is liable in exemplary damages. *New Orleans, Jackson and Great Northern R. R. Co. v. Albritton*, 38 Miss., 242, 1859.

12. **Fireman.** Permission given by the company to one of its engineers to allow a fireman to act as an engineer, when he deemed the fireman competent, makes the company responsible for injuries resulting from a mistake or negligence of the engineer in permitting a fireman to handle the engine when incompetent for duty. *Harper v. Indianapolis and St. Louis R. R. Co.*, 47 Mo., 567, 1871.

13. **Knowledge of employé of co-employé's incompetence.** Where the servant has full and equal knowledge with the master that a fellow-servant is incompetent, and he remains in the service, this may constitute contributory negligence; but if it appears that the master has promised to amend the defect, or other like inducement to remain has been held out to the servant, the mere fact of his continuing in the employment does not of itself, as matter of law, exonerate the master from liability. *Laning v. New York Central R. R. Co.*, 49 N. Y., 521, 1872.

14. — Where the plaintiff, who was a brakeman, knew that his conductor was habitually careless, and chose to continue in service with him, neither informing the company of his known carelessness, nor refusing to serve with him; *held*, that he could have no claim for injuries resulting from further acts of carelessness of the conductor, even though the company also knew it. *Frazier v. Pennsylvania R. R. Co.*, 38 Penn. St., 104, 1860.

15. — In an action for an injury to an employé resulting from the negligence of a conductor, it is proper, in defense, to show that the superintendent did not know that the conductor was a careless person. *Ib.*

16. **Switchmen.** Where, in an action for damage sustained by an employé, by the negligence of a fellow-servant in misplacing a switch, it appeared that a misplacing of a switch by the same switchman had caused an

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accident on a former occasion; *held*, that the company should have been allowed to prove, that on the occasion of the former accident, an investigation had been made by one of its roadmasters, who reported that the switchman was free from negligence. *Bauleo v. New York and Harlem R. R. Co.*, 12 Abbott's Pr. N. S. (N. Y.), 810, 1872; *Same v. Same*, 52 N. Y., 633, 1873.

17. — A railroad company employed A., who was careful and trusty in his general character, to tend the switches on its road; and after he had been long in such service, B. was employed to run the passenger train of cars on the road; B. knowing the employment and character of A. *Held*, that the company was not answerable to B. for an injury received by him, while running the cars, in consequence of the carelessness of A. in the management of the switches. *Farwell v. Boston and Worcester R. R. Co.*, 4 Metcalf (Mass.), 49. 1842.

18. — drunkenness. If a flagman employed by a railway company is addicted to drunkenness, and is usually intrusted with the management of a switch, and these facts are known, or, by the use of due care, would be known by the officers of the company, and he, through intoxication, fails properly to adjust a switch, whereby an accident happens to a person employed by the corporation to repair its cars, the corporation will be responsible in damages, although due care was used in the original selection of the flagman. *Gilman v. Eastern R. R. Co.*, 13 Allen (Mass.), 433. 1866.

19. — A railroad company is not responsible to one of its employés whose duty it was to repair its cars, for a personal injury arising from the negligence of a switchman, in failing properly to adjust a switch upon the track over which he is carried by the company free of charge, between his home and the place of his work, provided the company has used due care in the selection of the switchman; but if the switchman was an habitual drunkard, and this fact was known, or ought to have been known to the corporation, and the injury resulted from his intoxication, the corporation is responsible. *Same v. Same*, 10 Allen (Mass.), 233. 1865.

20. Want of skill. A railway company is not chargeable for injuries to one servant by

the negligence of another, on the ground of the unskillfulness of the latter, unless the injuries resulted from such unskillfulness. *Wright v. New York Central R. R. Co.*, 25 N. Y., 562, 1862; reversing *Same v. Same*, 28 Barbour (N. Y.), 80, 1858.

2. What constitutes an employe.

21. Contractors. Where a contractor, engaged in repairing a bridge upon a railway for the company, employs men to work thereon by the day, the latter are the servants of the contractor, and not of the company; and there is no privity between them and the company. *Young v. New York Central R. R. Co.*, 30 Barbour (N. Y.), 229. 1859.

22. — If a man, thus employed by the contractor receives an injury from a passing train while at work upon the bridge, he may, upon a proper showing, maintain an action for damages against the railroad company. *Ib.*

23. — A railroad company to which coal was delivered by vessels, undertook to remove it from the vessels to its cars at a fixed price per ton, paid by the masters of the vessels, and employed N., who was in its service as a weigh master, to do the shoveling and dumping, using a stationary hoisting engine belonging to the company, and employing his own help, and receiving a certain price per ton. N. hired B. as a shoveler, and B. was killed, while in the employment, by a car being backed upon him without notice by the servants of the company. The wages of B. were not paid by the company and his name was not entered on its pay roll. In a suit brought by his administratrix against the company in which the latter claimed that B. was its servant and that it was therefore not liable for the injury, the court charged the jury that if the company had control of B. and could have discharged him without breaking its contract with N., or if N. was its agent in employing him, then he was in the employment of the company, but that if N. was an independent contractor and hired B. as such, and the company could not control or discharge him, then he was not. *Held*, on a motion of the defendant for a new trial: I. That the charge was unexceptionable. II. That on the facts, the jury properly held that B. was not the servant of the company. *Burke v.*

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Norwich and Worcester R. R. Co., 34 Conn., 474. 1867.

24. Joint occupancy of railways. A switch tender was employed by a railroad company on a portion of its track upon which it permitted another company to run trains. *Held*, that such switch tender was not a servant of the latter company; and an engineer of the latter, injured by the negligence of such switch tender, may maintain an action against the switch tender's employer. *Smith v. New York and Harlem R. R. Co.*, 19 N. Y., 127, 1859; *Same v. Same*, 6 Duer (N. Y.), 225. 1856.

25. Parent and child. A minor son of the plaintiff was, with his consent, employed to go upon a construction train to furnish water to the laborers at the points where they stopped for labor. The son was also, at times with the father's knowledge, employed as brakeman and fireman upon the train. By the negligence of a person in charge of a section of the road, in not signaling the train, it ran off the track at a curve, where the rails were being elevated, and the boy was killed. *Held*, that the company was not liable for the injury. *Ohio and Mississippi R. R. Co. v. Hammersley*, 28 Ind., 371. 1867.

26. Persons helping employés. A train of defendant's coming into a city, the engine, tender and one car were detached from the remainder, and run under the charge of the fireman, in the engineer's place, to a water station belonging to defendant. At the station, the fireman asked a boy ten years old, standing there, to turn on the water; whilst he was climbing on the tender to put in the hose the remainder of the train came down with its ordinary force and struck the car attached to the engine; the jar threw the boy under the wheel and he was killed. *Held*, that it not being within the scope of the engineer's or fireman's employment to ask any one to come on the engine, the defendant was not liable. *Flower v. Pennsylvania R. R. Co.*, 69 Penn St., 210. 1871.

27. — The boy did not come within the protection of defendants; assuming that he became an employé, this relation would destroy the right of action. *Ib.*

3. What employments are common.

28. Brakemen. Engineers and brakemen

are held to be in the same class or line of service; and the fact that the engineer served on a passenger and the brakeman on a freight train, does not change the rule. *Louisville and Nashville R. R. Co. v. Robinson*, 4 Bush (Ky.), 507. 1868.

29. — A brakeman on a train and a switch tender are engaged in the same general undertaking, and the company is not liable to one for an injury caused by the negligence of the other. *Slattery's Adm'r. v. Toledo and Wabash R. R. Co.*, 23 Ind., 81. 1864.

30. — A brakeman, whose duty it is to apply the brakes only when directed by the engineer or conductor, cannot maintain an action against their common employer for an injury resulting from the culpable speed at which the engineer and conductor ran the train. *Sherman v. Rochester and Syracuse R. R. Co.*, 17 N. Y., 153, 1858; *Same v. Same*, 15 Barbour (N. Y.), 574. 1853.

31. Carpenters. Employés engaged in a carpenter shop of a railroad company, and employés operating an engine, are not engaged in a common employment. *Ryan v. Chicago and Northwestern R. R. Co.*, 60 Ill., 171. 1871.

32. Car repairer. An engine driver, in charge of a switch engine, and a laborer engaged in repairing cars, the switch engine being used at times to move such cars as needed repair, were held to be engaged in one common employment, so that the one could not recover against the railway company for injuries resulting from the negligence of the other. *Chicago and Alton R. R. Co. v. Murphy*, 53 Ill., 336. 1870.

33. Common hazards. Where the ordinary duties of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be regarded as fellow servants. *Ib.*

34. Conductor. The plaintiff, an employé of a railway company, was employed by the month to render service generally on the road, in the capacity of baggage master, conductor of passenger trains, and gravel trains, at such times and places along the road as directed; and being ordered to go to F. and take charge of a gravel train the next day at that place, took passage on the train for F., but passed by F. to T., and on the morning of the next day returned, by the same train, toward F., to

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take charge of the gravel train as directed. Before arriving at F., by the carelessness of the servants operating the passenger train, he was thrown from the car and injured, and brought his action against the company for damages. *Held*, that his relation of fellow servant to the employés operating the train, entitled the plaintiff only to the exercise on their part of ordinary care; and not to that extraordinary care due to a common passenger. *Manville v. Cleveland and Toledo R. R. Co.*, 11 Ohio St., 417. 1860.

35. — When a railroad company places the engineer under its employ under the control of the conductor, who directs when the cars are to start, stop, etc., the company is liable to the engineer for an injury received, occasioned by the negligence of the conductor, whilst they are both engaged in their respective employments. *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415. 1851.

36. **Contractors.** A. contracted to deliver wood to a railroad company, the company to furnish the equipments to move it, the men on the train to obey the orders of the contractor. One of the servants employed by him to load wood upon the car was thrown off and killed. *Held*, that the parties were all servants of the company, and that no recovery could be had against the company for his death. *Illinois Central R. R. Co. v. Cox*, 21 Ill., 20. 1858.

37. — A subcontractor engaged in building bridges on the line of a railroad is not a co-servant of those employed in operating the trains. *Donaldson v. Mississippi and Missouri R. R. Co.*, 18 Ia., 280. 1865.

38. **Coupling cars.** An employé whose employment consists in the performance of various duties, among other things, of coupling and uncoupling cars, is, while engaged in uncoupling cars, to be regarded in the same general undertaking as the engineer and conductor having charge of the cars. *Wilson v. Madison, etc. R. R. Co.*, 18 Ind., 226. 1862.

39. — The fact that such servant had other duties to perform would not enlarge nor diminish his rights in the premises. *Ib.*

40. — A common laborer having been ordered by the foreman to couple cars, he being ignorant of such duty, went between the cars for that purpose and while there, was killed by the negligence of the engineer in

bringing the cars together with great force. *Held*, on demurrer, that the railway company was liable for the damages. *Lalor v. Chicago, Burlington and Quincy R. R. Co.*, 52 Ill., 401. 1869.

41. **Defective cars.** Where a brakeman upon a freight train was injured while descending a ladder on one of the cars, in obedience to a signal from the engine driver, the injury being occasioned by the absence of some rounds from the ladder, it was *held*, the brakeman should not be prejudiced as to his right of recovery by the negligence of those servants of the company having charge of the inspection and repair of their cars, as they were superior to him in authority; notice to them of the defect was notice to the company. *Chicago and Northwestern R. R. Co. v. Jackson*, 55 Ill., 492. 1870.

42. **Grades of employment.** When several employés are engaged in the same general service, and one is injured by the negligence of another, though the negligent servant in his grade of employment is superior to the one injured, the employer is not responsible. *Shauck v. Northern Central R. R. Co.*, 25 Md., 462, 1866; *Thayer v. St. Louis, Alton and Terre Haute R. R. Co.*, 22 Ind., 26, 1864.

43. — Railway companies are liable for injuries arising from the negligence or carelessness of their agents and officers, in the course of their employment, in the same manner, and to the same extent, as private individuals. *Cleveland, Columbus and Cincinnati R. R. Co. v. Keary*, 3 Ohio St., 201. 1854.

44. — These principles apply where a corporation places a brakeman in its employ under the control of the conductor, the latter having the exclusive command of the train, and the brakeman, without fault on his part, is injured by the carelessness of the conductor. In such a case, the brakeman is entitled to recover of the company for the injury; the conductor being the sole and immediate representative of the company upon which rested the obligation to manage the train with skill and care. *Ib.*

45. — But a principal is not liable to one servant in his employ for injuries resulting from the carelessness of another servant, when both are engaged in a common service, and no power or control is given to the one over the other. Such employés stand as equals to

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each other, and are alone liable for the injuries they may occasion. *Ib.*

46. — The agent or officer entrusted with power and control over the subordinates, and the operations of the business, is not engaged in a common service with them, admitting of joint participation; nor is he, in any just sense, their fellow servant; but their employments are separate and distinct, although both are necessary to a successful result in the business. *Ib.*

47. — Where a servant receives a personal injury through the carelessness of a fellow servant engaged in a common business and employment, and no relation of subordination or subjection existed between them, and the employer is himself guilty of no fault, such employer is not responsible for the injury. *Whaalen v. Mad River and Lake Erie R. R. Co.*, 8 Ohio St., 249. 1858.

48. Gravel trains. A set of hands were working for a railroad company, graveling a part of the track. The gravel was conveyed from the gravel pit to the place where it was used, by a train of cars. The same hands loaded and unloaded the gravel, and rode upon the cars to and from the place of loading and discharging. While thus employed, the train, through the alleged carelessness of the engine-driver ran against an ox, was thrown off the track, and one of the hands was killed. *Held*, that the engine-driver and the deceased were engaged in the same general undertaking, and the representative of the deceased could not recover damages. *Ohio and Mississippi R. R. Co. v. Tindall*, 13 Ind., 366, 1859; see also *Fitzpatrick v. New Albany and Salem R. R. Co.*, 7 ib., 436, 1856.

49. Joint occupancy of railways. Where the deceased was in the sole employ of one railway company, and was killed by the cars of another company, running its trains over the road of the former company, the right of action of the widow of the decedent is not precluded on the ground that the deceased was in the same general employment as defendant's servants. The rule as to employés recognized in the adjudged cases will not be extended. *Catawissa R. R. Co. v. Armatrong*, 49 Penn. St., 186. 1865.

50. Laborers. Where a laborer upon a construction train, working under the orders of the conductor in charge of such train, is in-

jured in consequence of the train being moved by the engineer, also in pursuance of the order of the conductor, but without giving any signal, as required by the rules, such laborer cannot recover against the common master for injuries resulting from the carelessness of his engineer, if the master has used due diligence in his selection. *Chicago and Alton R. R. Co. v. Keefe*, 47 Ill., 108. 1868.

51. — A laborer employed to put gravel upon a new and unfinished railroad track, upon which no train had run, and who was walking upon such track towards the place where he was to commence his day's work, was overtaken and injured by a passenger train using the new track in consequence of a temporary obstruction upon the old track of the same company, which was parallel and about six feet distant. *Held*, that he could maintain no action therefor. *Boldt v. New York Central R. R. Co.*, 18 N. Y., 482, 1858; *Gilshannon v. Stoney Brook R. R. Co.*, 10 Cushing (Mass.), 228, 1852.

52. Machinist. A master machinist who has the immediate charge, control and direction of the locomotive and other machinery of a railroad company, and the repairs of the same and the control and direction of the engineers and firemen on the trains, is a fellow-servant of such firemen. *Columbus and Indianapolis Central R. R. Co. v. Arnold*, 31 Ind., 174. 1869.

53. Minors. A railroad company is liable for the negligent act of a fireman in charge of dangerous machinery, who, in the scope of his duty, orders a minor employé to perform a dangerous service not in the ordinary course of the employment of such minor. *Fort v. Union Pacific R. R. Co.*, 2 Dillon (U. S. C. C.), 259. 1871.

54. Track repairer. Where the injured servant is engaged in the repair of a railroad track which is then in use, and the party through whose negligence the injury occurs is a hand employed on the engine and tender of a passing train, they are engaged in a common employment, and the injured party cannot recover damages from his employer. *Whaalen v. Mad River and Lake Erie R. R. Co.*, 8 Ohio St., 249. 1858.

55. — The plaintiff was employed as a trackman to follow in a hand car, passenger trains over a certain part of the defendant's road to

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keep it in order, and report defects; and while engaged in this duty, in the evening, was run over, and very seriously and permanently injured by a train of defendant's cars, without lights, not usually passing at that hour, and through the negligence (as was claimed) of the employés managing the train. *Held*, that the defendant was not liable to the plaintiff for the negligence of the managers of the train. *Coon v. Syracuse and Utica R. R. Co.*, 5 N. Y., 492, 1851; *Same v. Same*, 6 Barbour (N. Y.), 231, 1849.

56. — The plaintiff was a section hand engaged in repairing track. He was injured by the negligence of an employé who so carelessly piled wood upon the tender that a stick fell off and injured the plaintiff. *Held*, that the employés were engaged in the same general employment and plaintiff could not recover for the injury. *Foster v. Minnesota Central R. R. Co.*, 14 Minn., 360. 1869.

4. *Employments not common.*

(See subdivision immediately preceding.)

57. *Liability of corporation.* A railway company is liable to a servant for an injury occasioned by the negligence of other servants of the company, where the duties of the latter in connection with which the injury happened were not common nor in the same department with those of the injured servant, and where the injured servant is guilty of no contributory negligence. *Fitzpatrick v. New Albany and Salem R. R. Co.*, 7 Ind., 436, 1856; *Gillenwater v. Madison and Indianapolis R. R. Co.*, 5 ib., 339, 1854.

58. — The difference in the grade of the servants in the same employment does not change the rule. *Columbus and Indianapolis Central R. R. Co. v. Arnold*, 31 ib., 174. 1869.

59. *Servant not on duty.* The rule that a master is not liable for injuries sustained by one servant through the negligence of another servant does not apply where the servant at the time of the injury is not acting in the service of the master. *Washburn v. Nashville and Chattanooga R. R. Co.*, 3 Head (Tenn.), 638. 1859.

5. *Common law rule.*

60. *General rule.* Where a railroad company has exercised reasonable care in the

selection of its employés, it is not liable for injuries resulting to one of such employés from the neglect of an employé engaged in the same general employment. *O'Connell v. Baltimore and Ohio R. R. Co.*, 20 Md., 212, 1863; *Cumberland Coal and Iron Co. v. Scally*, 27 Md., 589, 1867; *Ponton v. Wilmington and Weldon R. R. Co.*, 6 Jones' Law (N. C.), 245, 1858; *Honner v. Illinois Central R. R. Co.*, 15 Ill., 550, 1854; *Madison and Indianapolis R. R. Co. v. Bacon*, 6 Ind., 205, 1855; *Ohio and Mississippi R. R. Co. v. Tindall*, 13 Ind., 366, 1859; *Wilson v. Madison, etc., R. R. Co.*, 18 Ind., 226, 1862; *Farwell v. Boston and Worcester R. R. Co.*, 4 Metcalf (Mass.), 49, 1842; *Harrison v. Central R. R. Co.*, 2 Vroom (N. J.), 298, 1865; *Coon v. Syracuse and Utica R. R. Co.*, 5 N. Y., 492, 1851; *Same v. Same*, 6 Barbour (N. Y.), 231, 1849; *Warner v. Erie R. R. Co.*, 39 N. Y., 468, 1868; reversing *Same v. Same*, 49 Barbour (N. Y.), 558, 1867; *Mobile and Ohio R. R. Co. v. Thomas*, 42 Ala., 672, 1868.

61. — The soundness of this rule is questionable, but it seems to be well established. *Burke v. Norwich and Worcester R. R. Co.*, 34 Conn., 474. 1867.

62. — The servants of a contractor are the servants of his principal only where the latter has the right to select and control them. *Id.*

63. — This general doctrine only applies to cases where the injury occurs without the fault of the principal, either in the act which caused the injury or the employment of the person who caused it. *Chicago and Northwestern R. R. Co. v. Swett*, 45 Ill., 197, 1867; *Illinois Central R. R. Co. v. Welch*, 52 ib., 183. 1869.

64. — The master is not liable for the damages resulting to a servant by the negligence of another servant, unless that other servant was habitually careless and unskillful. *Hubgh v. New Orleans and Carrollton R. R. Co.*, 6 La. An., 495. 1851.

65. — A railroad company is not liable to one of its agents for an injury arising from the negligence of another competent agent. *Murray v. South Carolina R. R. Co.*, 1 McMul-lan (So. Car.), 385, 1841; *Hayes v. Western R. R. Co.*, 3 Cushing (Mass.), 270. 1849.

66. — Independent of the statute, a railway company is not liable for injuries sustained by one of its employés through the negligence

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of another. *Hunt v. Chicago and Northwest-ern R. R. Co.*, 26 Ia., 363. 1868.

67. — Although the statute gives a right of action, in such cases, the standard of negligence is different from what it is in case of injuries to passengers; ordinary care only is due to the employé. *Ib.*

68. — The common law rule is not changed by the Revised Statutes of Maine, ch. 81, § 21. *Carle v. Bangor and Piscataqua Canal and R. R. Co.*, 43 Me., 269. 1857.

69. — This rule is not changed by the "right of way act" of 1853. *Sullivan v. Mississippi and Missouri R. R. Co.*, 11 Ia., 421. 1860.

70. Grades of employment. A servant who has sustained an injury from the negligence of a superior agent engaged in the same general business, cannot maintain an action against their common employer, although he was subject to the control of such superior agent and could not guard against his negligence. *Sherman v. Rochester and Syracuse R. R. Co.*, 17 N. Y., 153, 1858; *Same v. Same*, 15 Barbour (N. Y.), 574, 1853.

71. Gravel trains. Where one of the laborers on a railroad gravel train was injured through the carelessness of the conductor or engineer, by the dumping of one of the cars while on their passage between their lodgings and their work, it was held, that the employers were not answerable. An employer is not responsible for the injury of one of his servants, through the carelessness of another servant. *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. St., 384. 1854.

72. Liability notwithstanding the common law. An employé can recover of his employer for an injury occasioned by the negligence of another employé engaged in the same business, upon the general rule that every person is responsible for injuries occurring to others by the negligence of his servants while in the execution of his employment. *Chamberlain v. Milwaukee and Mississippi R. R. Co.*, 11 Wis., 238. 1860.

73. — A servant of a railroad company does not, in undertaking his business, agree to assume the risk of negligence as well as others; but on the contrary, he assumes only such risks as are incidental to the employment when conducted with ordinary care and prudence. *Ib.*

74. — Public policy requires that employes should be protected against injury by other employes. *Ib.*

75. — The same doctrine has been held in Tennessee. See *Haynes v. East Tenn. and Ga. R. R. Co.* 3 Coldwell (Tenn.), 222. 1866.

76. — Unusual risks. Although a servant cannot recover from his employer for injuries sustained through the neglect of a coemployé, this rule does not apply to risks not fairly to be presumed within the contract of service. *Railroad Co v. Fort*, 17 Wallace, 553. 1873.

II. DEFECTIVE ROADWAY, MACHINERY AND MATERIALS.

1. Roadway.

77. Bridges. A servant of a railway company could not recover against the company for an injury caused by the falling of a bridge, unless such injury was caused by incompetent servants or agents of the company whose employment might be traced to the negligence of the company, or to a defect in the bridge attributable to the fault of the company. *McDermott v. Pacific R. R. Co.*, 30 Mo., 115. 1860.

78. — It is no defense against an action for damages resulting from a defective bridge that the injured employé knew of the defective condition of the bridge before the injury. *Graff v. Cincinnati and Indianapolis R. R. Co.*, 1 Cincinnati Superior Ct. Rep., 264. 1871.

79. — A railroad company having employed skillful and competent persons to supervise and inspect its road bed and bridges, and having made it their duty to do so, is not liable for an injury to an employé, occasioned by the falling of one of its bridges, where the defect was such as was not apparent, and of which it had no notice. *Warner v. Erie R. R. Co.*, 39 N. Y., 468, 1868; reversing *Same v. Same*, 49 Barbour (N. Y.), 558. 1867.

80. — Where a railroad bridge was built of good materials, and its sinking was not due to any defect in its original construction, but to a process of natural decay, called dry rot; and the day before it fell, it had been inspected by the repairer of bridges, and the division superintendent, competent men, and examined, tested and watched under the weight of a train of cars, and was deemed by

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them entirely sound and safe; *held*, that the company was not liable to the representatives of an employé who was killed by the falling of the bridge. *Faullener v. Erie R. R. Co.*, 49 Barbour (N. Y.), 324. 1867.

81. Ditches. Plaintiff's intestate had been employed by defendant as a brakeman for two months upon through trains running from A. to S. In the discharge of his duty, he was, in the night, coupling some cars to a train slowly moving backward upon a switch at a way station. While walking along between the cars he fell into a partly uncovered ditch running across the track, and was run over and killed. In an action against defendant for damages for his death, *held*, that it was for the jury to determine whether there was such negligence on the part of the company in leaving the ditch partly uncovered as to render it liable for the death of the intestate. *Plank v. New York Central and Hudson River R. R. Co.*, 1 N. Y. Sup. Ct., 319. 1873.

82. Roadway. A company is bound to furnish a safe and sufficient roadway to its servants as well as others traveling over it. *O'Donnell v. Allegheny Valley R. R. Co.*, 59 Penn. St., 239. 1868.

83. — If the substructure of the road is permitted to lie until it becomes rotten and unsafe, it is the negligence of the company. *Ib.*

84. — Casualty from such cause is not an ordinary peril which an employé is bound to incur. *Ib.*

85. — A railroad company may be held liable for an injury to one of its employés, which is caused by a want of repair in its road bed. *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441. 1864.

86. — There is no implied warranty, generally, of the completeness or fitness of the road or rolling stock, as between the company and its employés. *Indianapolis and Cincinnati R. R. Co. v. Love*, 10 Ind., 554. 1858.

87. — But there are many exceptions. If a defect existed in the road, which was known to the company, but which it was impossible for it to remove immediately, and in consequence of such defect, the road was unsafe but not impassible, and yet it should suffer an employé, who does not know of the defect, to attempt to pass upon the road, and injury should thereby result to him, the company would be liable. So, on the other hand, if the

employé had knowledge of the defect, and the employers had not, the latter would not be liable. And where both parties had such knowledge, each takes the risk, unless the company undertake to give special directions as to the mode of operating. *Ib.*

88. Snow and ice. An action may be maintained against a railroad corporation by one of its servants employed as a brakeman, who was injured by reason of the negligence of the corporation in permitting its road to become blocked with snow and ice, and a car to be out of repair, the plaintiff being without fault. *Fifield v. Northern R. R. Co.*, 42 N. H., 225. 1860.

89. Trestle work. Where the track over a trestle work was not capable of supporting an engine, and the engine driver in charge had orders not to put his engine thereon, which orders he disobeyed, and the intestate of the plaintiff, who was a fireman on the engine, and who was unaware of such orders or of the danger, was thereby killed, the said trestle work giving way: *held*, that the plaintiff was entitled to recover, on the ground that such death was occasioned in part by the want of care in the defendant, the railroad company, with respect to said trestle work. *Paulmier v. Erie R. R. Co.*, 5 Vroom (N. J.), 151. 1870.

2. Machinery.

90. Brakes. In an action to recover from a railroad company for injuries received by a brakeman while in the service of the company, by reason of the breaking of the chain, and giving way of the brake while working it, owing to a defect therein, whereby he was thrown from the train and injured, it was *held*, that it was the duty of the company to use all reasonable and ordinary care in providing safe and well equipped brakes for the brakemen, and that if the company, in neglect of such duty, has procured a defective and improper brake, and placed the brakeman to work the same, without an opportunity to know such defect, and he was thereby injured, a right of action would thereupon arise against the company. That if the existence of such defect at the time of the accident was owing to the neglect of the other operatives of the road, supposed to be competent, whose duty it was to have inspected said brake, but who neg-

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lected so to do, and negligently suffered the same to continue in use, when not road worthy, unknown to the company, it is not liable therefor, inasmuch as such delinquent inspector is to be regarded a fellow servant of the brakeman, in a common service. *Columbus and Xenia R. R. Co. v. Webb*, 12 Ohio St., 475. 1861.

91. — Where a brakeman was thrown from a car and killed, it being alleged the accident was caused by a defect in the brake, and in the effort to work the brake, the wheel came off and the deceased was thrown to the ground, it was held, that it was the duty of the brakeman to see that the brake was in fit condition for use, and the company would not be liable; otherwise if the accident would not have occurred but for the recklessness of the engine driver which was known by the company, the train being run at an excessive rate of speed in approaching a station. *Illinois Central R. R. Co. v. Jewell*, 46 Ill., 99. 1867.

92. — A brakeman cannot maintain an action against his employer, a railroad company, for an injury sustained by him, and which resulted from a defect in the brake on the train he was operating, if the defect existed by reason of the neglect or want of care of his fellow servants, unless the railroad company was negligent in the selection of those servants; and the onus of proof of such negligence is on the plaintiff. *Wonder v. Baltimore and Ohio R. R. Co.* 32 Md., 411. 1870.

93. Degree of care. Railroad companies will be held to the highest degree of vigilance in regard to the condition of their machinery. *Chicago and Alton R. R. Co. v. Shannon*, 43 Ill., 338. 1867.

94. Employé's riding free. A railroad company exercising reasonable care in providing and using suitable engines and tenders on its road, is not liable for an injury occasioned by a defect therein to a workman employed by it, while being carried over its road without paying fare. *Seaver v. Boston and Maine R. R. Co.*, 14 Gray (Mass.), 466. 1860.

95. Engines. When an injury has occurred to a servant of a corporation, in consequence of a defect in an engine, and he sues the corporation for such injury, the burden is upon the plaintiff to show negligence, or the want of care and diligence in the defendant. The

onus of proof is not shifted to the defendant by the fact that an injury has resulted from the defect. *Mobile and Ohio R. R. Co. v. Thomas*, 42 Ala., 672. 1868.

96. — A railway company which continues in use a defective and dangerous locomotive engine, after notice of its dangerous condition, is liable to one of its employé's engaged in running such engine for an injury sustained by him (without negligence on his part), in consequence of such defects. *Keegan v. Western R. R. Co.*, 8 N. Y., 175. 1853.

97. — explosion. The complaint alleged that the decedent had been in the employment of the railway company as a fireman on a freight engine for about two months, when, on a day mentioned, he was ordered by defendant to serve as fireman on a particular engine attached to an express passenger train, then running on said road between certain points named; that said engine "was old and rickety, with a weak, defective, patched up and leaky boiler," which was not strong enough to endure a high pressure of steam, and could not be used with safety in drawing a train of any kind, and that its use to an express train, in its weak and unsound condition, involved great peril to the lives of passengers and employé's; that the deceased did not know, and had no means of knowing, the weak and unsafe condition of said engine when he was placed upon it as fireman; that defendant, with full knowledge of the defective and unsafe condition thereof, carelessly and negligently caused the same to be used in drawing said express train; that on the same day, the boiler exploded, by reason of its defective and unsound condition, and caused the death of the decedent, without any negligence or fault on his part. Held, that the complaint was good on demurrer. *Columbus and Indianapolis Central R. R. Co. v. Arnold*, 31 Ind., 174. 1869.

98. — If the boiler of an engine of a railroad car has an apparent defect, and the engineer continues running it with a head of steam higher than he was instructed to carry, he could not recover damages for any injury he might sustain by reason of the explosion of the boiler, nor can his widow or his heirs recover damages for his death under such circumstances. *Hubgh v. New Orleans and Carrollton R. R. Co.*, 6 La. An., 495. 1851.

99. — Where a certain locomotive was re-

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ported to the employes of the company having charge of its machinery, as unsafe, and after such report, they failed to ascertain its condition, the company cannot claim exemption by reason of such negligence on the part of its agents. *Chicago and Alton R. R. Co. v. Shannon*, 43 Ill., 338. 1887.

100. — Where the directors have placed the engines of the company under the immediate charge, control and direction of a competent and trustworthy master machinist, and have provided him with sufficient materials and resources for their repair, notice to the directors that an engine is out of repair and unsafe for use is not, in the absence of notice that it is being so used, sufficient to render the company liable for an injury to a fireman employed by the company, while in the performance of his duty upon such engine under the direction of the master machinist, caused by the explosion of the boiler, by reason of its defective condition, without his fault or negligence, or the fault or negligence of the engineer in charge. *Columbus and Indianapolis Central R. R. Co. v. Arnold*, 31 Ind., 174. 1869.

101. — The plaintiff's intestate who was an engine driver on defendant's road, was killed by the explosion of the locomotive which he was running. The explosion occurred through the neglect of the defendant's master mechanic who was superior in the grade of his employment to the intestate. The directors of the company were not guilty of negligence in furnishing defective machinery in the first instance, and they did not know of the defect in the engine in question. *Held*, that the railway company was not liable, the injury having been occasioned by the negligence of one of its employes, who was employed in the same general business with the deceased. *Hard v. Vermont and Canada R. R. Co.*, 32 Vt., 472. 1860.

102. — In an action to recover damages caused by the explosion of a locomotive, the testimony of the employes of the company using it, that, among them, such engine had always been considered unsafe, is competent for the purpose of showing that the person having care of the machinery of the road knew, or might have known, by reasonable diligence, that it was not safe. *Chicago and Alton R. R. Co. v. Shannon*, 43 Ill., 338. 1887.

103. Evidence. An artisan charged with a duty of repairing, within the scope of his handicraft, is not conclusively shown to have been negligent, by a failure to remedy some defect in an engine or other machinery, specifically pointed out to him. *Mobile and Ohio R. R. Co. v. Thomas*, 42 Ala., 672. 1868.

104. General principles. The general principles stated regulating the liability of the master for injuries to one servant caused by another, or by the defects in the machinery and implements furnished, or arrangements prescribed by the master. *Wright v. New York Central R. R. Co.*, 25 N. Y., 582, 1862; *Laning v. Same*, 49 ib., 521, 1872.

105. — The master is not liable for injuries occurring to one of his servants through the negligence or misconduct of one of his fellow servants, unless the latter servant is not possessed of ordinary skill and capacity, and unless his employment is attributable to the want of ordinary care on the part of the master; but the rule is otherwise where the injury is the result of defective or improper machinery or appliances used in the prosecution of the work — the condition of which, by ordinary and reasonable care and prudence, the master might know. The legal implication is that the master will adopt suitable instruments and means with which to carry on his business. *Gibson v. Pacific R. R. Co.*, 46 Mo., 163. 1870.

106. — In an action against a railway company for an injury sustained by a conductor on a train of cars, on the ground that the injury was the result of the insufficiency of the cars, or defects in the machinery or fixtures of the train, the company is not to be treated as a guarantor of the sufficiency and safety of the cars and machinery of the train; but as responsible only where the injury is without fault on the part of the conductor, and the result of the neglect of that ordinary and reasonable care and diligence in furnishing sufficient and safe cars and machinery for the train, which appertains to that particular branch of business. *Mad River and Lake Erie R. R. Co. v. Barber*, 5 Ohio St., 541. 1856.

107. — The conductor of a train of cars, although he undertakes his engagement in view of the nature and hazards of his employment, has a right to exact that reasonable care and diligence on the part of his employer, in

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furnishing him with safe and sufficient cars and machinery for the train, which is most common and usual in the business of railroad companies; and being presumed to contract in contemplation of this, he can require no more. *Ib.*

108. — A railroad company is not liable to an action for damages for an injury received by a conductor of one of its trains, in consequence of the insufficiency of the cars, or defects in the machinery or apparatus of the train under his charge and control, where such insufficiency or defects were unknown to both parties, and neither party was in fault. *Ib.*

109. — It is the duty of a railway company to furnish the necessary and proper number of hands for the safe management of its trains; and for a delinquency in this particular, the conductor of a train has a right to decline his charge, or refuse to run the train. But where he takes the charge, and runs his train for a length of time, without a sufficient number of hands, he voluntarily assumes the risk, and waives the obligation of the company in this respect as to himself, and if injured by means of such delinquency on the part of the company, he is without a remedy against the company for damages. *Ib.*

110. — A master is not liable to his servant for an injury occasioned by defective machinery furnished to the latter to operate, unless there is negligence in providing such machinery, or, knowing of the defect, the master omitted to warn the servant of its existence. *Wonder v. Baltimore and Ohio R. R. Co.*, 32 Md., 411. 1870.

111. — It is the duty of railroad companies to provide their cars with such appliances as are calculated and reasonably necessary to insure the safety of their employés. *Greenleaf v. Illinois Central R. R. Co.*, 29 Ia., 14. 1870.

112. — If a car was wanting in some such necessary appliance at time of its construction and so continued when put upon and used on the road, it would not be necessary to show any further knowledge thereof on defendant's part in order to fix its liability. *Ib.*

113. — It seems that if the employé knows of such defect, and no inducement is used to cause him to remain in the employ of the company, and he afterwards continues in such employment, he thereby assumes the risk. *Ib.*

114. — But though the employé knew of the defect, the company would be liable if the employé was at the time acting under the immediate orders of a superior. *Ib.*

115. Improvements in machinery. A railway company is liable in damages for an injury which has resulted to any person lawfully using its road, from its neglect to introduce any improvement in its apparatus which it knows to have been tested and found materially to contribute to safety, and the adoption of which is within its power so as to be reasonably practicable. *Smith v. New York and Harlem R. R. Co.*, 19 N. Y., 127, 1859; *Same v. Same*, 6 Duer (N. Y.), 225, 1856.

116. — A master is not bound to change his machinery in order to apply every new invention or supposed improvement in appliance. *Wonder v. Baltimore and Ohio R. R. Co.*, 32 Md., 411. 1870.

117. Knowledge of defects by employé. A servant does not, by simply remaining in the employ of his master, with knowledge of defects in the machinery which he is obliged to use, assume the risks attendant upon such use. Such result only follows where he remains without objection or protest against the continuance of the defects. *Greenleaf v. Dubuque and Sioux City R. R. Co.*, 33 Ia., 52. 1871.

118. Turn table. In an action against the owner of a railroad, brought by his servant to recover damages for a personal injury sustained by reason of a locomotive engine's running upon the plaintiff from a turn table, while turning upon it, in consequence of the want of a sufficient brake, evidence is competent on the part of the owner of the road to show that the person who had charge for him of all the engines on the road had given instructions to the engineers before the accident to have the wheels of their engines blocked while turning on the turn table, and that the accident occurred from the failure of some of the defendant's servants to obey such instructions; although such instruction was not known to the plaintiff. *Durgin v. Munson*, 9 Allen (Mass.), 396. 1864.

3. Other defects.

119. Collision with a mail catcher. A fireman upon a locomotive was killed by a collision with a mail catcher while the train was in motion, the accident being occasioned by

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the negligence of the company in permitting the mail catcher to be placed too near the track. In an action by the administrator of the deceased, to recover damages against the company, under the statute, it was *held*, that those servants of the company whose duty it was to see that the mail catcher was placed a safe distance from the track, were not fellow servants of the deceased, in the same line of employment, and that the company was liable. *Chicago, Burlington and Quincy R. R. Co. v. Gregory*, 58 Ill., 272. 1871.

120. — The opinions of railroad men, as experts, that the mail catcher in its proximity to the track was not dangerous, were not conclusive on that question, but the jury might consider any other evidence in the case on the subject. *Ib.*

121. Fences. That bars were down or boards off of a fence along a railroad, through which horses probably came upon the track, where they were run into by the cars, throwing the train off and killing the conductor, would not of itself constitute any ground for a recovery against the company. *Dovey v. Chicago and Northwestern R. R. Co.*, 31 Ia., 373. 1871.

122. — There is no obligation imposed upon a railway company, so far as its servants, employed upon its engines, are concerned, to erect and maintain fences on the sides of the road; so as to render the corporation liable for an injury happening to a servant thus employed, in consequence of its neglect to fence against cattle. *Langlois v. Buffalo and Rochester R. R. Co.*, 19 Barbour (N. Y.), 364. 1854.

123. — Under § 44 of the general railroad act, requiring railway companies to erect and maintain fences on the sides of their road, and declaring that in case of omission to do so, by any corporation, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon, the duty is one in respect to the owners of such animals, only; and the liability prescribed is all that is incurred by a violation of it. *Ib.*

124. — A servant in order to recover of his principal, a railway company, for an injury occurring to him through defects in the machinery or roadway, or in the fences along

such roadway, must prove actual notice to his principal, of such defects. *McMillan v. Saratoga and Washington R. R. Co.*, 20 Barbour (N. Y.), 449. 1855.

125. — He must notify his principal of any such defects coming to his knowledge. *Ib.*

126. Projecting awning. In an action for injuries sustained by the plaintiff, while acting as a brakeman, the evidence showed that the injury happened while plaintiff was engaged in the discharge of his duties, by collision with an awning of one of the station houses, on defendant's line of road, whereby he was so injured as to require amputation of his left arm; and that the dangerous position of this awning was well known to the division superintendent and division engineer, whose attention had been called to it a long time prior to the accident. *Held*, that the company was liable for the damages sustained. *Illinois Central R. R. Co. v. Welch*, 52 Ill., 183. 1869.

127. Scaffolding. In case of an injury occurring to an employé by reason of a defect in certain scaffolding erected in the shops of the employer, the burden of proof is upon the employer to show such facts as will excuse him from liability for the injury resulting from such defect. *Brickner v. New York Central R. R. Co.*, 2 Lansing (N. Y.), 506. 1870.

128. Switch. The complaint averred, in substance, that A. was a brakeman on a freight train of defendant, and was killed by the cars being thrown off the track by the breaking of a switch-pin, which the company and its servants, knowing it was insecure, had carelessly left out of repair for twelve days previous. There was no switch tender, and the whole care of the switch, and all things pertaining to its security, was under the control of the section boss and his hands, who had nothing to do with running the trains. *Held*, that in the absence of an averment that the company was negligent in the employment of an incompetent section boss, the complaint did not sufficiently state a case of negligence against the company. *Slattery's Adm'r v. Toledo and Wabash R. R. Co.*, 23 Ind., 81. 1864.

129. In an action against a railroad company for the accidental death of a person in its employ, caused by a displaced switch, it was shown that previous to the accident a

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common switch had been substituted for a patent one, at the request of the intestate. *Held*, that such substitution was not negligence on the part of the company. *Péper v. New York Central and Hudson River R. R. Co.*, 1 N. Y. Sup. Ct., 290. 1873.

130. — Where it was claimed by the plaintiff that the injury was the result of the neglect of defendant's switchman in misplacing a switch, it was *held*, that it was proper for defendant to show that the misplacement of the switch was done by some one in the absence of the switchman. *Baulee v. New York and Harlem R. R. Co.*, 5 Lansing (N. Y.), 436, 1872; *Same v. Same*, 62 Barbour (N. Y.), 623, 1872.

131. — And it appearing from the evidence that the misplacing of a switch, by the same switchman, had caused an accident, on a former occasion; *held*, that the defendant should have been allowed to prove that after the previous accident, an investigation was made by a track-master, who reported to the company that the switchman was free from negligence, in respect to that accident. *Ib.*

132. — A fireman in the employ of a railroad company lost his life by reason of a switch being displaced; but the displacement of the switch was not traced to the railroad company, or either of its employés. *Held*, in an action brought by the administratrix of the deceased, to recover damages of the company, that the judge was right in refusing to submit the case, or any question in it, to the jury, and that he correctly nonsuited the plaintiff. *Tinney v. Boston and Albany R. R. Co.*, 62 Barbour (N. Y.), 218. 1872.

III. RISKS ASSUMED BY EMPLOYÉS.

133. Highway bridge. A brakeman, while discharging his duties in the line of his employment, upon the roof of a freight car, was carried against a highway bridge, and sustained injuries, for which he brought an action against his employer. The bridge was some three and a half feet higher than the top of the highest freight car in use by the company, and had so remained for many years, and since the construction of the railway. The brakeman had entered into the employment of the company with knowledge of the position and

height of the bridge, and he had had opportunity of informing himself as to its continuance in the same position. *Held*, that the plaintiff should have been nonsuited, the danger from the bridge being clearly incident to the labor he undertook to perform. *Owen v. New York Central R. R. Co.*, 1 Lansing (N. Y.) 108. 1869.

134. Incompetence of co-employés. Railway companies may be liable to employés for injuries happening to them through the negligence of the company; which negligence may consist in the employment of incompetent persons in the management of the road and trains, or of unsafe machinery in the running of them, or of using the road when defective, etc., if the injuries actually happen from such causes, and the employés injured have not the same means of knowledge of the existence of such causes as the employer. *Thayer v. St. Louis, Alton and Terre Haute R. R. Co.*, 22 Ind., 26. 1864.

135. — Where one employé knows that another employé is habitually negligent, or that the materials with which he works are defective, and he continues his work without objection and without being induced by his employer to believe that a change will be made, he will be deemed to have assumed the risk, and cannot recover for an injury resulting therefrom. *Kroy v. Chicago, Rock Island and Pacific R. R. Co.*, 32 Ia., 357. 1871.

136. — Where it was the habit to uncouple the engine from a freight train at a certain station while the train was in motion, and the decedent had, without protest or objection, contributed to the establishment of this custom, and its performance generally devolved on him, and in the particular instance was voluntarily assumed by him, it was *held*, that the railway company was not liable for an injury sustained by him while in the performance of this act. *Ib.*

137. Increased risks. Where an employé of a railway company, who is hired to labor in a particular service only, is compelled by a fellow employé of such company to labor at a business much more perilous than that which he engaged to do, and while thus laboring receives an injury, the company is liable for the damages occasioned by the injury. *Chicago and Great Eastern R. R. Co. v. Harney*, 28 Ind., 28. 1867.

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IV. EMPLOYÉS AS PASSENGERS.

138. Contract. In an action for negligence against a railway company, it is error to reject any evidence tending to prove that the plaintiff, although in the service of the company, was also by the contract a daily passenger on the road, and that he was not out of place at the time of the injury. *O'Donnell v. Alleghany R. R. Co.*, 50 Penn. St., 490. 1865.

139. — A carpenter working for a railway company, and going to and from his work on the train as a part of his contract of hiring, is a passenger. *O'Donnell v. Alleghany Valley R. R. Co.*, 59 Penn. St., 239. 1868.

140. — The court charged that the baggage car is an improper place for a passenger to ride; whether the rule against it was communicated to him or not, if he left the seat in the passenger car and went into the baggage car it was negligence, which nothing less than a direction or invitation from the conductor would excuse; such invitation should not be inferred from his having ridden there frequently with the knowledge of the conductor and without objection. *Held*, to be error. *Id.*

141. — The defendant employed the plaintiff to frame and build a bridge on its road across Sugar creek, and while he was engaged in the work, the defendant directed him to proceed in its cars to Greenwood, and assist in loading timbers for the bridge. While on its cars as directed, the servants of the defendant, who had in charge the running of the cars, so carelessly managed and ran the same, without the leave, sanction, or consent of the defendant, that they were thereby run off the track; by means of which the plaintiff's right hand was fractured and permanently injured, so as to disable him from pursuing his business of house carpenter. *Held*, that the plaintiff was a passenger, and that the defendant was liable for the injury. *Gillenwater v. Madison and Indianapolis R. R. Co.*, 5 Ind., 339. 1854.

142. — A laborer employed by a railroad company to work in connection with a train of cars, under an arrangement by which he was to be carried to his home every night in such cars free of charge, cannot maintain an action against the company for an injury sustained, while thus riding home, in conse-

quence of the negligence of the engineer. *Russell v. Hudson River R. R. Co.*, 17 N. Y., 134, 1858; reversing *Same v. Same*, 5 Duer (N. Y.), 39, 1855.

143. Negligence of employés. A railroad company will not be exempted from liability for injuries incurred by a passenger while on its cars, produced by the carelessness of the servants, upon proof that the servants were carefully selected by the company with reference to their competence, and that the negligent act was done without the sanction of the company. *Gillenwater v. Madison and Indianapolis R. R. Co.*, 5 Ind., 339. 1854.

144. — Public carriers of passengers not only engage for the competent skill of their employés, but for the faithful and continued application of such skill. *Id.*

145. — The servants of a corporation are no more and no less than the servants of natural persons, and whatsoever is negligently done or omitted by them, is, as to the public, the employer's act. *Id.*

146. Pleading. Action was brought by a widow against a railroad company, to recover damages for the loss of her husband, who was killed, as her complaint alleged, while traveling as a passenger in one of defendant's cars. The answer averred that the husband was not a passenger but a servant of the company, and that the accident by which he lost his life happened through the negligence of his fellow servants acting with him in the management of the train. *Held*, that the answer was sufficient. *Madison and Indianapolis R. R. Co. v. Bacon*, 6 Ind., 205. 1855.

V. NEGLIGENCE AS BETWEEN EMPLOYÉS.

147. Collision. S. was a brakeman upon defendant's train. He had gone to the engine to warm himself, thinking his services at the brakes were not needed, as the train was going up a heavy grade, but some cars of a preceding train became detached and were rapidly descending the grade when a collision occurred in which S. lost his life. *Held*, that S. was guilty of contributory negligence. *Sprong v. Boston and Albany R. R. Co.*, 60 Barbour (N. Y.), 30. 1871.

148. — The fact that the employé or other person is riding in the baggage car, with the

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knowledge of the conductor, or is riding free, will not preclude him from a recovery for an injury caused by a collision, even though he might or would not have been injured if he had remained in the passenger car *Washburn v. Nashville and Chattanooga R. R. Co.*, 3 Head (Tenn.), 638. 1859.

149. — A railway company is not liable in damages to a brakeman on one of its trains, for injuries sustained by him in a collision of his train with another train of the same company, where the collision occurred by means of the negligence of the conductor or engineer, or both, of such other train; unless it appear that the company was guilty of a want of ordinary care in the selection and employment of an incompetent conductor or engineer through whose negligence the collision occurred. *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Devinney*, 17 Ohio St., 197. 1867.

150. **Contributory negligence.** In an action for injuries received by an employé, it was held, that if the employé exercised ordinary and reasonable care in the performance of his duties he was not guilty of contributory negligence. *Greenleaf v. Dubuque and Sioux City R. R. Co.*, 33 Ia., 52. 1871.

151. — Plaintiff's decedent being in the employ of a railroad company, but not engaged in operating the train in question, and on which he was riding, voluntarily got upon the tender of the engine to ride. While he was in this position, the engine broke through a defective bridge and he was killed. A caboose car was attached to the train for passengers and employés to ride in, and if he had been there, he would not have been injured. Held, that he was guilty of contributory negligence, and that plaintiff could not recover. *Doggett v. Illinois Central R. R. Co.*, 34 Ia., 284. 1872.

152. — If it appear that the accident would not have occurred if the agents of the railroad company had used ordinary care in running the train which occasioned the killing, and had given reasonable and usual signals of its approach, and had kept a proper lookout, the company is liable even if the deceased were guilty of the want of ordinary care and prudence in being on the railroad track at the time of the accident. *Baltimore and Ohio R. R. Co. v. The State*, 33 Md., 542. 1870.

153. — If it is the duty of a servant of a railroad company to uncouple the cars of a

train, and this cannot easily be done while the train is still, and he, in endeavoring to uncouple them while the train is in motion, steps between the cars and meets with an injury which is caused by a want of repair of the roadbed, the court cannot rule as a matter of law that he was careless, but should submit that question to the jury, although he continued in the employment of the company after he knew of the defect. *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441. 1864.

154. — Where the plaintiff, being in the employ of a railroad company, as a brakeman on a gravel train, of his own accord, and on his own business, leaves the train while proceeding to its place of destination, and voluntarily attempts to get aboard the same train, on its return, while its speed is not sufficiently "checked up" to permit this to be done with safety, and, in making the attempt, seizes the rim of a gravel box, which, through defect of material, breaks, whereby the plaintiff falls upon the track and is run over by the train and injured, held, that these facts show such a want of ordinary care by the plaintiff, as will preclude him from a recovery. *Timmons v. Central Ohio R. R. Co.*, 6 Ohio St., 105. 1856.

155. — An employé cannot recover from a railroad company for injuries sustained by reason of the negligence of a co-employé, if he was also negligent and careless. *Hoben v. Burlington and Missouri R. R. Co.*, 20 Ia., 562. 1866.

156. — The same rule applies where an action is brought by the widow of an employé for damages sustained by his death. *Rowland v. Cannon*, 35 Ga., 105. 1866.

157. — **degree of care.** As to its employés, a railway company is only responsible for ordinary care. *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Ruby*, 38 Ind., 294. 1871.

158. **Degree of negligence.** The responsibility of railroad companies, for injuries resulting from the negligence or unskillfulness of their engineers, is graduated by the classes of the persons injured by the engineer's neglect or want of skill; as to strangers, ordinary negligence is sufficient; as to subordinate employés, associated with the engineers in conducting the cars, the negligence must be gross; but as to employés in a different department of service, unconnected with

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the running operations, ordinary negligence may be sufficient. *Louisville and Nashville R. R. Co. v. Collins*, 2 Duvall (Ky.), 114, 1865; *Same v. Robinson*, 4 Bush. (Ky.), 507, 1868.

159. Gross negligence. Although the plaintiff, suing for an injury resulting from the gross negligence of the defendant, may have been guilty of negligence, if, nevertheless, the injury might have been avoided by the proper care of the defendant, such coöperating negligence of the plaintiff will not exonerate the defendant. *Louisville and Nashville R. R. Co. v. Collins*, 2 Duvall (Ky.), 114, 1865.

160. — The implied undertaking of employés in the same general service to risk the contingencies which the ordinary skill and care of each other in his line of service could not avert, does not exonerate the company from liability for damages resulting to one of such co-employés from the extraordinary or gross negligence of another of them. *Louisville and Nashville R. R. Co. v. Filbern's Adm'r*, 6 Bush. (Ky.), 574. 1869.

161. — Willful negligence in this case did not depend "on the knowledge or belief of the road master or section boss, as to whether the tree which fell across the track and caused the injury was decayed and subject to fall or be blown down across the track, and his failure, though so apprised, to remove it." These were facts from which the jury might have inferred willful neglect, but they did not necessarily constitute it. *Ib.*

162. — Whether or not willful neglect is the same as gross neglect, or in any case more or less culpable, it must involve either an "intentional wrong, or such a reckless disregard of society and right as to imply bad faith." *Ib.*

163. — If the employé or agent injured, contributed to it, by his own negligence, he cannot recover damages from the railroad company, unless its coöperating agent, charged with gross neglect, could have avoided the impending danger, by the observance of ordinary diligence. *Louisville and Nashville R. R. Co. v. Robinson*, 4 Bush. (Ky.), 507, 1868.

164. — For any injury resulting to a railroad employé through gross negligence or carelessness, or want of ordinary care on the part of the company alone, recovery may be had; but otherwise, if the employé himself

is at fault. *Vicksburg and Meridian R. R. Co. v. Wilkins*, 47 Miss., 404. 1872.

165. In pari delicto—war of 1861. Where a railroad employé is engaged in aiding or abetting a rebellion against the government, and while thus engaged receives an injury through the negligence of others, no cause of action accrues therefor. *Wallace v. Cannon*, 38 Ga., 190. 1868.

166. Laborers. Among common laborers, constituting a distinct class, no one of them, as between himself and his coequals, is the corporation's agent. *Louisville and Nashville R. R. Co. v. Collins*, 2 Duvall (Ky.), 114. 1865.

167. Time—mistake. An employé cannot recover for an injury resulting from the negligence or misconduct of a co-employé, unless there be fault in the employment of unsafe machinery, or in the selection of the wrongdoer, or, in continuing him there after he has proved incompetent. *Weger v. Pennsylvania R. R. Co.*, 55 Penn. St., 460. 1867.

168. — The company is not liable to such employé for an injury resulting from the difference between the time kept by a fellow servant and the conductor. *Ib.*

169. — The company was not liable where an employé was killed on a hand car by a train, where the accident was occasioned by the foreman's watch being slower than the conductor's. *Ib.*

170. Wanton injuries. Railway companies are liable for injuries done to persons not passengers, when the injuries arise from negligence on their part, to which injuries the negligence of the injured party does not immediately contribute; and this may include wanton injuries by the companies, where there may be negligence on the part of the injured party. *Thayer v. St. Louis, Alton and Terre Haute R. R. Co.*, 22 Ind., 26. 1864.

171. Wanton or willful negligence. Although the deceased may have been negligent in riding on some one of the cars instead of another deemed less dangerous, or might, notwithstanding the wreck of the train, have effected his escape by the use of ordinary diligence, yet, if the disaster resulted from a willful neglect of duty on the part of other agents of the defendant, who controlled the running operations of the train, and it might have been prevented or avoided by them by the use of ordinary prudence and care in the discharge

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of their duty, the company was not exonerated from responsibility. *Louisville, Cincinnati and Lexington R. R. Co. v. Mahoney's Adm'r*, 7 Bush. (Ky.), 235. 1870.

VI. INJURIES CAUSING DEATH.

172. Damages. Only actual damages can be recovered by the next of kin under the statute. *Chicago and Northwestern R. R. Co. v. Swett*, 45 Ill., 197, 1867; *Chicago and Alton R. R. Co. v. Shannon*, 43 ib., 338, 1867; *Chicago and Rock Island R. R. Co. v. Morris*, 26 ib., 400. 1861.

173. — The fact that no evidence was introduced showing the amount of the earnings of the deceased at the time of his death, will not prevent a recovery for more than nominal damages. *Baltimore and Ohio R. R. Co. v. The State*, 24 Md., 271. 1865.

174. — Where the court instructed the jury that, in estimating the damages in case of an injury resulting in death, they might consider the actual pecuniary loss to the plaintiff occasioned by the death of the son and servant, and also such other circumstances as have injuriously affected the plaintiff in person, in peace of mind, and in happiness; *held*, that this was error. *Ohio and Mississippi R. R. Co. v. Tindall*, 13 Ind., 366. 1859.

175. — In an action for damages resulting from the death of a parent and husband, evidence as to the business, education and habits of sobriety and economy of the deceased is admissible. *Taylor v. Western Pacific R. R. Co.*, 45 Cal., 323. 1873.

176. — The condition of the family of the deceased directly and essentially affects the question of damages. This action is of that peculiar kind in which all attendant circumstances of aggravation which go to characterize the wrong complained of may be given in evidence. *Louisville, Cincinnati and Lexington R. R. Co. v. Mahoney's Adm'r*, 7 Bush. (Ky.), 235. 1870.

177. — The rules in relation to damages in this class of cases — discussed. *Chicago and Northwestern R. R. Co. v. Swett*, 45 Ill., 197. 1867.

178. — In an action against a railroad company to recover damages for the killing of a person, brought by the state in behalf of the widow and children of the deceased, the

jury in assessing the damages should consider the reasonable probabilities of the life of the deceased, and award damages not only for past losses, but for such as they will suffer as the direct consequence of the killing; the prospective damages for the children to be estimated to their majority, and also for the widow upon the probable duration of her life. *Baltimore and Ohio R. R. Co. v. The State*, 33 Md., 542. 1870.

179. Representatives of decedent. A railroad company is not liable, so far as the simple question of negligence is concerned, to the parents, guardians, or representatives of a servant killed upon the road, where it would not have been liable to such person, had he been injured simply, and not killed. *Ohio and Mississippi R. R. Co. v. Tindall*, 13 Ind., 366. 1859.

180. Statutes: — California. Under § 3 of the act of April 26, 1862, in relation to compensation for death caused by the wrongful act or negligence of another, the jury or court should assess such damages as will be a just compensation to the surviving widow and children for the death of the husband and parent; but if the widow dies before the trial of the action, the question of compensation to her no longer exists, and proof on that point is irrelevant to the issues, and has nothing to do with the controversy; and the only question left to be determined in relation to damages is, what will be a just compensation to the children for the loss of the father. *Taylor v. Western Pacific R. R. Co.*, 45 Cal., 323. 1873.

181. — Iowa. Where an employé is injured in consequence of the negligence of a co-employé, the company will be regarded as the "perpetrator" of the act within the meaning of § 4111 of the Rev. of 1860, providing that the perpetrator of an act producing death shall be civilly liable for the injury. *Philo v. Illinois Central R. R. Co.*, 33 Ia., 47. 1871.

182. — And where an employé is killed through the negligence of a co-employé, a right of action accrues to the representatives of the deceased. Ch. 169, Laws of 1862. *Ib.*

183. — Louisiana. An action for damages caused by the homicide of a free human being cannot be maintained, in the absence of any statute authorizing it. *Hubgh v. New Orleans and Carrollton R. R. Co.*, 6 La. An., 495. 1851.

Evidence.

184. — The subsequent passage of such a statute will not authorize the bringing of an action for a death occurring before its passage. *Hermann v. New Orleans and Carrollton R. R. Co.*, 11 La. An., 5. 1856.

185. — Under this statute (Act March 15, 1855), a father may bring an action for the death of his minor son. *Frank v. Same*, 20 La. An., 25. 1868.

186. — **Missouri.** Under the statute, the burden of proof is upon the plaintiff to show that death was the result of the negligence of defendant. *Schultz v. Pacific R. R. Co.*, 36 Mo., 13. 1865.

187. — **New Jersey.** The statute is intended for the benefit of all the next of kin who may be deprived of a reasonable expectation of a pecuniary advantage from a continuance of the life of the deceased. *Paulmier v. Erie R. R. Co.*, 5 Vroom (N. J.), 151. 1870.

188. — Where death ensues to a party by the wrongful act or default of another, and the deceased leaves no widow surviving, an action may be maintained under the statute of New Jersey by the personal representatives of the deceased, for the benefit of the next of kin. *Haggerty v. Central R. R. Co.*, 2 ib., 349. 1865.

189. — The act is in its highest sense remedial, and is entitled to receive the liberal construction which appertains to such statutes. *Ib.*

190. — **Ohio.** Under the statute of March 25, 1851, entitled "an act requiring compensation for causing death by wrongful act, neglect or default," an action may be maintained by the administrator of the decedent for the benefit of the next of kin of the deceased, though he leave no widow or children, and though the petition do not contain a statement of special circumstances rendering the death a pecuniary injury to them. Such special circumstances can affect only the amount of the recovery. *Lyon's Adm'r v. Cleveland and Toledo R. R. Co.*, 7 Ohio St., 336. 1857.

191. — Under the statute, the administrator of a party injured can bring an action for the injury under the same restrictions, and on the same grounds that the party injured, if death had not ensued, might have done. *Meara's Adm'r v. Holbrook, Receiver*, 20 ib., 137. 1870.

192. — An administrator appointed in Indiana cannot maintain an action in the courts of that state, under a statute of the state of

Illinois, authorizing the personal representative of a person who comes to his death by the wrongful act, neglect or default of another, to maintain an action against such other, for damages, for the benefit of the widow or next of kin of such deceased person. *Woodard v. Michigan Southern and Northern Indiana R. R. Co.*, 10 ib., 121. 1859.

VII. EVIDENCE.

193. **Burden of proof.** The burden of proof is upon the employé to show both the negligence of the company and his own care, but he is not bound to do more than raise a reasonable presumption of negligence on the part of the company. *Greenleaf v. Illinois Central R. R. Co.*, 29 Ia., 14. 1870.

194. **Damages.** In an action against a railroad company by an employé for injuries sustained through the negligence of a co-employé, it was held, that it was competent to show that the plaintiff had no means to subsist upon, and that he was dependent entirely upon his labor for support. This evidence is admissible, as tending to show the nature of his business and the value of his services. *Hunt v. Chicago and Northwestern R. R. Co.*, 20 Ia., 363. 1868.

195. — But the jury cannot take into consideration the ability of the defendant to pay. *Ib.*

196. **Employé's pass.** That the plaintiff was riding on an employé's pass is a presumptive admission by him that he was a servant of the company. *Pennsylvania R. R. Co. v. Books*, 57 Penn. St., 339. 1868.

197. **Offer of donation.** In an action for damages against a railroad company for killing plaintiff's husband, proof of a letter from the president to plaintiff, containing an offer of money as a charitable donation, but not admitting any legal liability, although strictly improper for irrelevancy, would not be calculated to work harm to defendant, and would not justify a reversal of the cause. *Gavisk v. Pacific R. R. Co.*, 49 Mo., 274. 1872.

198. **Unfitness of employé.** Where an employé brings suit for an injury resulting from the negligence or unfitness of a co-employé, the burden of proof is upon the plaintiff to show such unfitness, or that it was known to the corporation. *Davis v. Detroit and Milwaukee R. R. Co.*, 20 Mich., 105. 1870.

Pleadings.

199. — General reputation of unfitness would be admissible in evidence, and might be sufficient to charge the company, although it may have been ignorant of such reputation. The ignorance will be negligence where any proper inquiry would have obtained the necessary information. *Ib.*

200. — Where the injured employé knows of the unfitness of his co-employé and does not disclose it to the company, he assumes the risks of injury from such unfitness. *Ib.*

201. — Where the reasons relied upon, to charge the corporation with knowledge of such unfitness, apply with equal force to show the knowledge of the plaintiff, the negligence of the latter in not complaining is as great as that of the company in employing an incompetent person. *Ib.*

202. — It is neglect of duty in an employé not to give notice to the proper officers of the corporation of any fact affecting the performance of the duties of the company to the public, occurring within the department under his supervision. *Ib.*

VIII. PLEADING.

203. Contributory negligence. In an action for an injury to the person, caused by negligence, it must appear from the complaint, either by express averment, or by a particular showing of the facts, that the injury occurred without the fault or negligence of the plaintiff. *Evansville and Crawfordsvill R. R. Co. v. Dexter*, 24 Ind., 411. 1865.

204. Defective machinery. Action was brought by an employé of a railroad company against his employer, to recover damages for an injury sustained whilst in the employ of the company as a brakeman, occasioned by the roughness of the road and the breaking of a defective axle. A demurrer to the complaint was overruled. The objection was, that the complaint did not negative a knowledge by the plaintiff, of the condition of the road and machinery. *Held*, that this was not necessary; that it was matter of defense, which would more properly appear in the answer. *Indianapolis and Cincinnati R. R. Co. v. Klein*, 11 Ind., 38. 1858.

205. Hand car. Where the pleadings aver that the plaintiff was injured by negligence in

the management of a hand car, it is erroneous to permit him to show that the injury occurred from some other cause. *Thomas v. Georgia R. R. Co.*, 40 Ga., 231. 1869.

206. Neglect of co-employé. In an action brought by an employé for an injury sustained by reason of the employer's carelessness, if the employer relies upon the defense that the injury was occasioned by the neglect of a co-employé, such fact should be averred in the answer. An averment that the plaintiff's own negligence caused the injury, does not raise such issue. *Contin v. San Francisco and San José R. R. Co.*, 36 Cal., 404. 1868.

207. Negligence. In a suit brought against the company by an employé engaged as an engineer in running a train upon the road, to recover for injuries sustained in such service, the plaintiff must allege and also prove negligence on the part of the company, by means of which the injury was caused. *Indianapolis and Cincinnati R. R. Co. v. Love*, 10 Ind., 554. 1858.

208. Particular case. The sufficiency of the pleadings—determined in a particular case. *Baltimore and Ohio R. R. Co. v. Gettle*, 3 W. Va., 376. 1869.

209. Unfitness of employé. In an action by an employé against his employer for injuries caused by the negligence of a fellow servant, an allegation that an employer knew of the latter's incompetency is not supported by proof simply of an employment without reasonable inquiry as to fitness. *Union Pacific R. R. Co. v. Young*, 8 Kans., 658. 1871.

210. — In an action brought by a brakeman against a railway company for injuries caused through the negligence of the conductor, the petition was held insufficient on demurrer where it failed to show that the company was negligent in employing or retaining the conductor. *Dow v. Kansas Pacific R. R. Co.*, 8 Kans., 642. 1871.

211. — In an action for damages against a railway company, an allegation that it was the duty of the defendant to employ a suitable engineer, and that it failed and neglected to do so, does not authorize proof that a fireman, in the absence of the engineer, did manage and control the engine. The petition should allege that defendant authorized or allowed the fireman to do such act. *Harper v. Indianapolis and St. Louis R. R. Co.*, 44 Mo., 488. 1869.

General Matters.

IX. GENERAL MATTERS.

212. Board of directors. The board of directors of a railway company are its immediate representatives, and sustain the relation of master to the various employes of the corporation engaged in operating the road. *Columbus and Indianapolis Central R. R. Co. v. Arnold*, 81 Ind., 174. 1869.

213. Conductor. That the deceased was conductor and superior officer of the train, and directed the line of conduct that resulted in his death, would estop the administrator from recovering against the company on the ground of negligence on the part of the employes. *Dewey v. Chicago and Northwestern R. R. Co.*, 31 Ia., 373. 1871.

214. Connecting lines. Where a steamboat company and a railway company run in connection with each other and sell tickets over each other's lines, but the fares over each line are separate and distinct, the servants of one company cannot be held to be co-employes with the servants of the other, so as to prevent the liability of their employers for injuries to each other resulting from their negligence. *Carroll v. Minnesota Valley R. R. Co.*, 13 Minn., 30. 1868.

215. Contractors. The term employe, as used in connection with railroads, does not apply to contractors and persons engaged in constructing the road. *Ney v. Dubuque and Sioux City R. R. Co.*, 20 Ia., 347. 1866.

216. Employes off duty. Damages may be recovered against a railroad company for the killing of a person who was employed by it at a fixed price per day, but who was not in its service at the time of the killing, if the killing has resulted directly from the want of ordinary care on the part of the agents of the company, and not from the want of ordinary care on the part of the deceased, directly contributing to the accident. *Baltimore and Ohio R. R. Co. v. The State*, 33 Md., 542. 1870.

217. Evidence. In an action brought by a father for an injury to his minor son, it was held, that the declarations of the son, made on the day following the injury, as to the cause of the accident, were not admissible against the plaintiff. *Ohio and Mississippi R. R. Co. v. Hammersley*, 28 Ind., 371. 1867.

218. Express messengers. A messenger of an express company, who was entitled to be

carried on a freight train, was employed by the superintendent of the road to act as brakeman for one trip, and whilst so employed, was, by the negligent conduct of the engineer, thrown from the cars and greatly injured. Held, that an action would lie against the railway company whether he were to be considered a passenger or an employe. *Chamberlain v. Milwaukee and Mississippi R. R. Co.*, 11 Wis., 238. 1860.

219. Hand car. Where several employes were traveling upon a hand car, under the charge of a "boss," employed as such by the company, such employes are not chargeable with any negligence of the "boss" in the management of the car. *Hoben v. Burlington and Missouri River R. R. Co.*, 20 Ia., 562. 1866.

220. — By the provisions of the § 3329 of the Code, railroad companies are liable to be sued for injuries done to persons or property, by the running of "hand cars" upon their roads, as well as by the running of cars propelled by steam power. *Thomas v. Georgia R. R. Co.*, 38 Ga., 222. 1868.

221. Minors. The common law rule that a master is not liable for an injury to one servant through the neglect of another servant, is not changed where the injured servant is a minor. *King v. Boston and Worcester R. R. Co.*, 9 Cushing (Mass.), 112. 1851.

222. — A minor, without an appointed guardian, and without an estate of inheritance, living in his mother's family, the mother being a widow, is subject to her control, as his natural guardian, and she is entitled to his wages; and where such an infant, while in the employ of a railway company, was killed by a train through the negligence of its agent, it was held, that an action would lie in the mother's name, for damages. But, held, also, that as such guardian, the mother could not, it seems, assume, the custody of any separate estate the son might possess. *Ohio and Mississippi R. R. Co. v. Tindall*, 13 Ind., 366. 1859.

223. — Where the injured person is a minor, who is, at the time of receiving the injury, in the employ of a railway company, and the injury is caused by his own negligence, or the negligence of a co-employe engaged in the same general employment, an action cannot be maintained by the father of such minor for the injury received, unless the company was negligent in hiring the co-serv-

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ant by whose negligence the injury was caused. *Chicago and Great Eastern R. R. Co. v. Harney*, 28 Ind., 28. 1867.

224. Rules and regulations. Where an employé enters upon the employment of a railway company with the knowledge that no provision has been made for protecting such employé from moving trains and engines about the depot grounds, he has no cause of action for injuries resulting to him by reason of the neglect of the corporation to make such rules and regulations as prudence would require in that respect. *Haskin v. New York Central and Hudson River R. R. Co.*, 65 Barbour (N. Y.), 129. 1873.

INJURIES TO PASSENGERS.

See ARBITRATION; INDICTMENT; INJURIES TO EMPLOYEES; INJURIES TO PERSONS GENERALLY; LIMITATIONS; NEGLIGENCE; SUNDAY LAWS; TICKETS.
(For damages caused by delay, see PASSENGERS.)

I. INJURIES RECEIVED IN GETTING ON AND OFF OF THE CARS.

1. *Getting on the cars.*
2. *Getting off the cars.*

II. INJURIES CAUSED BY DEFECTIVE ROADWAY, MACHINERY, ETC.

III. INJURIES RECEIVED ON DEPOT PLATFORMS AND IN DEPOTS.

IV. INJURIES RECEIVED ON CAR PLATFORMS.

V. NEGLIGENCE.

1. *Of carrier.*
2. *Of passenger.*
3. *Of third person.*

VI. ASSAULT AND BATTERY.

VII. EXPULSION OF PASSENGERS FROM THE CARS.

VIII. INJURIES CAUSING DEATH.

IX. DAMAGES.

1. *Death.*
2. *Other damages.*

X. GRATUITOUS PASSENGERS.

XI. LIMITATION OF LIABILITY.

XII. INJURIES RECEIVED AT CAR WINDOW.

XIII. COLLISIONS AND RUNNING OFF THE TRACK.

1. *Collision of trains.*
2. *Collision with cattle or teams.*
3. *Running off the track.*

XIV. JOINT OCCUPATION OF RAILWAYS, AND CONNECTING LINES.

1. *Connecting lines.*
 - a. *Railway lines.*
 - b. *Stage lines.*
2. *Two companies running same track.*
3. *Crossing of two railways.*

XV. FREIGHT TRAINS.

XVI. EVIDENCE.

XVII. PLEADING.

XVIII. GENERAL MATTERS.

I. INJURIES RECEIVED IN GETTING ON AND OFF THE CARS.

1. *Getting on the cars.*

1. Custom. Where there was no passenger platform to indicate the proper place for passengers to enter the cars, and it was the custom of the company to receive and discharge passengers on both sides, and the plaintiff himself, on former occasions, had been received and discharged on the east side of the track, as had other passengers all along, for a distance of over 200 feet; *held*, that the company having permitted this method of receiving passengers at the station, must be regarded as responsible for the safety of the regulation. *Phillips v. Rensselaer and Saratoga R. R. Co.*, 57 Barbour (N. Y.), 644. 1870.

2. Negligence. The facts constituting negligence and contributory negligence, *held* to be properly submitted to the jury in a particular case. *Keating v. New York Central R. R. Co.*, 3 Lansing (N. Y.), 469. 1871.

3. — Passengers who are injured while attempting to get upon a train while it is in motion, cannot recover for the injury. *Knight v. Ponchartrain R. R. Co.*, 23 La. An., 462, 1871; *Hubener v. New Orleans and Carrollton R. R. Co.*, *ib.*, 492, 1871.

4. — The train being a night train with a sleeping car attached, it was not error to refuse to instruct the jury that plaintiff's attempt to get aboard before the sleeping car was abreast of the platform, was negligence *per se*; it not appearing that the plaintiff knew the length of the train as compared with the platform, or ought to have assumed that it was intended to bring the sleeping car

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to that position. *Curtis v. Detroit and Milwaukee R. R. Co.*, 27 Wis., 158. 1870.

5. — Where a train stops at a station in such a manner as to induce the belief on the part of the passengers waiting on the platform that it had stopped for their reception, it is negligence to start the train without a signal when they had commenced to go aboard. Under these circumstances, if it was not intended the passengers should go aboard, it was the duty of the company to have some one there to warn and prevent them. *Ib.*

6. — Where there was evidence tending to show that a railroad train had come to a full stop and that the persons waiting to get upon it were told to go on board by the persons in charge of it, and that the plaintiff below, in attempting to get on board, was injured in consequence of the sudden starting of the train, it was not error to leave to the jury the question of the negligence of the parties. *Detroit and Milwaukee R. R. Co. v. Curtis*, 23 Wis., 152. 1868.

7. — Nor were the facts that plaintiff below was told by the company's servants to get on the hind car, and that he was injured in trying to get on another car, such conclusive proof of negligence on his part as to take the case from the jury. *Ib.*

8. — It was error to instruct the jury that it was negligence in the company in not having an agent present, wearing a badge, whose duty should consist in informing the passengers what cars to enter. *Ib.*

9. — Plaintiff attempted to get upon a train of cars while slowly passing a station where he had bought a ticket. The platform and steps were full, so that he could only get upon the lower step. A jerk of the cars threw him off, but he held on to the iron rod and ran along by the car striving to recover his position upon the step, although the speed of the train was increasing, when he was struck by a platform near the track and injured. *Held*, there was such contributory negligence upon his part as justified a nonsuit. *Phillips v. Rensselaer and Saratoga R. R. Co.*, 49 N. Y., 177. 1872.

2. Getting off the cars.

10. Acts of employés. Information by the conductor of a freight train to a passenger of

mature age and accustomed to railroad traveling, that persons sometimes debarked at a particular place, does not require the passenger to take the risk of leaving the car at such place, and is not negligence in the conductor. *Chicago, Burlington and Quincy R. R. Co. v. Hazard*, 26 Ill., 373. 1861.

11. Aged or decrepid persons. Railroad companies must afford a reasonable time to passengers, whether young or old, to leave the cars in safety. But the age or decrepitude of a person will not determine the time of the stoppage of a train on its arrival at a station. *Toledo, Wabash and Western R. R. Co. v. Baddley*, 54 Ill., 19. 1870.

12. Cattle guard. The question of negligence resulting in the injury of a passenger by falling into a cattle guard, discussed with regard to the facts of a particular case. *Hulbert v. New York Central R. R. Co.*, 40 N. Y., 145. 1869.

13. Culvert. A train ran beyond the platform for landing passengers at a station, and stopped over a culvert, and the proper servants of the railroad company announced the name of the station as a notification to the passengers for that station that the train was there; a passenger for that station who had paid his fare, relying on the good faith of the company, alighted upon and in said culvert, without his fault or negligence, supposing he was alighting on the platform, it being at night and so dark that he could not see that the train had not stopped at said platform; whereby he was greatly injured. *Held*, that the company was liable for the injury so received. *Columbus and Indianapolis Central R. R. Co. v. Farrell*, 31 Ind., 408. 1869.

14. Custom. Where the plaintiffs on the trial of an action for an injury claimed to have resulted from the cars not stopping at a station a reasonable time for the passengers to leave; which was controverted by the defendant; and the plaintiff offered evidence to show the usual and customary period of the cars stopping at that place, *held*, that such evidence was admissible. *Fuller v. Naugatuck R. R. Co.*, 21 Conn., 557. 1852.

15. Duty of carrier. Wherever passengers are accustomed to be received upon a train, whether at the station house, at the water tank, or elsewhere, railroad companies are bound to keep in a safe condition for transit,

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the ordinary space, in which passengers go to and from the train, and passengers have the right to presume that this duty has been performed. *Hulbert v. New York Central R. R. Co.*, 40 N. Y., 145. 1869.

16. **Failure to stop the cars.** Where a passenger, by the wrongful act of the company, is compelled to choose between leaving the cars while they are moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, the company is liable for the consequences of the choice, provided it is not exercised wantonly or unreasonably. *Fyler v. New York Central R. R. Co.*, 49 N. Y., 47. 1872.

17. — Where a passenger had bought a ticket and desired to stop at F., where the train was advertised to stop, and it did not stop entirely, but, while it was moving very slowly by, plaintiff was directed by a brakeman to get off, and told that it would not stop or move more slowly. Another passenger got off safely; in attempting to follow him, plaintiff was injured. *Held*, that leaving the cars under such circumstances was not, as matter of law, negligence, but the question was a proper one for the jury. *Ib.*

18.—Where cars pass their usual stopping place, and to avoid being carried beyond his destination, a passenger, when they are in motion, jumps out, and in so doing sustains an injury, he cannot recover. *Damout v. New Orleans and Carrollton R. R. Co.*, 9 La. An., 441, 1854; *Railroad Co. v. Aspell*, 23 Penn. St., 147, 1854; *Illinois Central R. R. Co. v. Able*, 59 Ill., 131, 1871; *Gavett v. Manchester and Lawrence R. R. Co.*, 16 Gray (Mass.), 501, 1860; *Jeffersonville R. R. Co. v. Hendricks, Adm'r*, 26 Ind., 228, 1866; *Same v. Swift*, *ib.*, 459. 1866.

19.—If the train should be started again while the passenger is in the act of leaving it, and without giving him a reasonable time for that purpose, and an injury should result, the company would be liable. *Jeffersonville R. R. Co. v. Hendricks, Adm'r*, 26 Ind., 228. 1866.

20.—It is not sufficient to charge the company in such case that the conductor advised the passenger that he could safely jump from the train. *Jeffersonville R. R. Co. v. Swift*, 26 Ind., 459. 1866.

21.—Where a railroad company accepts the fare of a passenger to a particular station on

its road, it is bound to stop its train at that station, that he may get off the cars; it is not sufficient that the speed of the cars is slackened. And if, after passing the station, the speed of the cars is again slackened, that the passenger may get off, and, under the direction of the conductor, he does get off, and, in so doing, gets injured, the company is liable. It is not want of ordinary care, if a passenger prudently uses the means which the company affords him to get off the train. *Georgia R. R. Co. v. McCurdy*, 45 Ga., 288. 1872.

22.—Even if the plaintiff leaped from the car on suggestion of the conductor, and the conductor only gave it as his opinion that the plaintiff could leap from the train in safety, it was the plaintiff's duty to exercise his judgment whether or not it was safe, and if the danger was so apparent that a prudent man similarly situated would not have attempted the leap from the train, then the plaintiff was guilty of negligence, and should not be permitted to recover. *Chicago and Alton R. R. Co. v. Randolph*, 53 Ill., 510. 1870.

23.—It is not carelessness in the conductor to announce the place to which a train is approaching before it has actually stopped. *Railroad Co. v. Aspell*, 23 Penn. St., 147. 1854.

24. **Intermediate Stations.** When a passenger enters a railway train and pays the regular fare to be transferred from one station to another, his contract does not obligate the corporation to furnish him with safe ingress and egress at an intermediate station. *State v. Grand Trunk R. R. Co.*, 58 Maine, 176. 1870.

25.—And where such passenger, at an intermediate station, where the train is awaiting the passage of another train, without objection made or notice given, leaves the cars, he does no illegal act, but for the time being, he surrenders his place as a passenger, and takes upon himself the direction and responsibility of his own motions during his absence. *Ib.*

26.—When such train is about to start, the proper employes should give reasonable notice for such passenger to return to the car, and if there is an established signal by blowing the whistle, that should also be given. *Ib.*

27.—But if the passenger go out of sight and out of the reach of the voice which gives the usual loud and distinct notice for all passengers to repair on board, the corporation is not required to send after him. *Ib.*

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28.—A railroad company, undertaking the carriage of passengers to an intermediate point on its road, is bound to stop there a sufficient length of time to enable all the passengers to alight, whose destination is at that point; and if a passenger is injured in consequence of the starting of the train before a sufficient time has been given to alight, the company is liable in damages. *Pennsylvania R. R. Co. v. Kilgore*, 32 Penn. St., 292. 1858.

29. Length of stoppage. In an action to recover damages for injuries suffered by a passenger in leaving a train, alleged to have occurred by reason of the negligence of the employes of the company in not stopping the train at a station long enough to enable the plaintiff to leave it in safety, it was error for the court to refuse to instruct the jury that if the train had stopped "a sufficient time for the plaintiff to leave it upon the platform where passengers leaving the defendant's cars usually land, and had again started on its course and had passed said platform, and the plaintiff then left the platform of the car, rather than be carried by, he was guilty of carelessness and could not recover in the action;" and that "if the train stopped a sufficient time to allow the plaintiff to get off, then the defendant was not guilty of negligence in its management." *Davis v. Chicago and Northwestern R. R. Co.*, 18 Wis., 175. 1864.

30. Mistake. If a train is stopped, at night, merely for the purpose of allowing a train which is expected from the opposite direction to pass by, and no notice is given by the employes of the company to passengers that they may leave the cars, one who leaves the cars and walks into an open cattle guard and receives a personal injury cannot recover against the company therefor; and it is immaterial that he was misinformed by some person not in the employment of the company that he must go and see to having his baggage passed at a custom house, supposed to have been reached by the train, or that the train was near a passenger station, which was not the place of his destination. *Frost v. Grand Trunk R. R. Co.*, 10 Allen (Mass.), 387. 1865.

31.—A railroad company is not legally liable for the action of persons not its servants in falsely announcing the arrival of a train at a station, whereby a passenger in attempting to alight from the train is injured.

Columbus and Indianapolis R. R. Co. v. Farrell, 31 Ind., 408. 1869.

32. Negligence. In an action for an injury to a passenger occurring while getting off the cars, the court instructed the jury to the effect that if the want of proper care or skill on the part of the conductor caused the injury, the defendant would be liable, *held*, not to be erroneous, taken in connection with another instruction to the effect that if the plaintiff was guilty of negligence in jumping from the car, she could not recover. *Evansville and Crawfordsville R. R. Co. v. Duncan*, 28 Ind., 441. 1867.

33.—The evidence in this case disclosing that the plaintiff leaped from the cars merely to prevent being carried on, and that she was at the time warned that it was dangerous, and so thought herself, it was *held*, that she could not recover, she having contributed to the injury by her negligence. *Ib.*

34.—The principle that there can be no recovery for an injury resulting from mutual negligence is applicable to an action for an injury which is founded on a contract. *Railroad Co. v. Aspell*, 23 Penn. St., 147. 1854.

35.—In an action against a railroad company for an injury sustained by a passenger, who in a dark night upon the arrival of a train on the main track next to the depot, alighted on a narrow platform between that track and a side track, and in crossing from the platform to the highway was struck by an engine backing on the side track, if the evidence at the trial has any tendency to show, according to the general knowledge and experience of men, that the arrangement and use of the premises were such as to invite the plaintiff to cross to the highway in the manner in which he attempted to do so, that he used ordinary care in the attempt, and that the defendant did not provide proper safeguards against such an accident, the question whether there was due care on the part of the plaintiff, and negligence on the part of the defendant, are for the jury. *Gaynor v. Old Colony and Newport R. R. Co.*, 100 Mass., 208. 1868.

36.—In an action for an injury to a passenger, caused by leaping from a box car while the train was stopped at the station to which the plaintiff had taken passage, no means of descent being provided, it was *held*, that an instruction to the effect that if the

Injuries received in getting on and off the Cars.

plaintiff leaped from the car without being in peril, or having reason to believe that she was in peril, and the injury thereby resulted, she could not recover, was correctly refused, because it did not contain the further element that the circumstances were such that the plaintiff might reasonably have apprehended injury from the leap. *Evansville and Crawfordsville R. R. Co. v. Duncan*, 28 Ind., 441. 1867.

37. — Where a train had stopped a sufficient time to enable passengers to get off in safety, it was *held*, to be negligence for one of such passengers to attempt to get off after the train had again started. *Illinois Central R. R. Co. v. Slotton*, 54 Ill., 133. 1870.

38. — A female passenger, accompanied by three young children, on arriving at an intermediate station, proceeded to alight with them; two of the children had left the car, and whilst the plaintiff was still on the train, the cars started, when she sprang forward on the platform, on which one of the children had fallen prostrate, and was injured: *held*, that this was not such negligence as would prevent her from recovering damages for injuries sustained by the premature starting of the train. *Pennsylvania R. R. Co. v. Kilgore*, 32 Penn. St., 292. 1858.

39. — If, through the default of the company, or its servants, a passenger is placed in such a perilous condition as to render it an act of reasonable precaution, for the purpose of self preservation, to leap from the cars, the company is responsible for the injury he receives thereby, although if he had remained in the cars he would not have been injured. *Southwestern R. R. Co. v. Paulk*, 24 Ga., 356. 1858.

40. — Where the usual signal was given for slackening the speed of the train, and the conductor went with a passenger and his companion out on the platform to assist them in getting off safely, and such passenger, without any direction from the conductor, jumped off the train while in motion, the carrier is not responsible for injury resulting therefrom; but it would be otherwise if the motion of the train was so slow that the danger of jumping off would not be apparent to a reasonable person, and the passenger acted under the instructions of the conductor. *Lambeth v. North Carolina R. R. Co.*, 66 N. C., 494. 1872.

41. Passing from car to car. Where a

passenger attempts to pass from a train in motion, and not at a station, and is warned not to get off at that place, and the conductor takes hold of him to prevent him from passing from the car, the passenger is guilty of negligence if he passes from the train and receives injury thereby. *Ohio and Mississippi R. R. Co. v. Schiebe*, 44 Ill., 460. 1867.

42. Pleadings. The sufficiency of the pleadings in a particular case — determined. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Hendricks*, 41 Ind., 48, 1872; *Eldridge v. Long Island R. R. Co.*, 1 Sandford (N. Y.), 89, 1847.

43. Termination of carrier's liability. In an action against a railway company as a common carrier of passengers, for personal injuries, there being evidence from which the jury might have found that the relation of passenger and carrier had ceased before the accident, a judgment for the plaintiff was reversed because the jury were instructed (by a distinct proposition in writing), "that defendant was liable if the injury was caused by its negligence, without negligence of the plaintiff contributing thereto;" although by a subsequent written instruction they were told, that "if a reasonable time had elapsed for the plaintiff to get out of the cars, the relation of common carrier ceased, and the defendant could not be held liable as a common carrier," and were orally instructed that in such a case, the plaintiff could not recover at all in that action. *Imhoff v. Chicago and Milwaukee R. R. Co.*, 20 Wis., 344. 1866.

44. — A railroad company is liable for negligently injuring persons lawfully on or around its cars, even after its liability as a carrier has ceased, a reasonable time having elapsed for them to leave the train after arriving at its destination. *Same v. Same*, 22 Ib., 681. 1868.

45. — It is the duty of railway companies to stop their trains at their stations, and to have the names of the stations announced, and a sufficient time given to allow passengers to get off without danger. *Southern R. R. Co. v. Kendrick*, 40 Miss., 374, 1866; *Fairmount and Arch Street R. R. Co. v. Stutler*, 54 Penn. St., 375. 1867.

46. — Where a railroad company, by its negligence, compels a passenger to choose between incurring some risk in leaving the train, and being exposed to other inconveniences to

Injuries caused by Defective Roadway, Machinery, etc.

which it has no right to expose him, and he is injured in getting off, under circumstances which would not prevent a person of ordinary prudence from doing so, the company is liable. *Delamatyr v. Milwaukee and Prairie du Chien R. R. Co.*, 24 Wis., 578. 1869.

47. — Where the train stopped at the station only one minute, and during that time plaintiff's child alighted, and the plaintiff followed without any delay, but after the train was in motion, *held*, that she would not be barred from recovering for a personal injury received in consequence of jumping from the train. *Loyd v. Hannibal and St. Joseph R. R. Co.*, 53 Mo., 509. 1873

II. INJURIES CAUSED BY DEFECTIVE ROADWAY, MACHINERY, ETC.

48. **Bridge.** Where an accident happened from the breaking of a wheel, which had been previously cracked, but which crack had not been discovered, owing to an imperfect inspection of it by the officers of the company, and from the prostration of a bridge which had been so imperfectly constructed as not to be strong enough to guard against the accident, the company was guilty of negligence, and was responsible to parties injured. *Oliver v. New York and Erie R. R. Co.*, 1 Edmonds (N. Y.), 589. 1848.

49. **Machinery.** Where a passenger in a railroad car was injured by the breaking of one of the axles in consequence of a latent defect which could not be discovered by the most vigilant external examination, it was *held*, that the company was responsible to him for damages, although it purchased the car from extensive and skillful car makers, and the axle was procured from a manufacturer of skill and reputation, if the defect could have been discovered in the process of manufacturing the axle or car by the application of any test known to men skilled in such business. *Hegeman v. Western R. R. Co.*, 13 N. Y., 9, 1855; *Same v. Same*, 16 Barbour (N. Y.), 353, 1853.

50. — A common carrier is bound, absolutely and irrespective of negligence, to provide roadworthy vehicles. A railroad company is liable for injuries to a passenger, caused by a crack in the iron axle of a car, although the defect could not have been discovered by any practicable mode of examination.

Alden v. N. Y. Cent. R. R. Co., 26 N. Y., 102, 1862; see contra, *McPadden v. Same*, 44 ib., 478, 1871.

51. — The want of any necessary apparatus and fixtures to the locomotive or train will not increase the responsibility of the company, where the accident would have happened equally without them. *Hill v. New Orleans, Opelousas and Great Western R. R. Co.*, 11 La. An., 292. 1856.

52. — Whether a railroad company manufactures the cars and engines used in transporting passengers, or procures them from others, it is responsible that the utmost precaution, care and skill have been exercised in their construction to render them safe. *Hegeman v. Western R. R. Co.*, 13 N. Y., 9, 1855; *Same v. Same*, 16 Barbour (N. Y.), 353, 1853.

53. **Road bed.** A company cannot be required, for the sake of making travel on its road absolutely free from peril, to incur a degree of expense which would render the operation of the road impracticable. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Thompson*, 56 Ill., 138. 1870.

54. — The court will not set aside a verdict when the judge who tried the case in his discretion admitted testimony showing the general bad state of the defendant's track for miles distant from the place of accident, as one of the causes probably contributing to the accident, which occasioned the injury to plaintiff. *Holyoke v. Grand Trunk R. R. Co.*, 48 N. H., 541. 1869.

55. — Proof of the bad condition of the railroad in the immediate vicinity of the place where the accident occurred is admissible for the purpose of showing the negligence of the company. *Reed v. New York Central R. R. Co.*, 56 Barbour (N. Y.), 493. 1868.

56. — **ballasting.** Contractors employed by a railway company to deliver stone on the road and prepare it for ballasting the track (the ballasting not being necessary to the security, but being intended for the preservation of the track), placed the stone in ridges so near the rail that it was struck by the step of the baggage car, or the ridge was disturbed and a stone rolled down by the hub of one of the cars, or was rolled down by the jarring of the train as it passed near the ridge, or it was loosed from its place and rolled down by the haste of one of the hands employed by the contractors in getting off the ridge to avoid the

Injuries received on Depot Platforms and in Depots.

train, and the cars ran against it and were thrown off the track, whereby a passenger was injured. *Held*, that it is for the jury to inquire whether there was not danger in the work, arising from the mode and manner in which it was done; whether the company did not know, or should have ascertained, the existence of such danger; and whether it had used due care and foresight in guarding against it. *Virginia Central R. R. Co. v. Sanger*, 15 Grat-tan (Va.), 230. 1859.

57. — rails. Where the car in which the plaintiff rode was overset by reason of the breaking of one of the rails, in consequence of which his shoulder-blade was broken, and without any negligence on his part, he sustained serious injury; *held*, that he had made out a *prima facie* case of negligence on the part of the defendant, entitling him to damages. *Brignoli v. Chicago and Great Eastern R. R. Co.*, 4 Daly (N. Y.), 182. 1871.

58. — Where an accident has occurred by reason of a broken rail, if a passenger claims that the rail was broken before the train reached it, he is called upon to show that fact by evidence. *McPadden v. New York Central R. R. Co.*, 44 N. Y., 478, 1871; reversing, *Same v. Same*, 47 Barbour (N. Y.), 247, 1866.

59. — If a railroad company lays its rails in such a manner, that within the ordinary extremes of cold and heat, they expand so as to be pressed out of place thereby, that of itself is negligence. *Reed v. New York Central R. Co.*, 56 Barbour (N. Y.), 493. 1868.

60. — Where it was proved that the contraction and expansion of rails, of the length of those used, between the ordinary extremes of heat and cold, during the year, is from three-eighths of an inch to one-half an inch in each bar, and that the rails upon defendant's road were laid with spaces of not more than one-fourth of an inch between them: *held*, that the jury were authorized to find that the rails were negligently laid. *Ib.*

61. — Whether an accident, by which cars are thrown from the track and upset, is caused by the expansion of the rails from heat, or the shoving forward of the rails and throwing them out of place by running all the trains upon the track in one direction, or by both causes united, neither cause furnishes a defense to an action brought by a passenger sustaining an injury. *Ib.*

62. — Where a railroad company knows that, as its road is constructed and operated, an accident may happen from either or both of those causes, it is its duty to effectually guard against it, by so fastening the rails that they will not be liable to be pushed forward by the running of the trains; or if that cannot be done where (in case of a double track) the trains are running the same way all the time, then it should run them on the same rails, sometimes one way and sometimes the other. *Ib.*

63. — Where a complaint alleged that the injury resulted from a broken rail, which the company had carelessly left unrepaired for a long time, whereby the car in which the plaintiff was being carried as a passenger was thrown from the track and the plaintiff thereby injured, etc., it was held good, without an express averment, that the plaintiff was without fault. *Michigan Southern and Northern Indiana R. R. Co. v. Lantz*, 29 Ind., 528. 1868.

64. — repairs. Repairs of a track were attempted to be made without interfering with the passage of the trains. The time of the passage of such trains was well understood, and to insure safety, it was only necessary that the employes of the company should have an accurate timepiece, to enable them so to conduct the work that the track should be in order, on the arrival of the next train. *Held*, that it was the duty of the company to see that the men employed in labor of that kind were furnished with a proper timepiece. *Matteson v. New York Central R. R. Co.*, 62 Barbour (N. Y.), 364, 1862; see *Same v. Same*, 35 N. Y., 487, 1866.

65. — ties. Although a railroad company may use ties of wood, such ties shall be absolutely sound and road worthy. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Thompson*, 56 Ill., 138. 1870.

III. INJURIES RECEIVED ON DEPOT PLATFORMS AND IN DEPOTS.

66. Depot floor. It is gross negligence for a railway company to leave a hole in the floor of the depot, where its passengers are accustomed to alight from its cars, thus rendering their landing unsafe. *Liscomb v. New Jersey, etc. R. R. Co.*, 6 Lansing (N. Y.), 75. 1872.

Injuries received on Depot Platforms and in Depots.

67. Lights. The absence of a light at a depot, in a dark night, whereby a passenger was injured in falling from a platform was held to be sufficient evidence of negligence to go to the jury. *Patten v. Chicago and Northwestern R. R. Co.*, 32 Wis., 524. 1873.

68. Platform. It is not necessary that a person should be on the train of a railroad in order to be regarded as a passenger. As a passenger, he has the right to stand or walk on the platforms provided at stations for the convenience of passengers while the train is stopping for refreshments, and in a street alongside of the track and platforms. *Jeffersonville, etc., R. R. Co. v. Riley*, 39 Ind., 568. 1872.

69. — Neither an entry into the cars, upon a railroad, nor the payment of the fare, is essential to create the relation of carrier and passenger. Being within the waiting room, waiting to take the cars, is as effectual to make one a passenger as if he were within the body of a car. *Gordon v. Grand Street and Newtown R. R. Co.*, 40 Barbour (N. Y.), 546. 1863.

70. — Where an action was brought for an injury sustained by a party by reason of defective steps to a platform, which was not the usual place for passengers to get on and off the cars, the jury should have been instructed to ascertain from the evidence whether the company had set apart the platform in front of the depot as the place where all passengers were required to enter the cars; if so, and this was known to the plaintiffs, and they disregarded the requirement, and met an injury in attempting to get on at another place, the company would not be liable as a common carrier. *McDonald v. Chicago and Northwestern R. R. Co.*, 26 Ia., 124, 1868; 29 ib., 170, 1870.

71. — But if no such rule was known to them, and they, in the exercise of reasonable care, were seeking to enter the cars, they would have a right to presume that the platform and approaches were in a safe condition. *Ib.*

72. — As a general rule, a railway company is bound to keep in a safe condition all portions of its platforms and approaches thereto, to which the public would naturally resort. *Ib.*

73. — If a station room is full, or offensive from tobacco smoke, a passenger will be justified in entering the cars at as early a period as possible, and may endeavor to enter them before they are drawn up to the station, if he is not aware of any rule of the company to the

contrary; and if, in so doing, he receives an injury (he using proper care) from the unsafe and dangerous condition of the platform, or the steps, in a place where passengers would naturally go, the company will be liable therefor. *Ib.*

74. — Railroad companies must provide reasonable accommodations at their stations for passengers. *Ib.*

75. — Stopping the train at an unusual place is presumptively wrong, and the *onus* is on the company to explain this neglect. *Memphis and Charleston R. R. Co. v. Whitfield*, 44 Miss., 466. 1870.

76. — The conductor is bound to back the train if requested, so that a passenger may alight upon the platform. *Ib.*

77. — If the train is stopped at a place where there is no platform, the company is bound to assist the passengers off the train. *Ib.*

78. — It is the duty of a railroad company using a platform in a depot belonging to another company, to see that the platform used is safe and convenient for passengers. *Seymour v. Chicago, Burlington and Quincy R. R. Co.*, 3 Bissell (U. S. C. C.), 43. 1871.

79. — In an action, it was alleged that the death for which the suit was brought, was caused by negligence "in not allowing a safe and convenient platform or way, and a sufficient time to get into the cars, and causing an engine to run alongside the cars, which killed the deceased." *Held*, that the delay in the arrival of the train in which the deceased was to go, not being alleged in the declaration, was not a cause of action, but was a circumstance bearing on the question of negligence. *Pennsylvania R. R. Co. v. Henderson*, 51 Penn. St., 315. 1865.

80. — On the question of negligence, evidence was proper that the next day after the accident, the agent of the company telegraphed to the superintendent that the platform should be removed, and it was removed the next day. *Ib.*

81. — Where a railway company provides a platform or other safe means of exit from its cars, at a station, it is the duty of passengers to leave by the way provided, unless it is unsafe, or a justifying necessity exists to escape from peril or injury to life or limb; and it is error to admit evidence to be given to the jury that persons were in the habit of getting out

Injuries received on Car Platforms.

of the cars on the opposite side of the platform. *Pennsylvania R. R. Co. v. Zebe*, 37 Penn. St., 420. 1860.

82. — Where it appeared that a passenger on the defendant's cars, alighted from the cars on a dark night, at a station of the defendant, on one of two platforms extending along each side of the track to a highway (which, as he knew, crossed the railroad), and having a step at the end next the highway; instead of walking along the platform, he voluntarily stepped from it, to cross the track to the highway, and when he stepped off, fell into a cattle guard dug across the track, and was injured; it was *held*, that he was not in the exercise of due care, and could not recover. *Forsyth v. Boston and Albany R. R. Co.*, 103 Mass., 510. 1870.

83. — If the station house of a railroad company is separated by a side track from a platform provided for passing to the trains, and there are no regulations or directions as to when or how passengers shall pass to them, the question whether a passenger is bound to wait in the station house until the arrival of the train at the platform, or may go to and stand on the platform during its approach, depends on what is a reasonably safe and prudent course for him to adopt, and known usage may be considered in determining the question. *Caswell v. Boston and Worcester R. R. Co.*, 98 Mass., 194. 1867.

84. — A railway company that has provided a sufficient platform for the egress of passengers from its cars, is not liable for injuries occurring to a passenger in consequence of his voluntarily leaving the cars on the opposite side, and stepping on the track instead of the platform. *Pennsylvania R. R. Co. v. Zebe*, 33 Penn. St., 318. 1858.

85. — The company is not liable in such case, unless there were gross negligence on its part, in thus permitting the passenger to leave the cars. *Ib.*

86. — If a passenger be injured in consequence of his disregard of the necessary regulations of the company, in regard to the mode of alighting from its cars, the company is not liable, even though the negligence of its servants concurred in causing the mischief. *Ib.*

87. — A railway company is liable to a hackman for an injury received by him while carrying a passenger to the depot for transpor-

tation, by stepping into a cavity in the platform, and occasioned solely by the unsafe condition of the platform. *Tobin v. Portland, Saco and Portsmouth R. R. Co.*, 59 Me., 183. 1871.

88. — Under such circumstances the liability is not changed by the fact that the platform was erected and maintained in the limits of the highway. *Ib.*

89. *Switch.* If, by a displacement of a switch by an employé of a railway company, a train due over the main track of the railroad is diverted to a side track, and comes into collision there with other cars, and puts in peril passengers on an adjoining platform, it is competent for a jury to find that the omission to replace the switch was culpable negligence. *Caswell v. Boston and Worcester R. R. Co.*, 98 Mass., 194. 1867.

IV. INJURIES RECEIVED ON CAR PLATFORMS.

90. *Negligence.* Although the railway company has been guilty of negligence, yet if the passenger could have avoided the injury by the exercise of ordinary diligence, no cause of action will arise against the railway company; so *held*, in case of an injury by collision to a passenger while riding upon the platform in violation of the rules of the company. *Macon and Western R. R. Co. v. Johnson*. 38 Ga., 409. 1868.

91. — A passenger cannot maintain an action for an injury sustained in consequence of voluntarily and unnecessarily standing upon the platform of a car while in motion, even although the injured party is acting in conformity with a custom in that respect. *Hickey v. Boston and Lowell R. R. Co.*, 14 Allen (Mass.), 429. 1867.

92. — Passengers are not guilty of negligence in standing on the platform of cars in motion, when there are no vacant seats for them within the cars. *Willis v. Long Island R. R. Co.*, 34 N. Y., 670. 1866; *Same v. Same*, 32 Barbour (N. Y.), 399, 1860.

93. — The mere fact that the conductor does not object to a passenger's riding on the platform of a car, does not raise a presumption that the company assented to such act of the passenger, if notices were duly posted forbidding passengers thus to ride, as required

Negligence.

by the statute. *Higgins v. New York and Harlem R. R. Co.*, 2 Bosworth (N. Y.), 132. 1857.

94. — A passenger was injured while riding on the platform. After the injury, witnesses testified that he admitted that he would not have been injured if he had not been in an improper place. *Held*, that this evidence was properly left to the jury; that it did not follow that because such admissions were made, the plaintiff could not recover, but the question of negligence was for the jury. *Zemp v. Wilmington and Manchester R. R. Co.*, 9 Richardson's Law (So. Car.), 84. 1855.

95. — There was a notice near the door on the inside of the car, "that passengers should not stand on the platform." The court *held*, that even if the plaintiff knew that the platform was a prohibited place, then it was for the jury to say whether the act of the plaintiff contributed to the injury so as to exonerate the company, the facts clearly showing the negligence of the company in the construction of the road. *Ib.*

96. — One of a large funeral party who took passage upon a train to go a distance of twelve miles, was standing upon the steps of the platform of one of the cars holding on to the railing, when the conductor came along collecting fare. In making change for a bank note which the passenger paid for his fare, the wind carried away the paper. The passenger in attempting to regain it, lost his foothold and fell against an embankment, was thrown back under the cars and killed. The cars were quite full, but there was standing room in all of them. In an action against the company, it was *held*, that it was the negligence of the deceased, not that of the company, which caused his death, and there could be no recovery. *Quinn v. Illinois Central R. R. Co.*, 51 Ill., 495. 1869.

V. NEGLIGENCE.

1. Of Carrier.

97. Comparative negligence. If the negligence of one party is only slight, and that of the other appears gross, a recovery may be had. *Chicago, Burlington and Quincy R. R. Co. v. Dewey*, 26 Ill., 255. 1861.

98. — Where a passenger is injured and is entitled to damages, if he himself is at fault,

he will not be entitled to as heavy damages as he would if he had been free from negligence. *Yonge v. Kinney*, 28 Ga., 111. 1859.

99. Degree of care required. Carriers of passengers are bound to use the utmost care and skill in the performance of such duty. *Huelsenkamp v. Citizens R. R. Co.*, 37 Mo., 537, 1866; *Johnson v. Winona and St. Peter R. R. Co.*, 11 Minn., 296, 1866; *Taylor v. Grand Trunk R. R. Co.*, 48 N. H., 304, 1869; *Union Pacific R. R. Co. v. Hand*, 7 Kan., 380, 1871; *Brown v. New York Central R. R. Co.*, 34 N. Y., 404, 1866; *Mississippi Central R. R. Co. v. Miller*, 40 Miss., 45, 1866; *New Orleans, Jackson and Great Northern R. R. Co. v. Bailey*, *ib.*, 395, 1866; *Jeffersonville R. R. Co. v. Hendrick's Adm'r*, 26 Ind., 228, 1866; *Toledo, Wabash and Western R. R. Co. v. Baddeley*, 54 Ill., 19, 1870; *Fuller v. Naugatuck R. R. Co.*, 21 Conn., 557, 1852.

100. — It is an implied condition of the contract of railroad companies with each passenger, that he shall not be put in jeopardy by the slightest fault of the employes of the company. *Black v. Carrollton R. R. Co.*, 10 La. An., 33. 1855.

101. — The slightest neglect resulting in hurt or loss, against which human foresight and prudence may guard, renders a carrier of passengers liable. *Meier v. Pennsylvania R. R. Co.*, 64 Penn. St., 225. 1870.

102. — The requirement of extreme care does not extend beyond the use of known machinery and the modes of using it. *Ib.*

103. — Railroads must keep pace with science, art and modern improvement in their application to the carriage of passengers. *Ib.*

104. — The injury of a passenger without his own fault, makes a *prima facie* case against the carrier. *Ib.*

105. — The carrier may relieve himself by showing that the injury arose from an accident which the utmost skill, foresight and diligence could not prevent. *Ib.*

106. — An instruction was properly refused which read as follows: "The rule is not to be understood as requiring of such carriers those particular precautions as it is apparent after the accident might have prevented the injury." *Wheaton v. North Beach and Mission R. R. Co.*, 36 Cal., 590. 1869.

107. — Such carriers are chargeable if their negligence, however slight, was the sole

Negligence.

cause of the injury. *Knight v. Portland, Saco and Portsmouth R. R. Co.*, 56 Me., 234. 1868.

108. — When a railway company undertakes to transport passengers at an agreed price, that contract implies that the company is provided with a safe and sufficient railroad to the point indicated; that its cars are staunch and roadworthy; that means have been taken before hand to guard against every apparent danger that may beset the passenger; and that the servants in charge are tried, sober and competent men. *Sullivan v. Philadelphia and Reading R. R. Co.*, 30 Penn. St., 234. 1858.

109. — The degree of precaution, care and skill required of a carrier of passengers by stage coaches, in the preparation and management of the means of conveyance, is not a test of that which is required of those engaged in transporting persons upon railways. *Hege-man v. Western R. R. Co.*, 13 N. Y., 9, 1855; *Same v. Same*, 16 Barbour (N. Y.), 353, 1853.

110. — The standard of care required of a railroad company in carrying passengers does not depend upon its financial condition or the amount of its revenues, but it is bound to provide a track, rolling stock and all other agencies suited to the nature and extent of the business it assumes to do. *Taylor v. Grand Trunk R. R. Co.*, 48 N. H., 304. 1869.

111. — A direction to the jury that a railroad company must use such a degree of care as is practicable, short of incurring an expense which would render it altogether impossible to continue the business, is erroneous and calculated to mislead the jury. *Id.*

112. **Engine driver.** It is not negligence in an engine driver, on arriving at a station, if he should let on more than the exact quantity of steam necessary to overcome the friction of frogs and switches, thereby creating a jerking motion of the train, if in so doing, he exercises a reasonable discretion. *Chicago, Burlington and Quincy R. R. Co., v. Hazard*, 26 Ill., 373. 1861.

113. **Pleading.** Railway companies are responsible for injuries inflicted upon passengers in consequence of the negligence, imprudence and want of skill of persons in the service of those companies, and the injury having occurred, it is not necessary that the party who sues for damages should allege the particular cause of the accident. *Carmanty v. Mexican Gulf R. R. Co.*, 5 La. An., 703. 1850.

114. **Presumption.** No presumption of negligence arises from the mere fact that an accident has occurred. *Curtis v. Rochester and Syracuse R. R. Co.*, 18 N. Y., 534, 1859; *Same v. Same*, 20 Barbour (N. Y.), 282, 1855.

115. — But a presumption of negligence arises whenever it appears that an accident has resulted from a defect in the road, or any part of the apparatus employed in operating it. *Id.*

116. — The presumption of a want of care may arise from circumstances attending the injury; and whenever such a state of things exists, the *onus* is upon the company to show that the injury did not result from any negligence on its part. *Brehm v. Great Western R. R. Co.*, 34 Barbour (N. Y.), 256. 1861.

117. — When the presumption of negligence has been once established against a carrier of passengers, in an action for damages resulting from an accident, it can only be rebutted by proving that the accident resulted from circumstances against which human prudence and foresight could not guard. *Bowen v. New York Central R. R. Co.*, 18 N. Y., 408. 1858.

118. **Time.** Evidence of negligence must be confined to the time of the alleged injury. *Southern R. R. Co. v. Kendrick*, 40 Miss., 374. 1866.

2. *Of passenger.*

119. **Contributory negligence.** Where the negligence of the injured party contributed to the injury, he cannot recover. *Harper v. Erie R. R. Co.*, 3 Vroom (N. J.), 88, 1866; *Deyo v. New York Central R. R. Co.*, 34 N. Y., 9, 1865; *Spooner v. Brooklyn City R. R. Co.*, 31 Barbour (N. Y.), 419, 1860; *Same v. Same*, 36 ib., 217, 1862; *Jeffersonville R. R. Co. v. Hendrick's Adm'r*, 26 Ind., 228, 1866.

120. — If the injury was the result of negligence on both sides, then, as the passenger's own fault was contributory to it, he can recover nothing, unless the managing agents saw his perilous condition, and might, by ordinary diligence, have prevented the injury. *Kentucky Central R. R. Co. v. Dills*, 4 Bush (Ky.), 598. 1868.

121. — When a passenger, by his own misconduct or negligence, contributes to the injury, as by riding in the baggage car contrary to the rules of the road, he cannot recover.

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Higgins v. Hannibal and St. Joseph R. R. Co., 36 Mo., 418. 1865.

122. — If the injury was occasioned by the passenger's failure to obtain the knowledge of, and to act upon, established usage, custom and regulations, he cannot recover. *Southern R. R. Co. v. Kendrick*, 40 Miss., 374. 1866.

123. Evidence. In an action by a widow against a railway company to recover damages for the loss of her husband's life, it was error to instruct the jury that if the deceased knew that "the fast line" was approaching, and knew his danger in time to escape and did not, then the fault was his own, and there could be no recovery. The instruction should have been, that he was to be charged with knowledge, or regarded as knowing, if he had such warnings or opportunities of knowledge, as would, with ordinary caution in those circumstances, have saved him from danger. No one could prove his actual knowledge, but his means of knowledge could be shown. *Pennsylvania R. R. Co. v. Henderson*, 43 Penn. St., 449. 1862.

124. Negligence a question of law. If the facts are undisputed, and fail to show that the plaintiff was in the exercise of due and reasonable care at the time of receiving the injuries, it is the duty of the court to instruct the jury that he cannot recover. *Gavett v. Manchester and Lawrence R. R. Co.*, 16 Gray (Mass.), 501. 1860.

125. Pleading. A complaint seeking a recovery from a railroad company on the ground of negligence in running a train of cars, whereby the plaintiff has been injured, must expressly allege that the injury occurred without the fault or negligence of the plaintiff. *Maxfield v. Cincinnati, etc. R. R. Co.*, 41 Ind., 269, 1872; *Jeffersonville R. R. Co. v. Hendricks' Adm'r.*, 26 ib., 228, 1866.

126. — The burden is not on plaintiff to aver affirmatively that he was at the time exercising due care, and was himself without negligence, contributing to the injury. Negligence in the plaintiff is a mere defense to be set up by the answer, and shown like any other defense. *Thompson v. North Missouri R. R. Co.*, 51 Mo., 190. 1873.

3. Of third person.

127. It is no defense to an action by a passenger against a railway company to recover

damages for an injury sustained through its negligence, that the negligence or trespass of a third party contributed to the injury, although such third party acted entirely independent of the carrier. *Eaton v. Boston and Lowell R. R. Co.*, 11 Allen (Mass.), 500. 1866.

128. — The negligence of defendant, whereby plaintiff was injured, being established, and there being no pretense, that plaintiff was guilty of any personal negligence, the negligence of a third party, contributing to the injuries, furnishes no legal excuse for the negligence of defendant. *Webster v. Hudson River R. R. Co.*, 38 N. Y., 260. 1868.

VI. ASSAULT AND BATTERY.

(See next subdivision, *post*, 415.)

129. Exemplary Damages. Where an agent commits an assault in the line of his duty and within the scope of his employment, the master is liable, and is liable in exemplary damages in a proper case. *Hamilton v. Third Avenue R. R. Co.*, 13 Abbott Pr. N. S. (N. Y.), 318, 1872; *Same v. Same*, 3 Jones and Spencer (N. Y.), 118, 1872.

130. — A common carrier is responsible for the willful misconduct of his servant against a passenger. *Goddard v. Grand Trunk R. R. Co.*, 57 Me., 202. 1869.

131. — Where a person is assaulted and grossly insulted by a brakeman employed on the train, the company is liable. *Ib.*

132. — The retention of the brakeman in the service of the company, after such misconduct is known to it, will render it liable to exemplary damages. *Ib.*

133. Liability of carrier. Where an employé in the course of his employment, commits an assault and battery upon a passenger about to enter the cars without a ticket, it is a joint trespass, for which a joint or several action against either the principal or agent could be sustained. *Priest v. Hudson River R. R. Co.*, 40 Howard's Pr. (N. Y.), 456. 1870.

134. — A railroad company is responsible for an assault and battery by the conductor of one of its trains upon a passenger in seizing or attempting to seize his property to enforce payment of his fare. *Ramsden v. Boston and Albany R. R. Co.*, 104 Mass., 117. 1870.

135. — A brakeman employed by a railroad company, assaulted the plaintiff by strik-

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ing him, throwing him down, trampling on him, etc., as alleged in the complaint; *held*, that the action against the company was for assault and battery. *Priest v. Hudson River R. R. Co.*, 10 Abbott's Pr., N. S. (N. Y.), 60. 1870.

136. — Where the plaintiff, after purchasing a ticket as a passenger, applied to the servant of the defendant who was charged with the duty of checking baggage, to have his baggage checked to his place of destination, and by his importunate conduct and abusive language toward the servant, provoked a quarrel, in which the servant, to gratify his personal resentment, struck the plaintiff; *held*, that the wrongful act of the servant in striking the plaintiff cannot be regarded as authorized by the master, nor as an act done in the execution of the service for which he was engaged by the master. And the fact that the blow was inflicted with a hatchet furnished by the master, to be used for a wholly different purpose in connection with the servant's business, is immaterial as respects the liability of the master. *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St., 110. 1869.

137. — The acts of a servant beyond the scope of his employment, are, not chargeable to the master. *Ib.*

138. — A conductor, when sued for an assault and battery committed in ejecting a passenger from the cars, if he relies upon the rules and regulations of the company as a defense, must plead them. *Pier v. Finch*, 29 Barbour (N. Y.), 170. 1859.

VII. EXPULSION OF PASSENGERS FROM THE CARS.

(See preceding sub-division, *ante*, 414.)

139. Amount of force to be used. If a conductor attempt to expel from the cars a person who, by law or the rules of the company, has no right to ride thereon, he has no right to use more force or violence than is necessary to accomplish his purpose. *State v. Ross*, 2 Dutcher (N. J.), 224. 1857.

140. — In an action against a railroad company for blows struck upon the plaintiff by its servants in expelling him from a car from which they had a right to remove him, it is a question of fact for the jury whether the blows were struck in the exercise of justifiable force to effect the expulsion and overcome force

with which he was resisting it. *Coleman v. New York and New Haven R. R. Co.*, 106 Mass., 160. 1870.

141. Assault and battery. On the trial of an action against a railroad company for excessive violence used to expel the plaintiff from a car, if there is evidence tending to show that it consisted both in blows struck within the car, and in throwing him from the platform, the defendant has no ground of exception to the refusal of a ruling which assumes that the evidence related only to the blows. *Ib.*

142. — If assistants employed by the conductor of a railroad train to expel a person from the car, strike him unjustifiably in expelling him, the company is liable, although the blows were struck against the conductor's order. *Ib.*

143. — An action of trespass for an assault and battery will lie against a corporation. *Brokaw v. New Jersey R. R. Co.*, 3 Vroom, (N. J.), 328. 1867.

144. — In such action, an individual may be joined as a co-defendant, with a corporation. *Ib.*

145. — It is no defense to an action against a railroad company for excessive violence of its servants in expelling the plaintiff from a car, which aggravated a disease known to him, but not to them, to which he was subject, that he gave them no caution in relation to it. *Coleman v. New York and New Haven R. R. Co.*, 106 Mass., 160. 1870.

146. Colored persons. Where a colored woman was refused admittance to a ladies' car, solely on account of her color, and was directed to take a seat in another car, which was set apart for, and mostly occupied by men, and the evidence justifying the conclusion that the brakeman, in excluding her from the ladies' car, did so in a very rude manner, and in the presence of several persons, it was *held*, a verdict of \$200 recovered by the woman against the company, was not excessive. *Chicago and Northwestern R. R. Co. v. Williams*, 55 Ill., 185. 1870.

147. — An act of congress, passed in 1863, granting certain privileges which it asked to a railroad company, enacted also that "no person shall be excluded from the cars on account of color." *Held*, that this meant that colored persons should travel in the same cars that

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white ones did, and along with them in such cars; and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively for white persons, and in fact the very cars which were, at certain times, assigned exclusively to white persons. *Railroad Co. v. Brown*, 17 Wallace, 445. 1873.

148. Drunken passengers. The plaintiff's intestate was ejected by the defendant's conductor from a train of cars, and left, in the night time, in a state of intoxication, near the railroad track; several hours after, at a distance of a half mile from the station where he was displaced, he was killed by another train of cars. *Held*, that to entitle the plaintiff to recover, it should be made to appear, to the satisfaction of the jury, that the killing was the natural or proximate result of the act of defendant's agent. *Haley v. Chicago and Northwestern R. R. Co.*, 21 Ia., 15. 1866.

149. — The attention of the jury should have been called to the distance between the place where the deceased was left, and that where he was killed; the time which elapsed between his removal from the cars and his death, as presenting a material question for their determination; and whether his faculties had so far recovered as to enable him to understand the danger of being on the track. *Ib.*

150. Evidence. How far the declarations of the conductor, made at the time of ejecting a passenger, may be considered in evidence upon the trial of an action against the company for such act — considered. *Hamilton v. New York Central R. R. Co.*, 51 N.Y., 100. 1872.

151. — Where a plaintiff has brought suit for damages sustained from having been pushed off one of defendant's cars while in motion, by a negro, who emerged from the car, and stated that he was in charge of the same; this declaration, unless brought to the knowledge of the defendant or its agents, who had charge of the train at the time, is insufficient to make the defendant liable for the acts of the negro as its servant. *Lindsay v. Central R. R. Co.*, 46 Ga., 447. 1872.

152. Exemplary damages. A corporation, by the malicious acts of its agents within the scope of their employment, may render itself liable to punitive damages; but this doctrine being capable of great abuse, the giving of it

in a charge to a jury in a case clearly not warranting its application, tends to mislead them; and where, in such case, the damages found are obviously exorbitant, a new trial should be granted. *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Shusser*, 19 Ohio St., 157. 1869.

153. — In an action against a railroad company for the misconduct of the conductor in expelling the plaintiff from the cars before he reaches the place to which he had purchased a ticket, the measure of damages is such sum as would compensate him for his actual loss by being put off the cars, and not vindictive damages or smart money; unless it appear that the conduct of the conductor was malicious, and his act authorized or sanctioned by the company. *Ib.*

154. — Unless the malice or wantonness of the agent be brought home directly to the principal, such action will be deemed an action *ex contractu*, although brought nominally in tort. *Ib.*

155. — Plaintiff paid his fare upon one of defendant's cars. The car stopping for some reason, he was transferred to another car. Upon his refusal to repay his fare he was expelled by the conductor, who honestly supposed that the fare had not been paid. No unnecessary force was used, and plaintiff sustained no material injury. *Held*, that the act of defendant's servant, although in good faith, yet being unlawful, rendered it liable for compensatory damages, including compensation for loss of time, the fare upon another car, and a suitable recompense for the injury done to plaintiff's feelings; but that exemplary damages were not proper. *Hamilton v. Third Avenue R. R. Co.*, 53 N.Y., 25. 1873.

156. — It is erroneous to instruct a jury, that in a proper case for exemplary damages, they should know that, in case the party recover less than one hundred dollars, he cannot recover his cost in the action. *C., C. & C. R. Co. v. Bartram*, 11 Ohio St., 457. 1860.

157. Freight trains. A railroad company which instructs its conductor not to allow any person to ride in any freight car is responsible for the act of one of its conductors in improperly putting a person off from a freight car while the train is in motion. *Holmes v. Wakefield*, 12 Allen (Mass.), 580. 1866.

158. — Where a railroad company regularly carries passengers by a freight train, it

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thereby becomes a common carrier of passengers by such freight train, and has no more right to expel a passenger therefrom without cause than from a regular passenger train. *Chicago and Alton R. R. Co. v. Flagg*, 43 Ill., 364. 1867.

159. Liability of the employer. In an action brought against a railroad company for trespass committed by a servant of the company, the complaint alleged that the plaintiff had paid his fare and was seated in the car, when he was assaulted and beaten and ejected from the car, by an employé of the company; that the duty and employment of said employé was to provide seats for passengers and exercise care for their comfort, and that he then was in the exercise of his duties at the time of the commission of the assault. *Held*, that the expulsion of the plaintiff from the car, where he lawfully was, if done without unnecessary violence, would give a right of action against the company, and as this state of facts might have been proved under the allegations of the complaint, a demurrer to the complaint was correctly overruled. *Evansville and Crawfordsville R. R. Co. v. Baum*, 26 Ind., 70. 1866.

160. — If the act of the servant was necessary to accomplish the purpose of his employment, and was intended for that purpose, then it was implied in the employment, and the master is liable, though the servant may have acted willfully and maliciously. *Id.*

161. — For a willful and malicious trespass of an employé, not commanded or ratified by the employer, but perpetrated to gratify the private malice of the servant, under mere color of discharging the duty which he has undertaken for his employer, no action will lie against such employer. *Id.*

162. — In putting a trespasser off of a train, it is not necessary to consult his personal convenience, but he should not be wantonly exposed to peril. *Great Western R. R. Co. v. Miller*, 19 Mich., 305. 1869.

163. — A conductor of a train is in a position similar to that of the master of a ship; and in expelling a passenger from a train he will be regarded as acting in the line of his employment. But it does not follow that the responsibility of the company is the same as the conductors. Where the agent acts wantonly or maliciously, the employer

does not stand in the same footing as the agent. *Id.*

164. — Where a conductor is instructed by his employer that he must put off from the cars, with as little force as may be necessary, any passenger who does not pay his fare or produce a transfer ticket, the company is liable to a passenger put off by the conductor, in case of nonpayment, for any abuse of authority, and for injuries resulting from any error of judgment or mistake of fact by the conductor, as well as for those which arise from negligence or reckless performance of his duty. *Hamilton v. Third Avenue R. R. Co.*, 13 Abbott's Pr., N. S. (N. Y.), 318, 1872; *Same v. Same*, 3 Jones and Spencer (N. Y.), 118, 1872.

165. — Where the conductor has been instructed by the company to demand of every passenger a certain fare, and to remove from the car all passengers refusing to pay the same; if the company has not the right to demand the required fare, it is liable for any force used upon the person of a passenger in an attempt to execute such order; if it has a right to the fare, and the conductor, acting in the performance of his duty, exceeds the degree of force necessary and proper to accomplish the purpose of removal, and injury results, the company is also liable. *Jackson v. Second Avenue R. R. Co.*, 47 N. Y., 274. 1872.

166. — In an action for damages for injuries sustained by a forcible ejection from a car while in motion, proof that the conductor ordered the plaintiff to get off, and accompanied such order with such a show or demonstration of force sufficient to impress him with the belief that it would be employed, and thereby compelling him to jump from the car, is equivalent to proof of the employment of actual force. *Kline v. Central Pacific R. R. Co.*, 39 Cal., 587. 1870.

167. Mistake. A person who has, by mistake, got on a passenger train, other than the one he intended to take passage upon, is, nevertheless, a passenger upon the train he is on, and the relation of passenger and carrier exists between him and the company. *Columbus, etc., R. R. Co. v. Powell*, 40 Ind., 37. 1872.

168. — The company may, in such a case, charge him for the distance it carries him, and is not bound to stop to allow him to get off, except at a regular station or stopping place. *Id.*

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169. — Where a conductor, under a mistake of facts, or of judgment, ejected a person from the car in which he was a passenger, which act was not justified by the passenger's misconduct, it was *held*, that the company was liable. *Higgins v. Waterliet Turnpike and R. R. Co.*, 46 N. Y., 23. 1871.

170. — In an action against a railroad company by a passenger to recover damages for injuries sustained by him, while traveling over its road, it is not competent for the defendant to exonerate itself, in whole or in part, by proving mistakes committed by its own agents. *Baltimore and Ohio R. R. Co. v. Blocher*, 27 Md., 277. 1867.

171. *Negligence.* The negligence of a conductor of a train of cars, in putting or assisting a person off the cars, is the negligence of the corporation owning or operating the road. *Columbus, etc., R. R. Co. v. Powell*, 40 Ind., 37. 1872.

172. — If the train is stopped at any other point than a station, or the passenger is put off without stopping, reasonable and proper diligence must be used in putting him off, and if informed of dimness of vision and feeble condition of the passenger, such care must be used as his case requires, to prevent injury. *Ib.*

173. — Whether the action of the conductor in putting a passenger off the train while it was moving slowly, amounted to negligence is a question for the jury. *Meyer v. Pacific R. R. Co.*, 40 Mo., 151. 1867.

174. — To eject a passenger from a railroad car while in motion, is so dangerous an act that it may justify as much resistance on the part of the passenger as to a direct attempt to take his life. *Sanford v. Eighth Avenue R. R. Co.*, 23 N. Y., 343, 1861; reversing *Same v. Same*, 7 Bosworth (N. Y.), 122. 1860.

175. — Where the passenger is liable to expulsion in a proper manner, for refusing to pay fare, his resistance to the attempt to expel him without stopping the car, is not concurrent negligence on his part. *Ib.*

176. — Where, in such a case, the principal is responsible for the act of his agent, he is, it *seems*, also responsible for any circumstances of aggravation which attended the wrong. *Ib.*

177. *Place of expulsion.* Under the special charter of the Jeffersonville R. R. Co.,

which is silent upon the subject, if there is lawful cause for the expulsion of a passenger from the cars, he may be expelled between stations. *Jeffersonville R. R. Co. v. Rogers*, 28 Ind., 1. 1867.

178. — Although a person who is ejected from a car elsewhere than at a station, for non-payment of fare, sustains an injury for which he may bring an action, yet, where there is no improper conduct on the part of the agents of the company, nor any peculiar circumstances to justify it, a thousand dollars will be held to be excessive damages for the act. *Chicago, Burlington and Quincy R. R. Co. v. Parks*, 18 Ill., 460. 1857.

179. — Where a passenger refuses to pay his fare, and informs the conductor that he will get off if he will stop the train, and when it stops, refuses to do so; *held*, that this does not authorize the conductor to forcibly expel him at a place other than a regular station. *Chicago and Northwestern R. R. Co. v. Peacock*, 48 Ill., 253. 1868.

180. — A passenger for refusal, to pay fare, may be ejected from the cars at any regular station, not elsewhere. *Chicago, Burlington and Quincy R. R. Co. v. Parks*, 18 Ill., 460, 1857; *Chicago and Alton R. R. Co. v. Roberts*, 40 ib., 503, 1866; see also *Illinois Central R. R. Co. v. Sutton*, 42 ib., 438, 1867; *Chicago and Northwestern R. R. Co. v. Peacock*, 48 ib., 253, 1868; *Illinois Central R. R. Co. v. Sutton*, 53 ib., 398. 1870.

181. *Pleadings.* Where a party is ejected from a car and brings an action of trespass, and alleges consequential damages caused by detention, the pleading will be held bad on demurrer. The action of trespass can only be brought for a direct injury. *Barnum v. Baltimore and Ohio R. R. Co.*, 5 W. Va., 10. 1871.

182. — Where a passenger sues for damages solely for his removal from a railway train, and not for the *manner* in which it is done, if a legal justification for his removal is shown, it is immaterial whether unnecessary force was used by the conductor in the removal. *Johnson v. Concord R. R. Co.*, 46 N. H., 213. 1865.

183. *Refusal to pay fare.* A railroad company is liable for injuries resulting from the negligence, violence or carelessness of its conductors in removing from the cars a passenger who refused to pay his fare or produce his

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ticket. *Pennsylvania R. R. Co. v. Vandiver*, 42 Penn. St., 365. 1862.

184. — Where such injury resulted in the death of the passenger, and there was evidence on the trial that the conductor forcibly removed the hands of the deceased from the car railing so that he fell on the track of the road, it was not error in the court below to refuse to instruct the jury "that under all the circumstances of the case, their verdict should be for the defendant." *Ib.*

185. — A passenger who, for refusal to pay fare, has been ejected from a car, at a place where there is no station, cannot, by climbing upon the train again before it starts, and tendering the fare, obtain a right to be carried by it. *O'Brien v. Boston and Worcester R. R. Co.*, 15 Gray (Mass.), 20. 1860.

186. — A regulation of a railroad company, that conductors shall eject passengers refusing to pay their fare, and not afterwards accept their fare if offered after the cars have stopped, is within the authority conferred upon such corporation by the Rev St., ch. 39, § 83. *Ib.*

187. Right of expulsion. A passenger may be removed from a train for improper conduct, provided the removal is not made in an unreasonable manner, or by the employment of unnecessary force. *Marquette v. Chicago and Northwestern R. R. Co.*, 33 Ia., 562. 1871.

188. — The removal of a passenger from one car to another while the train is moving at the rate of twenty-five miles an hour, is not negligent or wrongful *per se*, but the question is for the jury under all the facts of the case. *Ib.*

189. — So, too, the question whether unnecessary force was used, or used in an unreasonable manner, is a question of fact for the jury. *Ib.*

190. — A railway company may expel a passenger from its cars at a place other than a regular station, for the violation of any reasonable rule, other than that of nonpayment of fare. *Illinois Central R. R. Co. v. Whittemore*, 43 Ill., 420. 1867.

191. — The statute requiring conductors to remove from the cars all persons who refuse to pay the established fares, was intended to apply to all persons properly acting as conductors, without regard to the formal regularity of their appointment. *Hilliard v. Good*, 34, N. H., 230. 1856.

192. — The right of the managers of a railroad to remove from their cars a passenger who refuses to pay his fare, is controlled by the provisions of ch. 26, § 52, of the compiled statutes. They can only do so at one of their usual stopping places. *Stephen v. Smith*, 29 Vt., 160. 1857.

193. Rules and regulations. The regulations of passenger carriers, in relation to the conduct of passengers, are not by-laws of the corporation, but regulations whose validity depends not upon their lawfulness, but upon their being reasonable. *State v. Overton*, 4 Zabriskie (N. J.), 434. 1854.

194. Street railways. One who, having paid to the conductor of one car the full fare to his place of destination, and upon the car stopping short of such destination, gets off and enters another car of the same company, he is entitled to ride in the latter car without payment of further fare, unless he has neglected to obtain a transfer ticket, if so required by the rules of the company. *Hamilton v. Third Avenue R. R. Co.*, 3 Jones and Spencer (N. Y.), 118, 1872; *Same v. Same*, 13 Abbott's Pr., N. S. (N. Y.), 318, 1872.

195. Tender of fare. Whether a tender of legal tender notes before entering the train would be sufficient, where payment was required to be made in coin, is not decided, but after the passenger enters the train, and the contract of the carrier to transport him is in process of performance, it is no longer an open question, and the company is bound to accept legal tender notes. *Tarbell v. Central Pacific R. R. Co.*, 34 Cal., 616. 1868.

196. — An absolute strict tender is not necessary, but a willingness and readiness to pay the legal fare is sufficient. *Ib.*

197. — Where the plaintiff was ejected from the train at a point twelve miles from his place of destination, and five miles from the place of departure, it was held, that a verdict of \$500 was disproportionate, and a new trial was ordered, unless the plaintiff should accept a judgment of \$100. *Ib.*

198. — An offer to pay the fare to an employé on the train unauthorized to receive the same, is not an offer to the company, and in such case, does not entitle the person to a place on a freight train, as a passenger. *Cleveland, Columbus and Cincinnati R. R. Co. v. Bartram*, 11 Ohio St., 457. 1860.

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199. Tickets—commutation tickets. The plaintiff purchased of the defendant a commutation ticket, entitling him to ride in its cars within certain limits, for a certain length of time, upon certain conditions. One of the conditions was, that the ticket should be shown to the conductor on every passage, and if not shown when called for, that the regular fare should be paid. Upon one of his passages, the plaintiff had by mistake left his ticket at home, and was unable to show it when called for. *Held*, I. That the defendant had a right to demand of him the ordinary fare for the passage. II. That the conductor, on his refusal to pay the fare demanded, had a right under the rules of the company in such cases to eject him from the cars at the next station. *Downs v. New York and New Haven R. R. Co.*, 36 Conn., 287. 1869.

200.—The plaintiff purchased of the defendant a commutation ticket, which gave him the right to ride in the defendant's cars between the city of New York and the town of W., during the ensuing year, upon certain conditions. One of the conditions was, that the ticket should be shown to conductors when requested, or when required by the rules of the company. One of the company's rules required commuters to show their tickets to conductors when required, in the same manner as other passengers. At the time of purchasing the ticket, the plaintiff signed a receipt containing similar conditions. During the year, while the plaintiff was riding in the defendant's cars between New York and W., he was requested by the conductor to show his ticket. The plaintiff had his ticket upon his person, but was unable to find it at the time, and so informed the conductor. The conductor knew that the plaintiff was a commuter, and that the time covered by his ticket had not expired, but demanded of the plaintiff his fare for the trip, and on his refusal to pay it, expelled him from the train. *Held*, that the plaintiff was not bound to produce his ticket immediately when requested, but was entitled to a reasonable time to find it, and had the right to ride as long as there was any reasonable expectation of finding it during the trip; that under the circumstances, the production of his ticket by the plaintiff was the moest formality, and that, in the absence of an express stipulation in the contract that the plaintiff should pay

the fare of the passage unless the ticket should be produced, his failure to produce the ticket was not such a breach of the contract as to justify the defendant in rescinding it, and treating the plaintiff as a trespasser on the train; and that if the defendant had a right to eject the plaintiff from the train, that right could only be exercised at a regular station on the road; that any rule or regulation of the defendant which required or allowed such an act to be done between stations to a person in the condition of the plaintiff, was unreasonable and void. *Maples v. New York and New Haven R. R. Co.*, 38 Conn., 557. 1871.

201.—express trains. The conductor of an express train may lawfully stop the train and expel a passenger who holds a ticket to a station between the place where fare is demanded and the first station at which the train, by the published time tables, is to stop, if such passenger refuses to pay the fare which, in addition to the sum paid for his ticket, would entitle him to ride to such latter station. And this is so, notwithstanding the train may stop at the station for which the passenger has a ticket, if, at the time the fare is demanded, facts do not exist which call for its stoppage there. *Fink v. Albany and Susquehanna R. R. Co.*, 4 Lansing (N. Y.), 147. 1871.

202.—extra fare. When a passenger, before the departure of the train, sought to buy a ticket, but the office was closed, and then entered the train, and offered to pay his fare to the conductor, which was refused, and he was expelled from the train at a place other than a regular station; *held*, that the company was liable for the damages. *Illinois Central R. R. Co. v. Sutton*, 42 Ill., 438. 1867.

203.—A discrimination of five cents in favor of those who purchase their tickets before entering the cars, over those who pay after taking their seats, is a reasonable regulation, and a passenger who, having neglected to procure a ticket, shall refuse to pay the additional five cents, may lawfully be ejected from the cars. *Hilliard v. Gould*, 34 N. H., 230, 1856; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind., 1. 1867.

204.—Such a regulation, however, carries with it an obligation on the part of the company to afford an opportunity to passengers to purchase tickets, and unless such an opportunity is given, the discrimination cannot be made. *Jeffersonville R. R. Co. v. Rogers*, 28 Ind., 1. 1867.

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205. — Where a passenger who has been denied an opportunity to purchase a ticket is expelled from the cars because of his refusal to pay an increased rate of fare, the difference between the two rates of fare is not the measure of his damages. The act being wrongful, the company is responsible for its consequences. *Ib.*

206. — He may be entitled to exemplary damages by reason of the time place, and circumstances under which he has been expelled from the cars. *Same v. Same*, 38 ib., 116. 1871.

207. — Where a company has adopted a rule to charge ten cents extra for passengers who do not procure tickets before entering the cars, a conductor will not be warranted in taking the ordinary fare from a passenger and then ejecting him from the train for a refusal to pay the extra ten cents, and without returning the fare already received. *Du Laurens v. St. Paul and Pacific R. R. Co.*, 15 Minn., 49. 1870.

208. — Where the published rates of fare from N. to N. L. were fifty cents, but the same regulation gave notice that if a ticket was not procured before entering the cars the rates would be fifty-five cents, and A., without a ticket, took a seat in one of the cars at N., and when called upon by the conductor after the cars left for N. L., offered to pay fifty cents, and refused to pay any more, whereupon the conductor ejected him from the cars. Upon the trial of an action of trespass, brought to recover damages for the injury sustained by A. in such removal, he claimed to have proved that he went to defendant's ticket office where tickets were usually sold, at a reasonable time before the train left for N. L., to procure a ticket; that said office was closed and there was no one there from whom he could procure a ticket then or afterward till the departure of the cars, and that he informed the conductor of these facts at the time that his fare was demanded; and it was admitted that said regulation of the defendant was a reasonable one. *Held*: I. That as a common carrier, the defendant was under no obligation to furnish tickets or carry passengers from N. to N. L. for less than fifty-five cents each. II. That plaintiff's claim to such passage for fifty cents rested entirely on the assumed engagement of the defendant to fur-

nish tickets, or to carry passengers between such points at fifty cents each. III. That such regulation was not a contract but a mere proposal, which might be withdrawn at pleasure. IV. That the closing of the ticket office was a withdrawal of such proposal. V. That such proposal being withdrawn, defendant was bound to carry plaintiff for fifty-five cents, but not otherwise. VI. That upon plaintiff's refusal to pay such sum, the conductor had a right to remove him from the cars. *Crocker v. New London, Willimantic and Palmer R. R. Co.*, 24 Conn., 249. 1855.

209. — Where, on such trial, the plaintiff claimed that, for the purpose of expelling plaintiff from said car, the conductor called to his assistance, servants of the defendant, and in the effort to remove him, a struggle ensued, before the determination of which, one of said servants intentionally kicked him in the face, and the defendant claimed that such kick, if given, was without the knowledge, and without any authority from the conductor or any other agent of the corporation, and the court charged the jury, that upon the facts as claimed by the plaintiff, the defendant was liable in that action; it was *held* that this was a misdirection. *Ib.*

210. — Where the court instructed the jury that, if the plaintiff was wrongfully removed from said car, he had a right to reënter it, and if in his endeavor to do so, he received the injury complained of, he was entitled to recover, unless there was, on his part, a want of reasonable care, which produced, or essentially contributed to such injury; but if such removal was lawful, or if, in his attempting to reënter it, there was, on the part of the plaintiff, a want of reasonable care or prudence, which produced or contributed to such injury, he was not entitled to recover, it was *held* that such instruction was correct. *Ib.*

211. — mistake of employes. A passenger gave to the conductor his ticket from C. to N., but the conductor gave him no check in return; before reaching N., there was a change of conductors, and the new conductor expelled the passenger for want of a ticket or check. *Held*, that the railroad company was liable in damages to the passenger, and that the supreme court would not disturb a verdict for \$500 in such a case, on the ground that the damages were excessive. *Pittsburgh, Cincin-*

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nati and St. Louis R. R. Co. v. Hennigh, 39 Ind., 509. 1872.

212. — **pass.** Where a passenger offered a worthless piece of paper, claiming it to be a pass, and refused to pay fare or leave the train; the servants of the company had a right to remove him from the train at a regular station, and to use the necessary force for the purpose. *Chicago, Rock Island and Pacific R. R. Co. v. Herring*, 57 Ill., 59. 1870.

213. — **passenger stopping over.** Plaintiff was a passenger on defendant's cars, under a contract to carry him from Charlotte, N. C., to Augusta, Ga., with the privilege of stopping at Columbia. His ticket was a through ticket from New York to Savannah, with coupons for the different roads — for defendant's road there being two, one from Charlotte to Columbia, and one from Columbia to Augusta. On the passage from Charlotte to Columbia, W., the conductor on the train detached both coupons, and gave plaintiff a conductor's check, which by the rules of the company and the general usage of railways, was good only for that trip. Plaintiff stopped at Columbia, and the next day took the train for Augusta, in charge of J., another conductor. On this train his ticket was again demanded, and on his exhibiting the conductor's check, and his ticket without the coupon to Augusta, was informed by J. that they did not answer, and that he must either pay the fare to Augusta or leave the train. He failed to pay, and was ejected from the train. *Held*, that the act of J. in ejecting plaintiff from the train, was wrongful, and that defendant was liable in damages therefor. *Palmer v. Charlotte, etc., R. R. Co.*, 3 So. Car., N. S., 580. 1872.

214. — Where a passenger buys a through ticket, which the conductor takes up and delivers a check marked, "good for this day and train only," the passenger has no right to get off at an intermediate station, and travel to his place of destination by a subsequent train without payment of fare. And upon refusal to pay, he may be expelled at any point. The conductor is not bound to expel him at a station. *McClure v. Philadelphia, Wilmington, etc., R. R. Co.*, 34 Md., 532. 1871.

215. — Where a passenger purchases a ticket and enters a railroad train, and after the train starts upon the road, he gives up his

ticket to the conductor, he cannot, at any intermediate station, by virtue of his subsisting contract, leave such train while in the reasonable performance of the contract, and claim a seat upon another train. *Cleveland, Columbus and Cincinnati R. R. Co. v. Bartram*, 11 Ohio St., 457. 1860.

216. — **punched ticket.** Where a passenger attempted to travel upon a train, offering a ticket that was void by reason of having a hole punched in it, and was ejected from the cars three or four miles from a station, it was *held*, that the company had no right to eject him except at a regular station, but that \$1,000 damages for such act was excessive, and a verdict for that amount was set aside. *Terre Haute, Alton and St. Louis R. R. Co. v. Vanatta*, 21 Ill., 188, 1859; see *Chicago and Northwestern R. R. Co. v. Peacock*, 48 Ib., 253, 1868.

217. — A railway company owned and operated two tracks from S. to R., one of which was longer than the other, and the fare upon the longer route was forty-five cents more than upon the other. A passenger, having purchased a ticket for the short route, insisted upon riding upon the long route without paying the extra fare; the conductor punched his ticket, but put him off at the next station. *Held*, that the ticket was not destroyed by being punched, and that the conductor had a right to expel the passenger upon his refusal to pay the fare. *Adwin v. New York Central, etc., R. R. Co.*, 60 Barbour (N. Y.), 590. 1871.

218. — **rules and regulations.** A regulation made by a railroad company, requiring passengers to exhibit their tickets whenever requested by the conductor, and directing the expulsion from its cars of those who should refuse to do so, is a reasonable and proper one. *Hibbard v. New York and Erie R. R. Co.*, 15 N. Y., 455. 1857.

219. — *It seems*, that a railroad company has the right to make a resolution requiring all passengers to purchase tickets before taking passage in a caboose car attached to a freight train, and to enforce this rule by ejecting all persons not having tickets. But if this should be so improperly done as to endanger life or person, as while the cars are in motion, the company would be liable. *Law v. Illinois Central R. R. Co.*, 32 Ia., 534. 1871.

220. — Where a passenger purchases a

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railway ticket for passage to a station on a railway line, in the absence of express stipulations he becomes entitled to be carried over the railroad to that station, in a reasonable time, and agreeably to reasonable rules and regulations of the corporation. *Johnson v. Concord R. R. Co.*, 46 N. H., 213. 1865.

221. — A rule established by the C. R. R. Co., a carrier of passengers between C. and N., in New Hampshire, that tickets over its road should be dated on the day of their sale, and should only entitle the holder to passage on that day, provided, that joint tickets should be good for such further time as might be necessary to enable the holders, by the regulations of the road, to reach the station to which such tickets were sold, is not unreasonable. *Id.*

222. — Where the plaintiff, nearly a year after the establishment of this rule, purchased a ticket from Chicago to Boston by way of that railway, voluntarily stopped nearly four months at M., an intermediate station on the C. railroad: *held*, that he was not afterwards entitled to a passage on such ticket from M. to Boston; also that it was not necessary that notice of this rule should be brought home to plaintiff, even if, prior to its establishment, a usage known to plaintiff had existed to allow such passengers to stop over at intermediate stations; a passenger should make inquiry as to the regulations of the company. *Id.*

223. — Evidence showing a violation of this rule by the conductors of the defendant's trains is incompetent, unless these instances are brought home to the knowledge of the governing officers of the corporation. *Id.*

224. Trespassers. If a boy sixteen years of age only, leaps from a railway car while in motion, in obedience to the command of the conductor, accompanied by a show of force, the court cannot say judicially that the act was voluntary, but should leave it for the jury to say whether the act was not the result of compulsion. *Kline v. Central Pacific R. R. Co.*, 37 Cal., 400. 1869.

225. — Where a person who has got upon a train in order to ride without payment of fare is put off, he must be ejected prudently and in such a manner as not to endanger his personal safety. If such prudence is not exercised, the company cannot exonerate itself on the ground that the wrong was mutual. *Id.*

226. — If, in such case, the conductor sees

the person attempting to get on the train, he may use force to prevent him, and no liability will result from the injury, but if the person is once fairly in the car, care must be exercised in his removal. *Id.*

227. — The rule that the plaintiff cannot recover where both are in the wrong, is confined to cases where the plaintiff's wrong or negligence has immediately or proximately contributed to the result. *Id.*

228. — It is within the scope of the authority of a conductor to remove persons from the cars who are wrongfully there, but if he does not exercise care and caution, or acts maliciously, and injury results, the company is liable. *Id.*

VIII. INJURIES CAUSING DEATH.

(See subdivision IX, *post* 425, for damages in cases of death of passengers; see also INJURIES TO PERSONS GENERALLY, for a number of cases in which the question is examined.)

229. Charter. An action for damages for causing the death of a person will not lie, since the passage of the acts of the legislature of 1847 and 1849, giving a right of action to the next of kin; in the absence of any clause in the defendant's charter subjecting the corporation to the operation of those acts, as a part of the condition of its being, the defendant being engaged in business in a foreign country. *Crowley v. Panama R. R. Co.*, 30 Barbour (N. Y.), 99. 1859.

230. Child. Only the persons mentioned in the statute can recover for the damages resulting from the death of a person occasioned by negligence or violence. *Coakley v. North Pennsylvania R. R. Co.*, 5 Penn. Law Jour. Rep. 444. 1858.

231. — In an action by the father for the death of his child, he should allege his cause of action as derived from the deceased. Act March 18, 1855. *Earhart v. New Orleans and Carrollton R. R. Co.*, 17 La. An., 243. 1865.

232. Damages. A recovery may be had in case of death caused by negligence without any proof of actual damages to the next of kin. *Keller v. New York Central R. R. Co.*, 2 Abbott's Ct. of Ap. Dec. (N. Y.), 480. 1861; see also *Dickens v. Same*, 1 ib., 504. 1864.

233. — Under the statute of Illinois, providing for an action in favor of the widow and next of kin, in case of the death of a person

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from the wrongful act, neglect, or default of another, it is not necessary that the widow and next of kin should have had a legal claim for support on the deceased. *Railroad Co. v. Barron*, 5 Wallace, 90, 1866; *Barron v. Illinois Central R. R. Co.*, 1 Bissell (U. S. C. C.), 412, 1863; *Same v. Same*, ib., 453, 1864.

234. — The part of the act of 1853, relating to railroads, which fixes the minimum of damages to be recovered for the loss of life of a passenger, by reason of negligence in the management of the road, is not penal but remedial. *Lamphear v. Buckingham*, 33 Conn., 237. 1866.

235. — Therefore, where an action was brought by an administrator against the trustees of a railroad, for the loss of the life of the intestate by reason of negligence, the superior court, on a hearing in damages, after demurrer overruled, found as a fact that the defendants were not guilty of any negligence, it was held, nevertheless, that the plaintiff was entitled to recover the minimum sum of \$1,000 fixed by the statute. *Id.*

236. — In an action under this statute heard in damages after the overruling of a demurrer, it was held, that the defendant might show the want of ordinary care in the deceased and the exercise of due care on its own part, to reduce the damages to the lowest sum fixed by the statute. *Carey v. Day*, 36 ib., 152. 1869.

237. — Under this statute, the ground of the damages was not the loss to such relatives by the death, but the injury to the deceased. *Goodsell v. Hartford and New Haven R. R. Co.*, 33 Conn., 51. 1865.

238. — This act, whether viewed as giving a new action, or as limiting or regulating an old one, takes away the right of an executor or administrator to sue for the injuries to his intestate, or for the injuries and death, for the benefit of the estate generally. *Andrews v. Hartford and New Haven R. R. Co.*, 34 Conn., 57. 1867.

239. — As to pecuniary injuries sustained by the next of kin in such cases, the statute has set no bounds to the sources thereof; and they may be such as arise from the loss of personal care, intellectual culture, or moral training, which would have been received had the deceased lived. *McIntyre v. New York Central R. R. Co.*, 37 N. Y., 287, 1867; *Same v.*

Same, 35 Howard's Pr. (N. Y.), 36, 1867; *Same v. Same*, 47 Barbour (N. Y.), 515. 1867.

240. Husband and wife. The husband cannot, under R. S. 292, bring an action for the death of his wife. *Green v. Hudson River R. R. Co.*, 2 Abbott's Ct. of Ap. Dec. (N. Y.), 277. 1866.

241. — The act of 1853 (Rev. of 1866, p. 202), provides that where the life of a passenger is lost by reason of the negligence of a railroad company, the company shall be liable to pay damages, not over \$5,000 nor less than \$1,000, to the use of the executor or administrator, to be recovered by him in an action on the statute, for the benefit of the husband or widow and heirs of the deceased person; if children, one-half to them, and if no children, the whole to the husband or widow, and if no husband or widow, to the heirs-at-law. A husband and wife, having no children, were injured at the same time by the negligence of a railroad company, and both died, but the husband died a little before the wife. Held, that the right to the damages vested absolutely in the wife, and on her death, went to her heirs and not the heirs of the husband. *Waldo v. Goodsell*, 33 Conn., 432. 1866.

242. — Under existing provisions of the statutes of New York, a husband cannot maintain an action for the instantaneous killing of his wife through the negligence of another. *Green v. Hudson River R. R. Co.*, 2 Keyes (N. Y.), 294, 1866; *Same v. Same*, 28 Barbour (N. Y.), 9, 1858; *Same v. Same*, 31 ib., 260, 1859; and *Same v. Same*, 32 ib., 25, 1860; see *Same v. Same*, 16 Howard's Pr. (N. Y.), 230, 1858.

243. Jurisdiction. In a suit for damages for the killing of a person by a railroad, under the act of 1850, the action should be brought in the county where the principal office of the corporation is kept. *Southwestern R. R. Co. v. Paulk*, 24 Ga., 356. 1858.

244. — The statutes of New York, passed in 1847 and 1849, giving an action for damages to the families of persons killed by the wrongful act, neglect or default of others, have no extra territorial application, and do not authorize a suit there for an act done out of the state. *Vanderwerker v. New York and New Haven R. R. Co.*, 6 Abbott's Pr. (N. Y.), 239, 1857; *Vanderwerker v. Same*, 27 Barbour (N. Y.), 244, 1857; but see in conflict with this, *Beach v. Bay State Co.*, ib., 248, 1838.

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245. — The statute, giving a cause of action to the representatives of a deceased person in case of the death of such person from negligence, will not apply to cases where the act causing death occurred beyond the limits of the state. *Whitford v. Panama R. R. Co.*, 3 Bosworth (N. Y.), 67. 1858.

246. — The statute giving an action for damages resulting from a death, caused by culpable negligence, does not apply where the injury is not committed in this state. *Whitford v. Panama R. R. Co.*, 23 N. Y., 465. 1861.

247. — It does not vary the case that the negligence was that of a corporation chartered by this state for the purpose of operating a railroad in a foreign country, and which made the contract in this state for the conveyance of the injured party over such road. *Ib.*

248. Non residence. Section 784, 2 G. & H., 330, was intended to provide a remedy, not only for the resident citizens of Indiana, but for the citizens of the several states while passing through or residing within this state. Section 2, Article 4, of the Constitution of the United States, would secure the benefit of this section to citizens of other states. *Jeffersonville, etc., R. R. Co. v. Hendricks*, 41 Ind., 48. 1872.

249. — The statute (Gen. Statutes, tit. 7, § 544, gives to the relatives of a passenger killed by the negligence of a railroad company, a right to recover damages against the company by a suit instituted by an administrator. Where a person so killed in this state was domiciled in another state, and had no property in this state, it was *held*, that his administrator appointed in the state where he was domiciled was entitled as a matter of right to an ancillary administration in this state, for the purpose of prosecuting the suit here, and that it was enough for the court of probate in granting such administration, to be satisfied that there was an apparent claim, and a *bona fide* intention to pursue it. *Hartford and New Haven R. R. Co. v. Andrews*, 36 Conn., 213. 1869.

250. — Where an injury occurs in Alabama, causing death, the action must be governed by the laws of that state. A recovery in such case cannot be had upon the statutes of Tennessee. *Nashville and Chattanooga R. R. Co. v. Eakin*, 6 Coldwell (Tenn.), 582. 1869.

251. Pleading. Under the statute of Illinois of Feb. 12, 1853, it is not necessary that the declaration should aver the manner in

which the next of kin have sustained pecuniary loss. *Barron v. Illinois Central R. R. Co.*, 1 Bissell (U. S. C. C.), 412. 1863.

252. Settlement. Where it is shown that the defendant settled with the deceased, in his lifetime, and paid him the amount of his claim on account of the injury, this will bar the action of his administrator. *Dibble v. New York and Erie R. R. Co.*, 25 Barbour (N. Y.), 183 1857.

253. — Therefore, by a settlement with the person injured, and payment before death ensues, all the consequences of the injury, past and future, are included. *Ib.*

254. Statute. Under § 83 of the act relating to civil actions (Rev. Stat. tit. 1, ch. 6, § 33), an action may be brought by an administrator for an injury to his intestate, which resulted in death. *Soule v. New York and New Haven R. R. Co.*, 24 Conn., 575. 1856.

IX. DAMAGES.

1. Death.

255. Excessive Damages. Where the person killed was a woman forty-eight years of age, a widow with three children, all of whom were over twenty-one years of age, and had left her; who was capable of earning a dollar a day by her labor, but who left but little property, and died intestate; and the jury in an action brought by her administrator, for the benefit of the next of kin, found a verdict in favor of the plaintiff for \$3,500: *held*, that the damages were excessive; and a new trial was ordered, unless the plaintiff would consent to remit \$2,000 of the damages, reducing the verdict to \$1,500. *McIntyre v. New York Central R. R. Co.*, 47 Barbour (N. Y.), 515, 1867; see *Same v. Same*, 43 ib., 532, 1865.

256. — Damages in the sum of \$2,333.35 were held not to be excessive in this case for an injury to a person resulting in death. *Jeffersonville, etc. R. R. Co. v. Riley*, 39 Ind., 568. 1872.

257. Expectancy of life. On the question of damages, the plaintiff might ask a witness "from his knowledge of decedent's habits, age, health and physical condition, how long he would have been useful to his family."

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Pennsylvania R. R. Co. v. Henderson, 51 Penn. St., 315. 1865.

258. **Husband and wife.** In an action by a father, as administrator of his wife, who was killed by negligence of a railway company, leaving children, the value of her earnings and the probability that the children would have received an estate increased by reason of such earnings on the death and intestacy of their father, cannot be considered in estimating damages. *Tilley v. Hudson River R. R. Co.*, 24 N. Y., 471, 1862; *Same v. Same*, 23 Howard's Pr. (N. Y.), 363. 1862.

359. — But the injury to the children, in the loss of maternal nurture and education, is a pecuniary one within the intent of the statute. *Ib.*

260. — It seems that in such a case, evidence of the habitual occupation and employment of the deceased is admissible, to show her general capacity and relation to the family. *Ib.*

261. — The nurture, instruction, and physical and mental training, which the mother gave to the children may be considered in estimating the damages. *Same v. Same*, 29 N. Y., 252. 1864.

262. — There is no sufficient legal reason for limiting the damages, in such action, to the minority of the children, if the jury are legally persuaded they will continue after that age. *Ib.*

263. — The court properly refused to charge that "if the deceased was largely indebted at the time of his death, his wife could have no pecuniary interest in his life until his debts were paid; and that the jury must, if they can, fix a period in his life, if he lived, in which he would have acquired property beyond his debts." *Pennsylvania R. R. Co. v. Henderson*, 51 Penn. St., 315. 1865.

264. — The right of action of the widow is different from that which would have accrued to the decedent if he had survived the injury, and excluded all questions of exemplary damages, the damages being simply compensatory for the loss sustained by the surviving family. *Ib.*

265. **Measure of damages.** Where a suit is brought by a widow, for the homicide of her husband, under the § 2920 of Irwin's Code, and there is no fault proven on the part of the deceased, the rule to be adopted for estimating

the damages, is: the pecuniary damages to the wife from the homicide, to be ascertained by inquiring what would be a reasonable support according to the circumstances in life of the husband, as they existed at his death, and as they may be reasonably expected to exist, in view of his character, habits, occupation and prospects in life; and when the annual money value of that support has been found, to give, as damages, its present worth, according to the expectation of the life of the deceased, as ascertained by the mortuary tables of well established reputation. *Macon and Western R. R. Co. v. Johnson*, 38 Ga., 409. 1868.

266. — In an action for damages for the loss of a life through the negligence of a railway company, the court instructed the jury that they might compute the damages by the probable accumulations of a man of the age, habits, health and pursuits of the deceased, during what would have probably been his lifetime; and added that if the jury could find no better rule, they were at liberty to adopt it. *Held*, that there was no error in this direction. *Pennsylvania R. R. Co. v. McCloskey's Adm'r*, 23 Penn. St., 526. 1854.

267. — The jury must, in such cases, place a money value on the life of an individual, in the same manner that in other cases they estimate the value of health and reputation. The law can furnish no definite measure of damages that are essentially indefinite. *Ib.*

268. — It is erroneous to tell the jury the rule as to the measure of damages, and at the same time to inform them that if they can find a better one, they are at liberty to adopt it. *Overruling, Ib.*; *Pennsylvania R. R. Co. v. Butler*, 57 Penn. St., 335, 1868; *Same v. Books*, *ib.*, 339.

269. — The proper measure of damages is the pecuniary loss suffered by the parties entitled to the sum to be recovered, without anything for distress of mind; and that loss is what the deceased would probably have earned by his intellectual and bodily labor during the residue of his life, which would have gone for the benefit of his children, taking into consideration his age, ability and disposition to labor, and his habits of living and expenditure. *Ib.*

270. — The damages must depend on the facts and circumstances of each particular case, and the result must be left mainly to the

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sound sense and deliberate judgment of the jury. *Railroad Co. v. Barron*, 5 Wallace, 90. 1866.

271. — The value of the services of the deceased, to her next of kin, is a question for the jury, and the jury is not limited to nominal damages. *McIntyre v. New York Central R. R. Co.*, 43 Barbour (N. Y.), 532, 1865; see *Same v. Same*, 47 ib., 515, 1867.

272. — The damages to be recovered by the surviving relatives for an injury resulting in death are confined to such as are capable of a pecuniary estimate; nothing is to be allowed for the sufferings of the injured party, or the mental sufferings of the survivors. It is error to tell the jury that the question of damages is one entirely for them. *Pennsylvania R. R. Co. v. Zebe*, 33 Penn. St., 318, 1858; *Pennsylvania R. R. Co. v. Vandever*, 36 Penn. St., 298, 1860; *Coakley v. North Pennsylvania R. R. Co.*, 5 Penn. Law Jour. Rep., 444, 1858.

273. **Minors.** In case of the loss of a minor son, the measure of damages is the pecuniary value of his services during his minority. *Pennsylvania R. R. Co. v. Zebe*, 33 Penn. St., 318. 1858.

2. Other damages.

274. **Drunkards.** In an action by a passenger for damages on account of a personal injury, it is proper for the defendant to show that the plaintiff was an habitual drunkard. This evidence has a direct bearing upon the question of compensatory damages. *Cleveland and Pittsburgh R. R. Co. v. Sutherland*, 19 Ohio St., 151. 1869.

275. **Excessive damages.** Five thousand dollars were held to be excessive damages for an injury to a passenger, where no bones were broken and the injury was only muscular, especially as there were some signs of feigning lameness. *Chicago, Rock Island and Pacific R. R. Co. v. McAra*, 52 Ill., 296. 1869.

276. — Where, by reason of a collision which occurred upon the defendant's road, the plaintiff, who was a passenger at the time, had his leg broken, between the knee and the ankle, and he received some flesh wounds upon the head, and was in consequence confined to his house about five months, and was obliged to go on crutches three or four months afterwards, and the injured leg was left somewhat shorter than the other, but it appeared

that at the time of the trial the muscles were well developed, and the plaintiff was restored to his usual health; it was *held*, that a verdict for \$6,000 damages was excessive; and a new trial was ordered, unless the plaintiff would stipulate to reduce the verdict to \$4,000. *Clapp v. Hudson River R. R. Co.*, 19 Barbour (N. Y.), 461. 1854.

277. — Where the jury, in an action for personal injuries occasioned by negligence, found, upon conflicting evidence, that the plaintiff was permanently injured in his spinal cord: *held*, that the court should not overrule them; and that if they were correct in that finding, a verdict in favor of the plaintiff for \$4,000 was not excessive. *Reed v. New York Central R. R. Co.*, 56 Barbour (N. Y.), 493. 1868.

278. **Exemplary damages.** Railway companies are liable to exemplary damages for tortious acts of their agents or servants done within the scope of their employment, in all cases where individuals, acting for themselves, if guilty of like tortious acts, would be liable to such damages. *Atlantic and Great Western R. R. Co. v. Dunn*, 19 Ohio St., 162. 1869.

279. — In actions against common carriers for neglect of duty, where the neglect is clearly unattended with any circumstances of insult, of aggravation of feelings, of injury to the person or his property, or of bodily or mental suffering, the jury will not be justified in finding exemplary damages. *Southern R. R. Co. v. Kendrick*, 40 Miss., 374. 1866.

280. — Where there is gross neglect or carelessness or want of skill on the part of the employés of the company, the jury may assess the damages in such an amount as they deem the circumstances of the case will justify. *Varillat v. New Orleans and Carrollton R. R. Co.*, 10 La. An., 88, 1855; *Kentucky Central R. R. Co. v. Dills*, 4 Bush. (Ky.), 593, 1868.

281. — But where there is no willful fault on the part of the company or its employés, exemplary damages cannot be awarded. *Ib.*

282. — Where an injury occurs to a passenger through the negligence of an employé, and the railroad company has employed competent agents and adopted all needful rules and regulations, the passenger cannot recover exemplary damages. *Ackerson v. Erie R. R. Co.*, 3 Vroom (N. J.), 254, 1867; *Porter v. Same*, ib., 261, 1867.

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283. — The jury can only give compensatory damages for the injury, and cannot anything by way of punishing the defendant. *Seymour v. Chicago, Burlington and Quincy R. R. Co.*, 3 Bissell (U. S. C. C.), 43. 1871.

284. — The jury may, in their discretion, give exemplary damages where a personal injury has been caused by the gross carelessness of a railway company in the management of its trains. *Hopkins v. Atlantic and St. Lawrence R. R. Co.*, 36 N. H., 9, 1857. *Taylor v. Grand Trunk R. R. Co.*, 48 ib., 305, 1869.

285. — On a rainy day, when the track was slippery, defendant's engineer, in charge of a freight train, uncoupled two cars loaded with stone, while standing on a side track, upon a downward grade; and in consequence of such uncoupling, and of neglect to block the wheels, or to turn the switch, two cars collided with an approaching passenger train; and plaintiff's injuries were caused (without fault on his part) by his jumping from the train to avoid the effects of the collision. Held, that this was not a case for punitive damages. *Spicer v. Chicago and Northwestern R. R. Co.*, 29 Wis., 580. 1872.

286. — Where exemplary damages are to be given, the condition and circumstances of the defendant may be material. What would be sufficient damages, by way of example, for a day laborer without means, would be nothing by way of punishment or example for a wealthy corporation. *Belknap v. Boston and Maine R. R. Co.*, 49 N. H., 358. 1870.

287. Husband and wife. In an action brought by a married woman to recover damages for personal injuries caused by the wrongful act of another, unless she is carrying on a trade or business, or performing labor or services on her separate account, she is not entitled to recover consequential damages resulting from her inability to labor. Her services and earnings belong to her husband. *Filer v. New York Central R. R. Co.*, 49 N. Y., 47. 1872.

288. Measure of damages. The damages for negligence are to be measured by the same rule to artificial persons as to natural persons. *Pittsburgh, Alleghany and Manchester R. R. Co. v. Donahue*, 70 Penn. St., 119. 1871.

289. — In estimating damages unless there is malice or willfulness, the jury should allow such reasonable sum as will compensate the

plaintiff, and no more. *Hill v. New Orleans, Opelousas and Great Western R. R. Co.*, 11 La. An., 292. 1856.

290. — In an action by the person injured by the negligence of a railway company, the jury may not only give such damages as he has already sustained, but also such damages as he will probably sustain in future, and they may also allow him for his pain and suffering. *Pittsburgh, Allegheny and Manchester R. R. Co. v. Donahue*, 70 Penn. St., 119, 1871; *Holyoke v. Grand Trunk R. R. Co.*, 48 N. H., 541, 1869.

291. — Damages may be assessed without calculating altogether on the pecuniary loss, or privation of pecuniary gain to the party. Civil Code, 1928. *Choppin v. New Orleans and Carrollton R. R. Co.*, 17 La. An., 19. 1865.

292. — In such an action, evidence of the number of the plaintiff's family, his habits, industry and economy is inadmissible. *Pennsylvania R. R. Co. v. Books*, 57 Penn. St., 339. 1868; *Same v. Allen*, 53 ib., 276, 1866; but see contra *Winters v. Hannibal and St. Joseph R. R. Co.*, 39 Mo., 468, 1867.

293. — In a suit by the party injured, the damages may include a reasonable compensation for suffering, expense of medical attendance and loss of time from confinement; but unless the injury has been wantonly inflicted, the damages must be strictly compensatory. *Pennsylvania R. R. Co. v. Books*, 57 Penn. St., 339, 1868; *Same v. Allen*, 53 ib., 276, 1866; *Holyoke v. Grand Trunk R. R. Co.*, 48 N. H., 541, 1869; *Brignoli v. Chicago and Great Eastern R. R. Co.*, 4 Daly (N. Y.), 182, 1871; *Morse v. Auburn and Syracuse R. R. Co.*, 10 Barbour (N. Y.), 621, 1851.

294. — Damages for bodily pain and suffering, in such cases are not exemplary or punitive in their character, in any strict or proper sense of those terms. *Ib.*

295. — It was held proper to charge the jury that "the law is that the plaintiff is only entitled to recover the pecuniary value of the injuries sustained, and so we lay it down to you. In its application to the question of damages for the physical pain suffered by the plaintiff, you must exercise your own discretion, governed by your own sense of justice and right, taking care not to indulge in your imaginations or sympathies so as to be led into an assessment of damages that would be

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unjust and oppressive." *Pennsylvania R. R. Co. v. Allen*, 53 Penn. St., 276. 1866.

296. — The plaintiff is entitled to receive as damages, one compensation for all injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. *Hol-yoke and Grand Trunk R. R. Co.*, 48 N. H., 541. 1869.

297. — Plaintiff is to have a reasonable satisfaction for loss of both bodily and mental powers, or for actual suffering both of the body and mind, which are the immediate and necessary consequences of the injury. *Ib.*

298. — Plaintiff will not be entitled to special damages on account of his particular calling or profession. *Ib.*

299. — The plaintiff may show his condition and situation in life and that of his family, to enable the jury to estimate the amount of damages. *Winters v. Hannibal and St. Joseph R. R. Co.*, 39 Mo., 468. 1867.

300. Mental injuries. In estimating the damages, the jury may consider whether the mental faculties of the plaintiff were impaired by the accident, and this is a legitimate subject of inquiry without reference to the question whether the act was willfully done. *Toledo, Wabash and Western R. R. Co. v. Baddeley*, 54 Ill., 19. 1870.

301. Minors. Where a child is injured by negligence of a railway company, the parent may recover for the loss of service for the remainder of the period of minority; should the disability continue beyond that period, the child may recover for such further loss. *Traver v. Eighth Avenue R. R. Co.*, 6 Abbott's Pr., N. S. (N. Y.), 46. 1867.

302. — A boy, eight years old, being injured while a passenger, the parent's damages are not confined to the loss of his services down to the trial, but include all such prospective loss as must necessarily follow from the injury. *Drew v. Sixth Avenue R. R. Co.*, 26 N. Y., 49. 1862.

303. Statute. The plaintiff purchased from the defendant, a New York corporation, at a station within the state of New York, a passenger's ticket thence to the city of New York, and having taken passage in its cars to be carried thither, received injuries upon a portion of the road situated in the state of Pennsylvania, through the negligence of the defendant's servants. Held, that the amount

of damages for such injuries, recoverable by him, was not affected by a statute of Pennsylvania limiting the amount of recovery in similar cases. *Dyke v. Erie R. R. Co.*, 45 N. Y., 113. 1871.

X. GRATUITOUS PASSENGERS.

304. Contracts limiting liability. A railroad company cannot, by contract, exempt itself from liability to a passenger for damage resulting from its own willful misconduct, or recklessness, which is equivalent thereto. *Perkins v. New York Central R. R. Co.*, 24 N. Y., 196. 1862.

305. — But in respect to a gratuitous passenger, it may contract for exemption from liability for any degree of negligence in its servants, other than the neglect of its board of directors. *Ib.*

306. — It is immaterial whether the negligence of the agents be slight or gross. The supposed distinction between different degrees of negligence, is illusory and impracticable. *Wells v. New York Central R. R. Co.*, 24 N. Y., 181, 1862; reversing *Same v. Same*, 26 Barbour (N. Y.), 641. 1858.

307. — A passenger who knowingly receives a free ticket with an indorsement of such contract upon it, will be bound by the terms of such contract, and cannot recover for injuries sustained from the cause specified. *Kinney v. Central R. R. Co.*, 3 Vroom (N. J.), 407, 1868; *Same v. Same*, 5 ib., 513, 1869.

308. — The use of a free pass, with a notice limiting the liability of the carrier endorsed upon the back of it, is an assent to the condition upon the part of the passenger. Such condition is binding upon him, but will not exonerate the carrier from the effects of gross negligence. *Illinois Central R. R. Co. v. Read*, 87 Ill., 484, 1865; *Indiana Central R. Co. v. Mundy*, 21 Ind., 48, 1863.

309. — Public policy forbids that a carrier should be allowed to contract for exemption from liability for damages caused by the negligence, willful default, or tort, of himself or his servants; and this rule applies also where he undertakes to transport passengers under "free tickets," containing an express stipulation on the part of the passenger, that, "in consideration thereof, he assumes all risk of accidents, and expressly agrees that the car-

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rier shall not be liable under any circumstances, whether of the negligence of his agents or otherwise, for any injury to the person or property. *Mobile and Ohio R. R. Co. v. Hopkins*, 41 Ala. N. S., 486. 1868.

310. — Where a person traveling upon a "free pass" is injured, and it is stipulated in the contract by which he obtains such pass, that he shall assume all risks of accident by negligence, and such contract is valid in the state in which the contract is made, and where the injury has occurred; *held*, that the liability of the railway company must be determined by the law of that state. *Knowlton v. Erie R. R. Co.*, 19 Ohio St., 260. 1869.

311. — The circumstance that a passenger who has received an injury while on the cars of a railroad company, by the negligence of its servants, was traveling free of fare, does not exempt the company from liability for the injury. *Gillenwater v. Madison and Indianapolis R. R. Co.*, 5 Ind., 339, 1854; *Todd v. Old Colony and Fall River R. R. Co.*, 3 Allen (Mass.), 18, 1861.

312. — Where a railroad company undertakes to convey a passenger upon its road, whether with or without compensation, if such passenger is injured by the culpable negligence or want of skill of the agents of the company, it is liable, in the absence of an express agreement to the contrary. *Nolton v. Western R. R. Co.*, 15 N. Y., 444, 1857; see *Same v. Same*, 10 Howard's Pr. (N. Y.), 97, 1854.

313. — The circumstances impose a duty upon the carrier which renders it liable. *Ib.*

314. **Drover's pass.** Where an agreement was made with a shipper of live stock, by which he received a ticket to go with his stock and return on a passenger train, and the ticket was endorsed as a "free ticket," with a proviso that the holder assumed all risks of accident from negligence or otherwise; *held*, that the pass and contract for shipping stock constituted a single contract, and that the holder was not a gratuitous passenger. That the stipulation exempting the company from liability for negligence was against public policy and void. *Cleveland, Painesville and Ashtabula R. R. Co. v. Curran*, 19 Ohio St., 1, 1869; *Pennsylvania R. R. Co. v. Henderson*, 51 Penn. St., 315, 1865; *Flinn v. Philadelphia,*

Wilmington and Baltimore R. R. Co., 1 Houston (Del.), 469, 1857.

315. — The same principle is seemingly held in the following cases. *Smith v. New York Central R. R. Co.*, 24 N. Y., 222, 1862; *Same v. Same*, 29 Barbour (N. Y.), 132, 1859; *Railroad Co. v. Lockwood*, 17 Wallace, 357, 1873.

316. — A carrier of passengers in consideration of an abatement in whole or in part of his legal fare, may lawfully contract with a passenger that the latter will take upon himself the risk of damage from the negligence of agents and servants, for which the carrier would otherwise be liable. *Bissell v. New York Central R. R. Co.*, 25 N. Y., 442. 1862.

317. — So *held*, where a cattle dealer paid no independent consideration for his own conveyance, but accompanied his cattle, under a contract stating that they were to be carried at a reduced rate, and providing that "the persons riding free, to take charge of the stock, do so at their own risk of personal injury from whatever cause." *Ib.*

318. — A railroad company may limit its liability for the carriage of passengers upon a drover's free pass, except as to willfulness or gross negligence. *Boswell v. Hudson River R. R. Co.*, 5 Bosworth (N. Y.), 699. 1860.

319. — Defendant received of plaintiff at N., a car load of sheep, to be transported to A., under a contract which contained a clause by which plaintiff agreed to go or send some one with the sheep, "who should take all the risks of personal injury from whatever cause, whether of negligence of defendants, its agents, or otherwise." After the sheep were loaded, plaintiff, who was intending to accompany them, and had a drover's pass, in passing by the tender to the engine, was injured by a stick of wood negligently thrown therefrom. *Held*, that under the contract, the company was not liable. *Poucher v. New York Central R. R. Co.*, 49 N. Y., 263. 1872.

320. **Stockholder.** One who, being lawfully on the defendant's road, was injured by the gross negligence of one of their servants, is entitled to an action for his damages, though he was a stockholder in the corporation, was riding by the invitation of the president, paying no fare, and not in the usual passenger cars. *Philadelphia and Reading R. R. Co. v. Derby*, 14 Howard, 468. 1852.

Limitation of Liability—Injuries received at Car Windows.

XI. LIMITATION OF LIABILITY.

(See subdivision X, *ante*, 429, in cases of free passes.)

321. Car belonging to party injured. At the request of the owner of a freight car, the agents of a railway company attached his car to a passenger train, contrary to the "instructions and rules" of the company; he agreeing to run all risks. *Held*, that the company could not repudiate the act of its agents so as to be free from responsibility for negligence. *Lackawanna and Bloomsburg R. R. Co. v. Chenewith*, 52 Penn. St., 382. 1866.

322. — The owner assumed only the risk of attaching his car, not the risk of the negligence of the company's agents. *Ib.*

323. — The agreement of the owner to attend to the brakes of his car did not constitute him an employé of the company so as to prevent him from bringing suit against the company for damages for negligence. *Ib.*

324. — Cattle being on the road at the time of an accident raises a question of negligence, and whether it is imputable to the company is only determinable by the jury. *Ib.*

325. Negligence. A stipulation by a common carrier that he will not be liable for damages, does not relieve him from responsibility for actual negligence. *Pennsylvania R. R. Co. v. Butler*, 57 Penn. St., 335. 1868.

326. Power to make such contracts. Carriers of passengers may restrict their liability by a contract. *Boswell v. Hudson River R. R. Co.*, 10 Abbott's Pr. (N. Y.), 442. 1860.

327. Roads running through two states. Where a Maryland railway corporation, whose charter contemplated the extension of the road beyond the limits of Maryland, was allowed by act of the legislature of Virginia—re-enacting the Maryland charter—to continue through that state, and to build a lateral road in the District of Columbia: *held*, that no new corporations were created, either in Virginia or the District, but that the old one was exercising its faculties with their permission; that the corporation was amenable to the courts of the district for injuries done on its road in Virginia. This responsibility was not lessened by the reception by the traveler of tickets announcing that "Responsibility for safety of person or loss of baggage on each portion of the route, is confined to the propri-

etors of that portion alone." *Railroad Co. v. Harris*, 12 Wallace, 65. 1870.

XII. INJURIES RECEIVED AT CAR WINDOWS.

328. Car windows. The proposition is not sound as a general principle, that "no car is roadworthy if the windows are not so constructed as to prevent the passengers from putting their arms through them;" but it is applicable to a road which, in some places, is so narrow as to endanger projecting limbs. *New Jersey R. R. Co. v. Kennard*, 21 Penn. St., 203, 1853; see also, *Indianapolis and Cincinnati R. R. Co. v. Rutherford*, 29 Ind., 82, 1867.

329. — A carrier of passengers or goods is bound to provide a proper vehicle, and no precaution which will conduce to the safety of passengers should be omitted. *Ib.*

330. Comparative negligence. Where a passenger permits his arm to rest on the base of the window, and slightly project outside, and thereby has his arm broken in passing a freight train, the negligence of such person is slight, compared with the negligence of the company, and a recovery may be had for the injury sustained. *Chicago and Alton R. R. Co. v. Pondrom*, 51 Ill., 333. 1869.

331. Negligence. A railway passenger cannot recover damages against the railroad company for a personal injury sustained in part by reason of allowing his arm or elbow to be outside of the car window. *Todd v. Old Colony and Fall River R. R. Co.*, 3 Allen (Mass.), 18. 1861.

332. — Such an act is negligence in itself. *Pittsburgh and Connellsville R. R. Co. v. McClurg*, 56 Penn. St., 294. 1867.

333. — Where the injury resulted from the arm of a passenger, placed by him several inches outside of the window, coming in contact with the structure of a water tank, it was *held*, that the carrier was not liable. *Indianapolis and Cincinnati R. R. Co. v. Rutherford*, 29 Ind., 82. 1867.

334. — The voluntary act of a passenger in putting his arm out of a car window, so that it was injured by striking against a car standing on a side track, was *held*, to be gross negligence on his part, and such negligence as to preclude a recovery, unless gross negligence

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or intentional wrong could be shown on the part of the company. *Louisville and Nashville R. R. Co. v. Sickings*, 5 Bush. (Ky.), 1. 1868.

335. — If an injury be not willfully done, when it occurs from an exposure of an elbow or arm out of a car window while moving, negligence in the carrier is not to be inferred. *Pittsburgh and Connellsville R. R. Co. v. McCurg*, 56 Penn. St., 294. 1867.

336. — If, in an action brought by a railway passenger against the railroad company, to recover damages for a personal injury from the swinging of an unfastened door of another car standing upon a track parallel to that over which he is riding, it clearly appears that his elbow extended through the open window, beyond the place where the sash would have been if the window had been shut, he cannot recover. *Todd v. Old Colony and Fall River R. R. Co.*, 7 Allen (Mass.), 207. 1863.

337. — In an action against a railway company for damages done to plaintiff while riding in defendant's cars, and alleged to have resulted from defendant's negligence, it was not error for the circuit court to refuse to instruct the jury that if the plaintiff was sitting with his elbow or arm projecting out of the window, and sustained the injury by reason of that fact, he could not recover. It was properly left for the jury to determine, under all the circumstances of the case, whether the plaintiff was guilty of negligence in respect to the position of his arm. *Spencer v. Milwaukee and Prairie du Chien R. R. Co.*, 17 Wis., 487. 1863.

338. — Where the evidence showed that the passenger was injured while sitting in his seat in a railroad car and resting his head on his arm, which rested on the window sill of the car, by the car coming in contact with the corner of a wrecked car which had not been sufficiently removed from the track; held, that there was no proper case made by the evidence for instructions upon the subject of contributory negligence. *Winters v. Hannibal and St. Joseph R. R. Co.*, 39 Mo., 468. 1867.

XIII. COLLISIONS AND RUNNING OFF THE TRACK.

1. Collision of trains.

339. **Burden of proof.** Proof of a collision is *prima facie* evidence of negligence, and

it casts upon the company the necessity of proving that the collision could not have been prevented by any human care and foresight. *New Orleans, Jackson and Great Northern R. R. Co. v. Allbritton*, 38 Miss., 242. 1859.

340. **Contributory negligence.** Negligence in the managers of a railroad car in which a passenger is carried, contributing to the collision with a train upon another road, by which a passenger is injured, will defeat a recovery. *Mooney v. Hudson River R. R. Co.*, 5 Robertson (N. Y.), 548, 1868; *Same v. Same*, 1 Sweeny (N. Y.), 325, 1869; see *contra Chapman v. New Haven R. R. Co.*, 19 N. Y., 341. 1869.

341. — A passenger may recover for an injury occasioned by the collision of two trains, although such passenger was in the baggage car at the time of the collision. *Carroll v. New York and New Haven R. R. Co.*, 1 Duer, (N. Y.), 571. 1853.

342. — A passenger who receives an injury while attempting to leave the cars on seeing two trains approaching each other at such a speed as to make a serious collision inevitable, is not to be deemed guilty of negligence. *Buel v. New York Central R. R. Co.*, 31 N. Y., 314. 1865.

343. — Although he is upon the platform of the cars, attempting to escape, at the time he was injured, he is not standing or riding upon the platform in such a sense as to excuse the company under the regulation prohibiting passengers from standing or riding on the platform. *Id.*

344. **Habits of employes.** In an action for injury to the plaintiff whilst on the defendant's cars, by collision with another train, evidence of the habits and competency of the conductor of the latter train is pertinent. *Pennsylvania R. R. Co. v. Books*, 57 Penn. St., 339. 1868.

345. — When habits of intoxication in a conductor are shown, it raises a presumption of negligence in case of accident. *Id.*

346. — Evidence of statements of a flagman as to how far he had gone back to flag a coming train was inadmissible. *Id.*

347. **Negligence.** Where a train upon the defendant's railway, in which the plaintiff was a passenger, was met by a construction train coming from the opposite direction, which had upon it a bar of iron projecting

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five or six feet, in a slanting direction, so that it would necessarily run into anything it came against, and such bar struck the car in which the plaintiff was sitting, and injured him; *held*, that this was *prima facie* evidence of negligence on the part of the company. *Walker v. Erie R. R. Co.*, 63, Barbour (N. Y.), 260. 1872.

348. — If the employé of a railway company, in the course of his employment, disobey an express order of his employers and thereby cause a collision, his employers are responsible to the person injured. *Philadelphia and Reading R. R. Co. v. Derby*, 14 Howard, 468. 1852.

349. — An instruction, that if the jury believe it impossible that the injury could have occurred in the manner stated by the plaintiff, he could not recover; but that it was not essential to his right to recover, that the injury should have occurred precisely as he alleged; it was enough that he was thrown down and injured by the collision by the negligence of the company, without fault on his part, is, in substance, correct. *Pollard v. New York and New Haven R. R. Co.*, 7 Bosworth (N. Y.), 437. 1860.

350. Two companies using the same track. In an action brought for injuries sustained by reason of a collision of railroad cars, where two companies use the same track, and a question arises as to which of the companies is at fault, the running time of trains may be shown, by other proof than the time table of the companies. *Chicago, Burlington and Quincy R. R. Co. v. George*, 19 Ill., 510. 1858.

2. Collision with cattle or teams.

351. Cattle. It is gross negligence for the employés of a railway company to run trains at full speed over any part of its road known to be frequented by cattle, unless that part of the track is properly guarded from that invasion. *Brown v. New York Central R. R. Co.*, 34 N. Y., 404. 1866.

352. — That a car was thrown off the track by running over a cow, that was unlawfully upon the road, and the passenger thereby injured, is not, in itself, sufficient to repel the presumption of negligence. The company is bound to make provision against such acci-

dents. *Sullivan v. Philadelphia and Reading R. R. Co.*, 30 Penn. St., 234. 1858.

353. — In an action for personal injury received by the plaintiff, by reason of the train in which he was a passenger having struck a cow which suddenly run upon the track, and the cars thrown from the track, it appeared that cattle were in the habit of resorting to the station where the accident happened, being attracted there by the corn liable to be scattered upon the ground, and that a few days before this accident, a train had run over a cow at that station. There was no watchman there to keep the track clear, and the train was passing the station with more than ordinary speed. *Held*, that this was inexcusable negligence. *Chicago, Rock Island and Pacific R. R. Co. v. McAra*, 52 Ill., 296. 1869.

354. — If the employés upon a train observe a drove of cows upon the railroad, whether properly, or improperly, or negligently there, they should not presume that they are properly attended, and will be driven off in season to escape collision. *Card v. New York and Harlem R. R. Co.*, 50 Barbour (N. Y.), 39. 1864.

355. Crossings. Railroad companies have no right to run their trains upon the assumption that travelers on a highway, which the railroad crosses, will always be prudent and careful. *Id.*

356. Statute. Ch. 268, Laws of 1860, requires railway companies to erect fences along the line of their roads, and makes them liable for all damages sustained by reason of the neglect to maintain such fences, except at depot grounds, highways, etc., and proof of a failure to erect such fences is evidence of negligence. Where an injury occurred to a passenger by a collision with live stock, at a point in the neighborhood of a depot, but out on the main line of the road, where there was but a single track, more than a hundred yards beyond the switch, and beyond where a cattle guard was subsequently placed, and the road at that place was fenced by the company soon after the accident, and continues to be so fenced. *Held*, that although long trains, in switching, run out to the place, it could not be considered a part of the depot grounds. *Blair v. Milwaukee and Prairie du Chien R. R. Co.*, 20 Wis., 254. 1866.

357. — The said statute is constitutional. *Id.*

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3. *Running off the track.*

358. Contributory negligence. A passenger was taken upon a train to be carried for a short distance; he was told that the passenger cars were full, and that he must ride in the baggage car; he commenced playing with his companions; obtruded into the passenger car; when that car was thrown from the track, he leaped from it, and was injured; *held*, that he could not recover for this injury. *Galeana and Chicago Union R. R. Co. v. Yarwood*, 15 Ill., 468, 1854; *Same v. Fay*, 16 ib., 558, 1855.

359. Evidence. In an action brought to recover for personal injuries caused by the defendant's car, in which the plaintiff was a passenger, running off the track, alleged to have occurred by reason of the defective condition of such track, it was *held*, that the admission of evidence, on behalf of the plaintiff, of the condition of the road at a point half a mile distant from the place of the accident, and evidence that new ties were subsequently put in at points in the neighborhood of the accident, was erroneous. *Reed v. New York Central R. R. Co.*, 45 N. Y., 574. 1871.

360. Hill side. If the railroad is built on an embankment or a hill side, the company is bound to take all due precautions against a carriage being thrown down the declivity either by widening the crown of the road, or erecting walls or railing sufficiently strong to prevent it. *Hanley v. Harlem R. R. Co.*, 1 Edmonds (N. Y.), 359. 1846.

361. Presumption. The proof of the overturning of a passenger car is *prima facie* evidence of the negligence of the railway company. *Pittsburg, Cincinnati, etc., R. R. Co. v. Thompson*, 56 Ill., 138, 1870; *Yonge v. Kinney*, 28 Ga., 111, 1859.

362. — Where a train of cars upon the defendant's road, in which the plaintiff was a passenger, was, in consequence of an embankment having been swept away or submerged, plunged into a gulf of some forty feet in depth, and the plaintiff seriously injured; it was *held*, that these facts being shown to exist, the presumption of negligence on the part of the defendant necessarily arose. *Brehm v. Great Western R. R. Co.*, 34 Barbour (N. Y.), 256. 1861.

XIV. JOINT OCCUPATION OF RAILWAYS AND CONNECTING LINES.

1. *Connecting lines.*

a. RAILWAY LINES.

363. Evidence. Where an action for injury to a passenger was brought against two connecting railway companies, and it did not appear what relations the two companies bore to each other, but that they had been notified to produce the writings showing their connection, which writings were in their possession, *held*, that their failure to produce such writings justified a judgment against both of them. *Wyde v. Northern R. R. Co. of New Jersey*, 53 N. Y., 156. 1873.

364. Getting on the cars. Two railroad companies having made an arrangement for the sale of through tickets, and the train of one company connecting with that of the other, arrived and left the same station at the same time from opposite sides of the same platform. A passenger having a through ticket arrived just as the other train was departing, stepped over the platform and stepped on the other train; by its movement he was thrown off and injured. *Held*, that it was for the jury to say whether the danger of boarding the train when in motion was so apparent as to make it the duty of the passenger to desist from the attempt. *Johnson v. Westchester and Philadelphia R. R. Co.*, 70 Penn. St., 357. 1872.

365. — It was the duty of both companies to give a reasonable time for the transfer of passengers and their baggage *Ib.*

366. — The conductor of the arriving train signalled the departing train that there were no passengers for it; the passenger was not responsible for this mistake. *Ib.*

367. — The company having wronged the passenger by the premature moving of the train, he was not required to exercise the same self possession and coolness in determining the danger as a bystander or passenger in the car would have. *Ib.*

368. Joint liability. Several railway companies, jointly interested in the business over their connecting line, may be held jointly and severally liable for the negligent breach of a contract made by one of them, in its own name exclusively, for transportation over the

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common route. *Wylde v. Northern R. R. Co.*, 14 Abbott's Pr., N. S. (N. Y.), 213. 1873.

369. When liability does not attach. A carrier of passengers who rightfully runs his cars upon the railroad of another, over which he has no control or right beyond that of running his own cars upon it, is not liable for injuries sustained by his passengers while upon that road, which are occasioned without his fault, by the misconduct or negligence of the operatives of that road, over whom he had no control. *Sprague v. Smith*, 29 Vt., 421. 1857.

b. STAGE LINES.

370. Collision. A passenger on a stage sleigh has a right to presume that the parts of the vehicle provided for passengers are safe for that purpose; and it was held, that a passenger was not guilty of contributory negligence by riding upon a foot board at the side of sleigh, in which position he was injured by collision with another sleigh. *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y., 230. 1873.

371. Liability. The defendant at the time specified in the declaration, was running its trains as a common carrier from N. H. to P., five miles short of C., its liability ending at P., except as resulting from stage carriage beyond P. The defendant had advertised that its cars would arrive at P. and stages leave P. for C. at specified times. The railroad company did not own the stage line, and had no interest in its profits. The plaintiff bought of defendant a ticket from N. H. to C. The injury complained of occurred in the stage between P. and C. Held, that the advertisement implied no liability of the defendant beyond the line of its road, and the ticket only showed the receipt of so much money paid by the plaintiff, which was all that he was to pay previous to the arrival at C.; and consequently the undertaking alleged in the declaration to carry safely from N. H. to C., was not proved. *Hood v. New York and New Haven R. R. Co.*, 22 Conn., 1. 1852.

372. — For more than six months before, and at the time of the sale of said ticket, the defendant had been in the daily usage of entering into and fulfilling contracts identically like that alleged in the declaration, and had, during the entire period, permitted its agents to publicly represent that the company was vested with the powers requisite for such pur-

pose. The plaintiff bought his ticket, believing in and relying on the truth of such representations. But defendant, under its charter, had no power to enter into the alleged contract, and had never by a corporate vote expressly authorized or sanctioned the same, nor had their directors by any vote directed any such contract to be made. Held, that defendant was not estopped from pleading its want of power to make the contract, and that it was not binding. *Same v. Same*, ib., 503. 1853.

373. — And where, on motion by the defendant for a new trial in an action at law on such contract, the court of errors directed a new trial on the ground that the court had erred in instructing the jury that the defendant was estopped from pleading its want of power to make such contract, and the plaintiff brought his bill in equity to restrain defendant from further prosecuting such motion for a new trial, on the ground that the defendant, by its representations, had induced the plaintiff to enter into said contract, and therefore its defense was inequitable; held, that the defendant would not be estopped from making such defense in equity any more than at law. That plaintiff's remedy at law was complete and adequate. *Same v. Same*, 23 ib., 609, 1855; see *Buffett v. Troy and Boston R. R. Co.*, 40 N. Y., 168, 1869.

2. Two companies using same track.

374. Contributory negligence. A passenger is not so identified with the proprietors of the train conveying him, or their servants, as to be responsible for negligence on their part. *Chapman v. New Haven R. R. Co.*, 19 N. Y., 341. 1859.

375. — He may therefore recover against the proprietors of another train for damages from a collision through their negligence, though there was such negligence in the management of the train conveying him as would have defeated an action by its owners. *Ib.*

376. — The contrary doctrine is held in *Mooney v. Hudson River R. R. Co.*, 5 Robertson (N. Y.), 548, 1868; and *Same Case*, 1 Sweeny (N. Y.), 325, 1869.

377. Defective roadway. A railroad corporation, by giving permission to another railroad company to use a part of its track, does not thereby bind itself to make the road safe,

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nor to put it in repair, nor to make any change in its existing state. *Murch v. Concord R. R. Co.*, 29 N. H., 9. 1854.

378. — In such case the claim of an injured passenger is upon the company with which he contracts. *Ib.*

379. Joint liability. Where a train, while moving on a track belonging to one railroad company, is in the exclusive charge of the servants of another company, the former company is not responsible for the negligence of the servants of the latter company in conducting such movement of the train. *Clymer v. Central R. R. Co. of New Jersey*, 5 Blatchford (U. S. C. C.), 317. 1866.

380. — A railroad corporation, which grants the use of its road to another company, is responsible for accidents caused to passengers which it itself carries, by the negligence of the trains of the other company, thus running by its permission. *Railroad Co. v. Barron*, 5 Wallace, 90, 1866; *Barron v. Illinois Central R. R. Co.*, 1 Bissell (U. S. C. C.), 453, 1864.

381. — Where two corporations, chartered respectively by the states of Michigan and Indiana, with power to each to construct and operate a railroad within its own state, have united in the business of transporting passengers over a third road, in the state of Illinois, beyond the limits authorized by the charter of either, such corporations are jointly liable for injuries to a passenger resulting from the negligence of their employes. *Bissell v. Michigan Southern and Northern Indiana R. R. Co.*, 22 N. Y., 258. 1860.

382. — And the same principle applies in case of a railway company carrying passengers by stage outside of the line of the railway. *Buffett v. Troy and Boston R. R. Co.*, 40 N. Y., 168, 1869; reversing, *Same v. Same*, 36 Barbour (N. Y.), 420, 1862.

383. — A passenger, injured by a collision resulting from the concurrent negligence of two railroad companies, may maintain a joint action against both. *Colegrove v. New York and New Haven R. R. Co.*, 20 N. Y., 492, 1859; *Same v. Same*, 6 Duer (N. Y.), 382, 1857.

3. Crossings of two railways.

384. Degree of care required. A conductor of a train of cars is bound to use reasonable care for the safety of passengers, and

at cross roads, where the tracks lie near together, more than ordinary care is requisite. *Curtis v. Central R. R. Co.*, 6 McLean, 401. 1855.

385. Loading freight trains. Any carelessness in loading a freight train of cars, or in not attending to the adjustment of the load of lumber, by which an injury is done to a passenger in another train, will make the owners of the freight train responsible. *Ib.*

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386. Carriage of passenger beyond his destination. A passenger on a freight train, which was not regularly, but only occasionally used to carry passengers, paid his passage money; the train carried him five miles beyond his destination; he had to walk back, although suffering from chronic rheumatism. Held, that he was entitled to recover. *Mobile and Ohio R. R. Co. v. McArthur*, 43 Miss., 180. 1870.

387. Cars. It is not usual to place a chain across the back end of the platform of a caboose car, and the omission to do so is not negligence. A passenger taking a freight train, takes it with the increased risks, or diminution of comfort incident thereto. *Chicago, Burlington and Quincy R. R. Co. v. Hazard*, 26 Ill., 373, 1861; see *Hazard v. Chicago, Burlington and Quincy R. R. Co.*, 1 Bissell (U. S. C. C.), 503, 1865.

388. Cattle guards. Where a railway company carries passengers upon a car attached to a freight train, it is bound to see that there is a safe and commodious passage way from the station or ticket office to the place where the passenger car has usually stopped; and it is liable in damages for any injury sustained by an intending passenger upon the train in question, in falling into an improperly constructed cattle guard, in consequence of the negligence of the company. *Dillaye v. New York Central R. R. Co.*, 56 Barbour (N. Y.), 30. 1865.

389. Evidence. It is sufficient to show that a railway company is a carrier of passengers by its freight trains, when it appears that it was accustomed to carry passengers on freight trains; that notices were posted up around the window of the ticket office, that passengers on freight trains must first obtain tickets, and that there were persons on the train who had

Evidence.

procured tickets. *Illinois Central R. R. Co. v. Sutton*, 53 Ill., 397. 1870.

390. Liability. Railroad companies are not to be regarded as common carriers of passengers by their freight trains unless they make it an habitual business. *Murch v. Concord R. R. Co.*, 29 N. H., 9. 1854.

391. — Where a railway company carries passengers upon a car attached to its freight train, it incurs the same liability as if such passengers were carried upon a regular passenger train. It makes no difference that the company does not check baggage upon such train. *Dillaye v. New York Central R. R. Co.*, 56 Barbour (N. Y.), 30, 1865; *Edgerton v. New York and Harlem R. R. Co.*, 39 N. Y., 227, 1868; *Same v. Same*, 35 Barbour (N. Y.), 193, 1860; and 389, 1861.

392. — Where a person enters the saloon car of a common freight train, without objection being made, though against the rules of the company, and the conductor receives from him first class fare, the corporation incurs the same liability for his safety as if he were on a regular passenger train. *Dunn v. Grand Trunk R. R. Co.*, 58 Me., 187. 1870.

393. — Such travelers acquiesce in the usual incidents and conduct of a freight train managed by prudent and competent men. *Hazard v. Chicago, Burlington and Quincy R. R. Co.*, 1 Bissell (U. S. C. C.), 503, 1865; *Chicago, Burlington and Quincy R. R. Co. v. Hazard*, 26 Ill., 373, 1861.

394. Persons in charge of freight. Where a person was traveling on a railroad, in a caboose car, in charge of his stock and furniture, and an entry in reference to him had been made on the way bill by the assistant superintendent, thus: "a man in charge," he was a passenger and entitled to all the rights and remedies of a passenger. *Indianapolis, etc. R. R. Co. v. Beaver*, 41 Ind., 493. 1873.

395. Private cars. A conductor of private freight cars, not in the employ of a railroad company, at the request of the company's conductor of the train, cut loose the cars following his own, fell off the train and was injured. The court properly charged "that if the injury was not caused by drawing the bolt, but by the negligence or misconduct of the engineer in increasing the motion of the cars, with a violent, unusual and unnecessary jerk, after the plaintiff had resumed his proper

position on the car, such as he could not anticipate and guard against, he might not recover." *Cumberland Valley R. R. Co. v. Myers*, 55 Penn. St., 288. 1867.

396. — The plaintiff, after performing the duty he voluntarily undertook, having resumed his proper place as a passenger, became entitled to the protection which such relation gave him. *Ib.*

397. Rules and regulations. A railroad company carrying passengers cannot shield itself from the consequences of its negligence, by showing that a person injured obeyed specific instructions of the conductor, instead of general directions of which he had been informed. *Pennsylvania R. R. Co. v. McCloskey's Adm'r*, 23 Penn. St., 526. 1854.

398. — A regulation requiring a passenger with live stock on a freight train, to remain on the cars which contained his stock, is not so transgressed by his being on another part of a train when it is at rest, as to make him a contributor to his own injury by that train being run into by another. *Ib.*

XVI. EVIDENCE.

399. Burden of proof. The injury of a passenger raises a presumption of negligence upon the part of the carrier. This presumption may be repelled by proving that the injury resulted from inevitable accident, or from something against which no human prudence and foresight could provide. *Sullivan v. Philadelphia and Reading R. R. Co.*, 30 Penn. St., 234, 1858; *Baltimore and Ohio R. R. Co. v. Worthington*, 21 Md., 275, 1863; *Zemp v. Wilmington and Manchester R. R. Co.*, 9 Richardson's Law (So. Car.), 84, 1855; *Galena and Chicago Union R. R. Co. v. Yarwood*, 17 Ill., 509, 1856; see also, *New Orleans, Jackson and Great Northern R. R. Co. v. Albritton*, 38 Miss., 242, 1859.

400. — Whether such circumstances exist as will repel the legal presumption of negligence, is a question of fact for the jury, to be determined from all the evidence in the case. *Sullivan v. Philadelphia and Reading R. R. Co.*, 30 Penn. St., 234. 1858.

401. — Where a passenger on a railroad is injured, the burden of proving that the injury was caused by the negligence of the company or its employes, rests upon the party seeking

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to recover damages. *Holbrook v. Utica and Schenectady R. R. Co.*, 12 N. Y., 236, 1855; affirming, *Same v. Same*, 16 Barbour (N. Y.), 113, 1852.

402. — The mere fact that a person is injured while riding in a railroad car, does not impose upon the company the burthen of disproving negligence. *Ib.*

403. — But the presumption of a want of proper care on the part of the company may arise from circumstances attending the injury, and in such cases the *onus* is upon the company to show that the injury is not attributable to any fault on its part. *Ib.*

404. Every one riding in a railway car is presumed to be there lawfully as a passenger, and the *onus* is on the carrier to prove that he is a trespasser. *Pennsylvania R. R. Co. v. Books*, 57 Penn. St., 339. 1868.

405. Cross examination. On the cross examination of a witness offered by the railroad company, and who had charge of the section where the alleged injury happened from a defective rail, it is proper to ask him if he was short of iron at the time. *Taylor v. Grand Trunk R. R. Co.*, 48 N. H., 304, 1869.

406. Experts. On the trial of an action against a railroad company by a passenger for a personal injury, after several experts called by the plaintiff had testified, upon a statement of the facts and circumstances of the accident, what in their opinion threw the cars from the track, the defendant was permitted to ask a machinist, who had been connected for many years with railroads and with the running of cars and engines upon them, and who was in the cars at the time of the accident, and saw all these facts and circumstances, "What in your judgment threw off the car at the time of the accident?" *Held*, that the plaintiff had no ground of exception. *Seaver v. Boston and Maine R. R. Co.*, 14 Gray (Mass.), 466. 1860.

407. — The testimony of a physician that injuries from railroad accidents were more severe than from other causes, though bearing the same external appearance, is admissible, although his knowledge is derived from study alone. *Taylor v. Grand Trunk R. R. Co.*, 48 N. H., 304. 1869.

408. Opinions of witnesses. In an action by one of a mercantile firm against a railroad company for injuries to plaintiff's person, caused by defendant's negligence, plaintiff

cannot ask the other partner, as a witness for him, what was the amount of the damages to said firm for a specified time, by reason of plaintiff's absence, caused by his injuries. The witness cannot state his opinion as to the amount of damages; he can only state facts from which the jury can estimate their amount. *Blair v. Milwaukee and Prairie du Chien R. R. Co.*, 20 Wis., 262. 1866.

409. Surgical examinations. The proposal of counsel to have surgeons called in during the progress of the trial to examine the plaintiff as to the extent of his injuries is unknown to the law, and the court has no power to enforce such an order. *Loyd v. Hannibal and St. Joseph R. R. Co.*, 53 Mo., 508. 1873.

XVII. PLEADING.

(See also the various other subdivisions for questions of pleading.)

410. Contributory negligence. In a suit against a railway company to recover damages for an injury to a passenger, the answer averred that the passenger was, at the time of the accident, riding upon the platform of the car, contrary to the rules of the company, of which he had notice; that it was dangerous to stand upon the platform while the train was in motion, "wherefore defendant says that the injury sustained by the plaintiff was the result of his own carelessness in being in an improper place." *Held*, that the answer failed to show, by any averment of fact, that the injury was occasioned by the fault of the plaintiff; the conclusion of the pleader not being equivalent to the averment of the fact. *Lafayette and Indianapolis R. R. Co. v. Sims*, 27 Ind., 59. 1866.

411. Defective track. Where the petition alleges that plaintiff was injured in consequence of a defective track, a defect in the track anywhere may be shown, if it contributed to the injury. *Union Pacific R. R. Co. v. Hand*, 7 Kans., 380. 1871.

412. Misjoinder. A declaration contained a count in trespass for the forcible expulsion of the plaintiff by the defendant, from its cars, and a count in trespass on the case for the same injury by the negligence of the defendant as a common carrier in conveying him as a passenger, the latter count containing an averment that it was for the same cause of

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action with the former. The latter count also contained an allegation that the defendant at the same time, assumed for a certain hire to also carry safely his tool chest, but so negligently carried it that it became broken and greatly damaged. *Held*, on a motion in error from a judgment overruling a general demurrer to the declaration, that although the latter count was averred to be for the same cause of action with the former, yet as the injury to the chest was so set forth as to constitute an independent and substantial ground of recovery, both counts could not be for the same cause of action, and there was therefore a misjoinder of counts. *Havens v. Hartford and New Haven R. R. Co.*, 26 Conn., 220. 1857.

413. Prospective damages. Successive actions cannot be maintained, but the party injured is entitled to recover, in a single action, compensation for all the damages resulting from the injury, whether present or prospective. *Filer v. New York Central R. R. Co.* 49 N. Y., 42. 1872.

414. — Therefore in such a case upon issue joined, a question to a physician, asking him to state, from his experience and medical knowledge, the probability of a recurrence of inflammation in an injured muscle, is competent. *Ib.*

415. — So, also, is evidence of a physician as to the probable effect on the general health of the injured person. *Ib.*

XVIII. GENERAL MATTERS.

416. Burning of passenger with money on his person. Where it was alleged that through the negligence of a railway company in the construction of a bridge by which a train was thrown from the track and burned by fire from stoves in the cars, and by which a passenger was burned, together with a sum of money upon his person, upon demurrer, it was *held*, that the railway company was not liable for the loss of money kept in the sole custody of a passenger, and which he carries without notice to the defendant, for a purpose unconnected with the expenses of his journey, notwithstanding the loss was occasioned by the negligence of defendant's servants. *First National Bank of Greenfield v. Marietta and Cincinnati R. R. Co.*, 20 Ohio St., 259. 1870.

417. Child. An infant, twelve years of age, was traveling with his mother upon defendant's cars, and being unable to find a seat in the car with her, by her permission, went into another and remained there until the train reached a station; when, in the effort to leave the car and return to his mother, he received an injury. *Held*, it was not *per se* a negligent act on the part of the mother to permit him to go from one car to another under the circumstances. *Downs v. New York Central R. Co.*, 47 N. Y., 83. 1871.

418. — That which is negligence in an adult will also constitute it in a child of tender years. *Solomon v. Central Park, etc. R. R. Co.*, 1 Sweeny (N. Y.), 298. 1869.

(See Injuries to Persons on the Track, subdivision V.)

419. Child or sick person. A sick or aged person or a child is entitled to more care from a railroad company than one in good health and under no disability. *Sheridan v. Brooklyn City R. R. Co.*, 36 N. Y., 39, 1867; *Same v. Same*, 34 Howard's Pr. (N. Y.), 217, 1867.

420. — The assistance of such persons in getting on and off the cars is an act within the line of duty of employ  s of a railway company, and negligence in so doing will render the employer liable. *Drew v. Sixth Avenue R. R. Co.*, 3 Keyes (N. Y.), 429. 1867.

421. — Sick persons, and persons unable to take care of themselves, should provide for themselves proper assistance while traveling, and if such passengers require longer delay than usual in getting off the train, they should give timely notice to the conductor. It is not the duty of conductors to see to the debarkation of passengers. It is their duty to have the stations announced, and to stop long enough for passengers to get off. *New Orleans, Jackson and Great Northern R. R. Co. v. Stat-ham*, 42 Miss., 607. 1869.

422. Confederate soldier. A soldier in the confederate service during the war of 1861, was engaged in an illegal transaction, and if while traveling upon a railway upon a purpose connected with the war, he has received an injury, no action lies for the negligence of a railway company in not transporting him safely. *Martin v. Wallace*, 40 Ga., 52, 1869; *Turner v. North Carolina R. R. Co.*, 63 N. C., 522, 1869.

423. Construction trains. When contract-

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ors, building a railroad and running a construction train, consent to take a passenger for hire on their train, they are private carriers for hire, and are only bound to exercise such care and skill in the management and running of the train as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances. *Shoemaker et al. v. Kingsbury*, 12 Wallace, 369. 1870.

424. — The passenger in such case takes upon himself the risks incident to the mode of conveyance. *Id.*

425. — Where an accident occurs to a passenger on such train by the cars being thrown from the track, the contractors are not responsible unless the accident is directly attributable to their negligence or unskillfulness. *Id.*

426. Epileptics. If a passenger on a railway car were known to be subject to epileptic fits, or insane, more care and attention would be required of the carrier than in ordinary cases. *Pittsburgh and Connellsville R. R. Co. v. McClurg*, 56 Penn. St., 294. 1867.

427. — Where the action is brought principally on account of a permanent injury to the plaintiff in consequence of epileptic spasms caused by the wound received, and the medical testimony leaves it very doubtful whether the wound contributed to the spasms, it would be unsafe for the judge to allow the jury to speculate upon such remote consequences. *Thrings v. Central Park R. R. Co.*, 7 Robertson (N. Y.), 616. 1868.

428. Express messenger. Where a railway company is transporting freight and messengers for an express company, and a person, not an employé of the express company, goes into the baggage car with the regular express messenger, not as a passenger, but for the purpose of learning the route, and assists such messenger along the route, and the conductor of the train, not knowing the facts, but supposing such person to be an express messenger, allows him to ride without paying his fare, and the baggage car turns over and said person is injured; in an action by such person against the railway company for damages for such injuries, *held*, that the plaintiff was not a passenger, nor entitled to the rights of a passenger. *Union Pacific R. R. Co. v. Nichols*, 8 Kans., 505. 1871.

429. Ferries. Under the facts of this partic-

ular case, a railway company was held liable for an injury occurring to a passenger in crossing on a ferry from New York to Jersey City. *New Jersey R. R. Co. v. Palmer*, 4 Vroom (N. J.), 90. 1868.

430. Gravel train. Action was brought against a railroad company for an injury done to the plaintiff, while traveling on a gravel train of the company. The defendant asked the court to instruct the jury as follows: A railroad company is not liable for an injury which may happen to a person who takes passage on a train engaged in transporting gravel, and not engaged in carrying passengers. *Held*, that the instruction was properly refused. *Lawrenceburgh and Upper Mississippi R. R. Co. v. Montgomery*, 7 Ind., 474. 1856.

431. Husband and wife. In an action against a railway company by the husband, to recover damages for an injury sustained by his wife, caused by the carelessness of the servants of a railway company, damages may be recovered for expenses incurred, and loss of services after the commencement of the suit, and for such expenses as may be incurred and loss of services as are reasonably probable in the future. *Hopkins v. Atlantic and St. Lawrence R. R. Co.*, 36 N. H., 9. 1857.

(See *ante*, 423, subdivision VIII, Injuries Causing Death.)

432. — A promise founded on a consideration relating to the wife's personal security does not vest absolutely in the husband, but may be the subject of an action in the name of the husband and wife. *Fuller v. Naugatuck R. R. Co.*, 21 Conn., 557. 1852.

433. — An implied contract will be presumed to be made with the party in interest, and as the husband has legally no interest in the wife's personal security, a contract for that purpose will be presumed to be made with her. *Id.*

434. Instructions. An instruction which directs the jury that in fixing the damages, if they believe from the evidence that the plaintiff is entitled to recover, they should consider all the circumstances surrounding the case, and then specifically points out the circumstances, is not obnoxious to the objection, that instructions should be based upon the evidence. *Chicago, Rock Island and Pacific R. R. Co. v. Otto*, 52 Ill., 416. 1869.

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435. Lessees and trustees operating a railway incur the same liabilities that would be incurred by the company itself, if it were operating the road. *Sprague v. Smith*, 29 Vt., 421. 1857.

436. — Under § 513 of the statute (Revision of 1866, page 196), a trustee of a railroad who operates the road for the benefit of bondholders or creditors, is liable to suit, as such trustee, in favor of the administrator of a passenger fatally injured by negligent carriage. *Lamphear v. Buckingham*, 33 Conn., 237. 1866.

437. — expulsion of passenger. A railroad company ran on the joint account of a receiver of part of it, and the lessees of the remaining part was held liable for injuries committed by a servant of the parties working it, upon the person of a passenger, whom such servant improperly expelled from the car, into which the passenger had entered; the railroad company having allowed tickets to be issued in its own name, in the same form as it had done before the road was leased, and the passenger, for aught that appeared, not knowing that the railroad company was not itself managing the road. *Railroad Company v. Brown*, 17 Wallace, 445. 1873.

438. Lunatics. A lunatic was traveling in the cars, in company with his father, who had paid the fare of both, through, and taken tickets. The father got out at a stopping place, to procure refreshments, leaving his son in the cars, without giving notice to any one, of his situation; and while absent the train started. On regaining the cars, the father did not find his son where he had left him, the latter having changed his seat. The conductor, in good faith, in the absence of the father, applied to the lunatic for his ticket. The lunatic refusing to deliver his ticket, the conductor caused the train to be stopped, and the lunatic to be put off the cars; in consequence of which the lunatic was run over by another train and killed. The evidence did not show negligence on the part of the conductor. *Held*, that the father's negligence was such that he could not recover. *Willetts v. Buffalo and Rochester R. R. Co.*, 14 Barbour (N. Y.), 585. 1853.

439. Mobs. There is no such privity between a railroad company and a passenger as to make it liable for that passenger's injury to another, upon the principle of *respondet*

superior. *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Hinds*, 53 Penn. St., 512. 1866.

440. — A train having stopped at a station, a riotous crowd rushed upon the cars in such numbers as to defy the power of the conductor to resist. They commenced a fight on the cars, in which the plaintiff was injured. *Held*, that the fact that the conductor knew the crowd were improper persons was immaterial. Railway companies are not required to prepare for such emergencies. *Ib.*

441. — Passengers take the risk of mobs by the way, and cannot throw them on the carrier. *Ib.*

442. — A conductor has large powers at his disposal to preserve order. His official character is a power. He may stop the train, call to his assistance the train employes, and such passengers as are willing to help. Until he does this, he has no right to abandon the conflict. *Ib.*

443. — A conductor falls short of his duty when he keeps his train in motion, or is busy in collecting fare in one car whilst a general fight is raging in another. *Ib.*

444. — Calling on the passengers to throw the fighters out is not enough; he should lead the way, stop the train, and expel the rioters, or demonstrate by an earnest experiment that it is impossible. *Ib.*

445. Payment of fare. In order to constitute the relation of common carrier and passenger, it is not necessary that the fare should have been paid. It is enough that it is understood that it is to be paid. *Nashville and Chattanooga R. R. Co. v. Messino*, 1 Sneed (Tenn.), 220, 1853; *Hurt v. Southern R. R. Co.*, 40 Miss., 391, 1866.

446. — If a passenger is lawfully on the cars, the company is bound to carry him safely, whether he has paid his fare or not, although if he refuses to pay, he may be ejected. *Ohio and Mississippi R. R. Co. v. Muhling*, 30 Ill., 9. 1861.

447. Passing from car to car. It is not negligence, *per se*, for a passenger to follow the direction given by a servant of a railroad company, and to pass from one car to another, while the same are in motion, for the purpose of finding a seat. *McIntyre v. New York Central R. R. Co.*, 37 N. Y., 287, 1867; *Same v. Same*, 47 Barbour (N. Y.), 515, 1867; *Same v. Same*, 35 Howard's Pr. (N. Y.), 36, 1867.

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448. — Where a female passenger upon a railroad, being ordered by an officer of the train, while the cars were in motion, in a dark and rainy night, to pass forward, in attempting to step from one car to another, fell between the cars and was instantly killed, it was *held*, that the deceased was not so clearly guilty of negligence as to warrant the taking of the case from the jury on that ground. *McIntyre v. New York Central R. R. Co.*, 43 Barbour (N. Y.), 532, 1865; see *Same v. Same*, 47 ib., 515, 1867.

449. Pop corn vender. A railroad corporation, for a certain sum of money per year, and in consideration of an agreement to supply the passengers on one of its trains with iced water, issued season tickets to A. for his passage on any of its regular trains, and permitted him to sell popped corn on all its trains. *Held*, that his relation to the company while traveling upon its road, under this contract, was that of a passenger and not of a servant. *Commonwealth v. Vermont and Massachusetts R. R. Co.*, 108 Mass., 7. 1871.

450. Prisoners of war—guards. The defendant undertook to transport prisoners of war, on the employment of an authorized government officer. *Held*, that it was liable, as a common carrier, to the soldiers in charge of the prisoners, and was in no such sense an agent of the government as to preclude it from such liability. *Truex v. Erie R. R. Co.*, 4 Lansing (N. Y.), 198. 1870.

451. Public enemy. In an action by a passenger for injuries caused by the cars being thrown into a chasm, occasioned by the burning of a bridge by the public enemy, of which defect in the road the conductor of the train was prevented from receiving notice by the acts of the enemy, an instruction confirming the issue of negligence to the particular case in the running of the cars, and telling the jury that "if the train was conducted and managed with as much care and diligence as a very prudent and careful man would have conducted the same where his own interest and safety were concerned, taking into consideration all the circumstances of the case, and that the injury complained of was the result of mere accident, then the carrier was not liable for the injury," was improperly refused, as it presented to the jury the principle that the defendant was not to be held liable for mere accident, in

the absence of any want of that degree of care and prudence which the law requires. *Sawyer v. Hannibal and St. Joseph R. R. Co.*, 37 Mo., 240. 1866.

452. Riding on the engine. A railroad company, by its printed rules and regulations, prohibited its engine drivers from permitting any one, not in its employ, to ride upon its engines. The plaintiff applied to an engineer for permission to ride upon the engine, and was told that it was against the rules of the company to carry him in that place, but the engineer finally consented that the plaintiff might ride with him, and he did so, without the knowledge of the conductor, and paying no fare. *Held*, that the consent of the engineer conferred no legal right, and that the plaintiff, not being lawfully upon the engine, was a wrong-doer, and could not recover damages of the company for an injury sustained while riding in that place. *Robertson v. New York and Erie R. R. Co.*, 22 Barbour (N. Y.), 91. 1856.

453. Rules and regulations. A railroad company has a right to make all reasonable rules respecting the time, manner and place of entering cars; and these rules, when known to the passenger, he is bound to conform to, and if he fails to do so, he cannot recover for an injury sustained thereby, although the jury may believe that an ordinarily prudent man might have adopted the same course. *McDonald v. Chicago and Northwestern R. R. Co.*, 26 Ia., 124. 1868.

454. — In an action against a railway company by a passenger, for an injury occasioned by a collision, it is not sufficient for the company to show that the plaintiff was acting at the time in disobedience of a proper order to secure his safety; it should also appear that the injury was caused by such disobedience. *Lawrenceburgh and Upper Mississippi R. R. Co. v. Montgomery*, 7 Ind., 474. 1856.

455. Speed. A railroad company is liable for any casualty that may occur from running at a greater rate of speed than is prudent, or on account of collisions with cattle, which might have been avoided by the most skillful and prompt use of all the means in its power. *Nashville and Chattanooga R. R. Co. v. Messino*, 1 Sneed (Tenn.), 220. 1853.

456. State roads. The owners of passenger cars on a state railway are liable, as common carriers, for an injury sustained by a pas-

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senger from the collision of two of their trains; though the motive power is furnished by the state, and under the control of the agents of the state, and though the accident happened through the negligence of such agents. *Ryland v. Peters*, 5 Penn. Law Jour. Rep., 126. 1851.

457. Sudden stoppage of cars. Evidence of the sudden stoppage of a train of cars is sufficient to sustain a finding of negligence, in an action by a passenger for injury caused thereby. *Wylde v. Northern R. R. Co.*, 14 Abbott's Pr. N. S. (N. Y.), 213. 1873.

458. Switch. A railroad company is responsible for an injury, sustained by a passenger in its cars, in consequence of the careless management of a switch, by which another railroad connects with and enters upon its road, although the switch is attended by the employés of the proprietors of the other road. *McElroy v. Nashua and Lowell R. R. Co.*, 4 Cushing (Mass.), 400. 1849.

459.—Injuries to passengers occurring through the misplacement of a switch—considered. *Baltimore and Ohio R. R. Co. v. Worthington*, 21 Md., 275. 1863.

460. Trespassers. Where a boy attempted to climb up on the rear of a train while it was in motion, and was injured in the attempt, it was held that he could not recover. *Chicago, Burlington and Quincy R. R. Co. v. Stumps*, 55 Ill., 367. 1870.

461. Unusual number of passengers. A railway company is not bound to receive an unusual number of passengers, beyond the number that it might reasonably be required to provide for, but if it does receive them, without condition, or notice of its inability to provide for their safety, it assumes all the obligations usually incumbent upon a carrier. *Evansville and Crawfordsville R. R. Co. v. Duncan*, 28 Ind., 441. 1867.

462. Vehicles in the streets. The negligence of other persons, running vehicles in a crowded street, is not an act for which carriers of passengers through such streets are responsible, where they are without fault themselves. *Spooner v. Brooklyn City R. R. Co.*, 81 Barbour (N. Y.), 419, 1860; *Same v. Same*, 36 ib., 217, 1862.

463. Wharf. Where a railway company runs its line in connection with a steamboat, issuing tickets over both lines, and the use of a wharf becomes necessary in the delivery of

passengers to the steamboat, the railway company is bound to the same degree of care in seeing that the wharf is safe as is required of it elsewhere on its line. Its liability only ceases where the steamboat company's liability commences. *Knight v. Portland, Saco and Portsmouth R. R. Co.*, 56 Me., 234. 1868.

464. Willful acts of employés. A principal is not responsible for the injuries arising from the willful acts of his servants. *Winter-son v. Eighth Avenue R. R. Co.*, 2 Hilton (N. Y.), 389. 1859.

465.—Whenever the justification of an act, alleged to be wrongful and injurious, is founded on the exercise of authority, the question of the excess of such authority is for the jury, and not for the court. *Hilliard v. Gould*, 34 N. H., 230. 1856.

466.—In all cases where it appears that the employment of the principal afforded the agent the means and opportunity, which he used, while so employed, in committing an injury to a third person, the principal is responsible, whether the injury results from the negligence or willful and malicious acts of the agent. *New Orleans, Jackson and Great Northern R. R. Co. v. Albritton*, 38 Miss., 242. 1859.

467.—This rule is, from public policy, applied with strictness in case of common carriers. *Id.*

INJURIES TO PERSONS GENERALLY.

See HIGHWAYS; INDICTMENT; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; NEGLIGENCE.

I. INJURIES GENERALLY.

II. INJURIES CAUSING DEATH.

I. INJURIES GENERALLY.

1. Frightened team. Where a driver of a carriage is not attending to his team, but is engaged in reading a newspaper, he is guilty of negligence, and cannot recover for an injury resulting from his team being frightened by an approaching snow plow which he might have seen if he had been attending to

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his business. *Gray v. Second Avenue R. R. Co.*, 2 Jones and Spencer (N. Y.), 519. 1872.

2. — Where a team was frightened by the starting of a locomotive, and ran away, and in endeavoring to stop it, the driver was thrown under the wheel of the wagon and had his leg broken — both the driver and the agents of the company being engaged in lawful pursuits — it was *held*, that if the accident occurred through negligence on the part of the company, and the negligence of the driver did not proximately contribute to it, he might recover; but not if the negligence of the driver concurred to produce it, or if it occurred entirely through his own fault. *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Karna*, 13 Ind., 87. 1859.

3. Persons assisting passengers. A person who enters the cars, not as a passenger, but for the purpose of assisting an aged and infirm relative to take a seat as a passenger, must, in order to maintain an action against the railway company for an injury sustained while leaving the cars, show that he exercised due care, that the company was wanting in ordinary care, and that such negligence was the cause of the injury; and if he attempts to leave the cars after they have started, or, finding them in motion as he is going out, persists in making progress to get out, he cannot maintain such an action, if his attempt causes or contributes to the injury; even if the corporation is guilty of negligence. *Lucas v. New Bedford and Taunton R. R. Co.*, 6 Gray (Mass.), 64. 1856.

4. State railways. Section 2 of the special act of March 3, 1869, authorizing compensation to persons injured on the Iron Mountain railroad, did not limit the claim to a party personally injured, but his administrator would be entitled under it to receive payment of the amount after his death. Section 2 was intended to guard against a sale of the claim, and nothing more. *Hickey v. Dallmeyer*, 44 Mo., 237. 1869.

II. INJURIES CAUSING DEATH.

(See also INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; INJURIES TO EMPLOYEES.)

5. Common law. The courts will presume that the common law is in force in another state, and that no action can be maintained

for a homicide occurring in such state, unless it is alleged that in such state a statute exists authorizing the action. The statute of the state in which the suit is brought will not apply. *Selma, Rome, etc. R. R. Co. v. Lacy*, 43 Ga., 461. 1871.

6. — No civil action at common law can be maintained for the death of a human being. *Worley v. Cincinnati, etc. R. R. Co.*, 1 Handy (Ohio), 481, 1855; *Kramer v. San Francisco Market St. R. R. Co.*, 25 Cal., 434, 1864; *Carey v. Berkshire R. R. Co.*, 1 Cushing (Mass.), 475, 1848.

7. Damages. In an action for the death of a person caused by negligence, no damages should be allowed on account of the grief of the survivors, or the loss of the society of the deceased; but in estimating the damages, the jury should consider his annual earnings, age, health, habits and estate. *Donaldson v. Mississippi and Missouri R. R. Co.*, 18 Ia., 280, 1865; *Illinois Central R. R. Co. v. Weldon*, 52 Ill., 290, 1869.

8. — The jury will not consider the pain suffered by the deceased, nor the wounded feelings of his friends, in estimating the damages. *Barron v. Illinois Central R. R. Co.*, 1 Bissell (U. S. C. C.), 412. 1863.

9. — The jury may take into consideration the support of the widow of the deceased, and the minor children, and the instruction and physical, moral and intellectual training of the minor children by the deceased. *Illinois Central R. R. Co. v. Weldon*, 52 Ill., 290. 1869.

10. — Where it appeared that the deceased was a common laborer who left a widow and several minor children, but what wages he was earning was not shown, yet a verdict of \$5,000 was regarded as excessive, in view of there being no evidence that he earned, annually, as much even as one-half the interest on that sum. *Ib.*

11. — In such cases, where no exact computation can be made, discretion in fixing the amount is left to the judge and jury. *C. C.*, 1928. *Frank v. New Orleans and Carrollton R. R. Co.*, 20 La. An., 25. 1868.

12. — In estimating the value of the life of the deceased, it is proper to instruct the jury to consider his probable gains and accumulations, his age, his family and his usual wages, and to award such an amount of damages as a careful and impartial examination of the evi-

Injuries causing Death.

dence seemed to demand. *Catawissa R. R. Co. v. Armstrong*, 52 Penn. St., 282. 1866.

13. — The obligation of the wife, whose husband has been killed by negligence, to support herself and children, and the loss of her chance to be endowed out of his future accumulations, are pecuniary injuries to her, to be redressed by the person who caused them. *Ib.*

14. — The value of the husband's life to his wife is to be determined by ascertaining how much better she would be in her pecuniary resources with him than without him. *Ib.*

15. — In such case, there can be no fixed standard for the measurement of damages, the discretion of the jury, properly instructed, is the standard. *Ib.*

16. — Damages for death are exclusively statutory, and are capable of restriction and limitation by the legislature. *Cleveland and Pittsburgh R. R. Co. v. Rowan*, 66 Penn. St., 393. 1870.

17. **Husband and wife.** Where a husband brings an action as the administrator of his wife, for the damages resulting from her death by the defendant's negligence, he can recover only for the pecuniary injury sustained by her next of kin. The value of her services to him does not enter into the estimate of damages, and evidence thereof is inadmissible. *Dickins v. New York Central R. R. Co.*, 23 N. Y., 158, 1861; reversing *Same v. Same*, 28 Barbour (N. Y.), 41, 1858; see *Same v. Same*, 13 Howard's Pr. (N. Y.), 228, 1856.

18. — To sustain an action under the statute, for injury to the person resulting in death, it must appear by pleadings and proof that there is a person in being who is entitled to the money when recovered. *Woodward v. Chicago and Northwestern R. R. Co.*, 23 Wis., 400. 1868.

19. — Where the person injured was a married woman and the husband survives, the measure of damages is the pecuniary loss to him, not exceeding \$5,000. *Ib.*

20. — Such an action sounds in tort; and in this case, it abates on the death of the husband, although the administrator is the nominal plaintiff, and there is a child of the deceased surviving. *Ib.*

21. — If a widow die, pending a suit for damages for the death of her husband, the action will survive to the children. *David v. Southwestern R. R. Co.*, 41 Ga., 223. 1870.

22. — No action lies on a promise by a railroad company to pay to the widow of one who was killed by an accident on its railroad a certain sum of money, in consideration of her forbearance to sue it for damages; the company not being liable, there was no consideration for the promise. *Palfrey v. Portland, Saco and Portsmouth R. R. Co.*, 4 Allen (Mass.), 55. 1862.

23. — An action lies for injuries done to a married woman by the wrongful act, neglect, or default of another person, resulting in her death. Such action must be brought by her executor or administrator. R. S. ch. 135, §§ 12, 13. *Whiton v. Chicago and Northwestern R. R. Co.*, 21 Wis., 305. 1867.

24. **Instantaneous death.** An administrator of a person killed by a collision on a railway, cannot maintain an action for the injury under St. 1842, ch. 81, § 1, where the death of the intestate was instantaneous with the collision. *Kearney, Adm'r v. Boston and Worcester R. R. Co.*, 9 Cushing (Mass.), 108, 1851; *Hollenbeck v. Berkshire R. R. Co.*, ib., 478. 1852.

25. — The statute supposes the party deceased to have been once entitled to an action for the injury. *Ib.*

26. — An action at law to recover damages for an injury which causes immediate insensibility, and death in fifteen minutes, survives to the administrator of the estate of the deceased. *Bancroft v. Boston and Worcester R. R. Co.*, 11 Allen (Mass.), 34. 1865.

27. — The fact that the injured party remains insensible up to the time of his death does not change the rule. *Ib.*

28. **Jurisdiction.** An administrator appointed in Massachusetts cannot maintain an action there on the statute of another state, which gives to the personal representatives of a person killed by wrongful act, neglect or default, a right to maintain an action for damages in respect thereof. (See *Woodard v. Michigan Southern R. R. Co.*, 10 Ohio St., 121.) *Richardson v. New York Central R. R. Co.*, 98 Mass., 85. 1867.

29. **Parent and child.** The act of April 26, 1855, gives the widowed mother power to recover damages for the death of her child by negligence; the damages are not limited to nursing and medical attendance, but are such as a court and jury, under all the circumstances, shall consider reasonable. *Pennsylv.*

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vania R. R. Co. v. Bantom, 54 Penn. St., 495, 1867; see *Cleveland and Pittsburgh R. R. Co. v. Rowan*, 66 Penn. St. 393, 1870.

30. — Both parents are entitled to recover damages, estimated by a common standard. *Pennsylvania R. R. Co. v. Bantom*, 54 ib., 495, 1867.

31. — The mother may show what the services of the child were worth to her, as if she had acquired the right to them by contract. *Ib.*

32. — Nursing, medical attendance and funeral expenses, are proper elements of estimate, but the value of the services lost is equally legitimate since the statute. *Ib.*

33. — On proof of the child's disposition, and that the parents were poor and in ill health, the judgment will not be reversed because the jury were allowed to consider, in estimating the damages, the parents' reasonable expectation of pecuniary benefit from continuance of her life after she should become of age. *Potter v. Chicago and Northwestern R. R. Co.*, 22 Wis., 615. 1868.

34. — In an action by a father against a company operating a railroad, for the negligent killing of his female child, the court refused to instruct the jury that in estimating what the services of the deceased, until she was twenty-one years old, would have been worth to the plaintiff, they were to make "allowance for the chances of her marriage after she should have attained the age of eighteen years;" but instructed them that the contingency was "too remote to be considered by them." *Held*, that whether or not such contingency was too remote to be considered, it was correctly excluded, because there was no evidence before the jury upon which they could have arrived at a conclusion on the subject. *Seaman v. Farmers' Loan and Trust Co.*, 15 Wis., 578. 1862.

35. — An action for damages "for causing death by wrongful act, neglect or default," (Laws of 1847-9), can be sustained by an individual as the administrator of his intestate mother, whose death was caused by the negligence of the agents and servants of the defendant, although the deceased was a widow and had no child at the time of her death, under the age of twenty-one years, or relative, who was dependent upon her, or who could have any legal claim upon her for service or support. *Keller v. New York Central R. R. Co.*, 17

Howard's Pr. (N. Y.), 102, 1858; see *Same v. Same*, 24 ib., 173, 1861.

36. Pleading. The right to sue in such cases, under § 784, 2 G. & H., 330, is given to the personal representative of the deceased, but the action is prosecuted for the benefit of the widow and children, or next of kin, and the names of these persons, and their relationship to the deceased, should be stated in the complaint. *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Keely's Adm'r*, 23 Ind., 133. 1864.

37. Statutes. Section 3, p. 426, R. S. 1852, which gave to the wife, or in case there was none, then to the minor children of a person killed by the negligence or unskillfulness of the officers or servants of a railroad company, etc., a right of action against the company, was repealed by implication by § 784, p. 205, 2 R. S., 1852. *President, etc., of Peru and Indianapolis R. R. Co. v. Bradshaw*, 6 Ind., 146, 1855; *Knightstown and Shelbyville R. R. Co. v. Lindsay*, 8 ib., 278. 1856.

38. — A corporation is liable in a civil action for the wrongful acts of its servants, causing death. Rev. 1860, § 4111. *Donaldson v. Mississippi and Missouri R. R. Co.*, 18 Ia., 280. 1865.

39. — A corporation may be guilty of criminal acts, for which it may be held liable in a civil action. *Ib.*

40. — In California, a civil action can be sustained by the administrator. *Kramer v. San Francisco Market Street R. R. Co.*, 25 Cal., 434. 1864.

41. — Where death is caused by the wrongful act, neglect or default of another, the personal representative of the deceased can recover damages only with reference to the pecuniary injury resulting from such death to the widow and next of kin of the deceased, and the intestate's cause of action cannot be taken into the account in assessing the damages, under the provisions of the statute, G. S., ch. 52. *Needham v. Grand Trunk R. R. Co.*, 38 Vt., 294. 1865.

42. — Where death thus occurs, two causes of action may arise, one in favor of the decedent, for his loss and sufferings in his lifetime, and revived by act of 1847, the other founded on his death and consequent injury to his heirs, under act of 1849. Both actions are to be prosecuted in point of form in the name of his personal representatives, but the damages in

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the two suits are given upon entirely different principles, and for different purposes. *Ib.*

43. — Where the injury was inflicted out of the state, and the cause of action of the intestate does not survive by the laws of the place where it accrued, our statute of 1847 does not apply; nor does the statute of 1849 apply where the injury which caused the death was inflicted without the state, though upon a citizen of this state, who was brought here before his death. *Ib.*

44. — The statute giving a cause of action to the widow or next of kin in cases of death from negligence — construed. *Chicago and Alton R. R. Co. v. Shannon*, 43 Ill., 338. 1867.

INJURIES TO PERSONS ON THE TRACK.

See DAMAGES; HIGHWAY; INJURIES TO EMPLOYEES; NEGLIGENCE; RECEIVER; SLAVES.

I. STREET AND HIGHWAY CROSSINGS.

1. *Negligence of railway companies.*
2. *Negligence of injured party.*
3. *Rights of both parties.*

II. STREETS.

III. SIGNALS.

IV. NEGLIGENCE.

1. *Contributory negligence.*
2. *Comparative negligence.*
3. *Negligence of railway company.*
4. *Gross negligence.*
5. *By whom the question of negligence is to be determined.*

V. INJURIES TO CHILDREN.

VI. INJURIES CAUSING DEATH.

VII. DAMAGES.

VIII. DEFECTS IN ROADWAY, MACHINERY, ETC.

IX. DEPOT GROUNDS.

X. EVIDENCE.

XI. FRIGHTENED TEAMS.

XII. GENERAL MATTERS.

I. STREET AND HIGHWAY CROSSINGS.

1. *Negligence of railway companies.*

1. **Burden of proof.** Where a traveler is injured in crossing a railway, negligence is not to be presumed against the company. *Penn-*

sylvania R. R. Co. v. Goodman, 62 Penn. St., 829. 1869.

2. **Cars moved by the wind.** Where a person attempted to cross a railway track during a high wind, with his hat over his face, and without looking up the track, and was killed by a train of cars standing upon the branch track, the cars being set in motion by the gale, it was *held*, that it was error to instruct the jury that it was a violation of duty in the company to fail to set the brakes or fasten the cars when left thus standing upon a side track. *Nicholson v. Erie R. R. Co.*, 41 N. Y., 525. 1870.

3. — Where, in consequence of the neglect of a railway company to chain or put blocks under the wheels of cars, left standing on a track, constructed on a pier used as a public highway, one, who was necessarily crossing the track during a dark night, without fault on his part, was run over and seriously injured by the cars, which had been put in motion by a strong wind, he will be entitled to recover damages to the extent of the injury sustained. *Brown v. Pontchartrain R. R. Co.*, 8 Robinson (La.), 45. 1844.

4. **Contributory negligence.** An action was brought against a railroad company for causing the death of S., by running its cars over him, while crossing the railroad track upon a public highway. The court instructed the jury, that though deceased was in fault in being upon the railroad track, yet if the company's agents were guilty of gross negligence in running over him, by which is meant a want of such care as very prudent persons take of their own concerns, the plaintiff was entitled to recover. *Held*, that if negligence and want of ordinary care of the deceased contributed to his death, the company cannot be held liable, although guilty of negligence, unless that negligence was so gross as to imply a willingness to inflict the injury. *Held*, also, that the want of such care as a very prudent man takes of his own concerns, does not constitute such gross negligence as would render the company liable, if deceased, by his own negligence, contributed to his death; while the exercise of such care would render the company excusable, although deceased was also without fault. *Evansville and Crawfordville R. R. Co. v. Smith*, 15 Ind., 120. 1860.

5. — To entitle the plaintiff, in an action

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brought against a railroad company to recover damages for injuries sustained by him in being caught between two cars of the defendant, while he was attempting to cross a street, it must be shown that such injuries were directly caused by the want of ordinary care and prudence on the part of the defendant, and that they could not have been avoided by the exercise of reasonable care and caution on the part of the plaintiff. *Baltimore and Ohio R. Co. v. Fitzpatrick*, 35 Md., 32. 1871.

6. — The following instruction was held erroneous to defendant's prejudice in an action against a railway company for injuries sustained in attempting to cross its track: "It is incumbent upon the plaintiff to use all reasonable care and prudence in crossing the track, and particularly at stations where there is a reasonable probability of there being trains; and the want of such care and prudence on the part of plaintiff, if it tended to cause the injury, will be taken into consideration by the jury in determining the liability of the company." The instruction was held erroneous, as falling short of stating the law. *Spencer v. Illinois Central R. R. Co.*, 29 Iowa, 55. 1870.

7. Crossing made by company. In an action against a railroad company for negligence in killing a man by its engine at the crossing of a public highway, evidence that such road had been made by the company was irrelevant. *Pennsylvania R. R. Co. v. Weber*, 72 Penn. St., 27. 1872.

8. Defective crossings and obstructions to the view. Where the defendant's road is carried across a highway in such manner and place that those traveling the highway can neither see nor distinctly hear approaching trains until too late to avoid collision with them, the company is liable for such collision in the absence of negligence of those injured. *Richardson v. New York Central R. R. Co.*, 45 N. Y., 846. 1871.

9. — This is the rule, although he might also have a remedy against the town which was bound to keep the highway in repair. *Gillett v. Western R. R. Co.*, 8 Allen (Mass.), 560. 1864.

10. — Compliance with the statute as to sounding the whistle and ringing the bell is not the whole duty of the company, and will not excuse it in such a case. *Richardson v. New York Central R. R. Co.*, 45 N. Y., 846. 1871.

11. — The circumstances under which a person was injured at a highway crossing considered — the approach of the railroad to the highway being through a cut. *Chicago, Burlington and Quincy R. R. Co. v. Triplett*, 38 Ill., 482. 1865.

12. — Injuries to a person in crossing a highway considered with reference to the facts of this particular case, the view of the crossing having been obstructed in excavating for the railway. *Duffy v. Chicago and Northwestern R. R. Co.*, 32 Wis., 269. 1873.

13. — The company having constructed a "crossing" at the intersection of a highway dedicated to public use, was bound to keep such crossing in such reasonable repair as to be safe and convenient for travelers to pass over. *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Dunn*, 56 Penn. St., 280. 1867.

14. — In an action against a railway company, it appeared that the company had just raised its track at a crossing of the highway, and had so left the crossing that a loaded team would naturally be hindered in crossing the track; that while the plaintiff, who was crossing the track in the night time was so hindered with his wagon, a locomotive of the company, without giving any signal of its approach, struck the wagon and injured the plaintiff; such conduct on the part of the company was sufficient to make out a clear case of negligence and to warrant the jury in inferring that there was no want of ordinary care on the part of the plaintiff. This rule would be the same if the plaintiff was driving a colt which balked at the crossing, and which balking might have been attributed to the bad condition of the crossing. *Milwaukee and Chicago R. R. Co. v. Hunter*, 11 Wis., 160. 1860.

15. Fireman. The running of an engine across a much frequented thoroughfare, such as the street of a village, by a fireman alone, without an engineer, would justify a jury in finding a want of proper care on the part of the railway company. *O'Mara v. Hudson River R. R. Co.*, 38 N. Y., 445. 1868.

16. Flagmen. In an action to recover damages for an injury occasioned by a collision at a crossing, evidence of the intoxication, on former occasions, of the flagman stationed there, is immaterial; the issue is confined to the question of negligence at the time of the

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collision. *Warner v. New York Central R. R. Co.*, 44 N. Y., 465, 1871; reversing *Same v. Same*, 45 Barbour (N. Y.), 299, 1866.

17. — The common law does not require a railroad company to station a flagman at every street or road crossing, where a jury may be of the opinion that the travel is so great that ordinary prudence requires such precaution. *Beisiegel v. New York Central R. R. Co.*, 40 N. Y., 9, 1869; *Ernst v. Hudson River R. R. Co.*, 39 ib., 61, 1868.

18. — And this, although an omission to station a flagman at a crossing where the railroad company runs its trains at a greater rate of speed, or in other respects differently from what would otherwise be permissible or consistent with proper care, may be evidence of negligence to go to the jury. *Id.*

19. — But the company, for its own convenience, may elect to place a flagman at certain crossings, and, by establishing a practice of that kind, may make a law binding upon itself. *Ernst v. Hudson River R. R. Co.*, 39 N. Y., 61, 1868; *Warner v. New York Central R. R. Co.*, 45 Barbour (N. Y.), 299, 1866.

20. — Where, by such voluntary and continued practice, it has become notoriously public, that a flagman is placed at such crossing to give notice of the approach of trains, then to withdraw such flagmen without notice, may become an act of negligence on the part of the company for which it would be liable. *Id.*

21. **Liability of corporation.** A railroad company having the general right to lay a track, and run its engines and cars across a public street in a city, must be shown to have committed some fault in the manner of doing it, before it can be held for a personal injury sustained by an individual. *Wilds v. Hudson River R. R. Co.*, 29 N. Y., 315, 1864; see *Same v. Same*, 24 ib., 430, and 33 Barbour (N. Y.), 503; see *Same v. Same*, 23 Howard's Pr. (N. Y.), 492, 1862.

22. **Signal.** In an action by the widow and children of a decedent, to recover damages for an injury occurring at a crossing of a public street, within the limits of a city, and causing his death, it was *held*, not error to instruct the jury that if the whistle was not sounded, nor any other usual notice given of the approach of the train, the deceased had a right to presume that the track was clear; and that, unless

the jury were satisfied by affirmative proof, that the deceased did not use ordinary care, the defendants were liable. *Philadelphia and Trenton R. R. Co. v. Hagan*, 47 Penn. St., 244, 1864.

23. — Nor was it error to instruct the jury that the employes of the train were required to approach such crossing at a moderate rate of speed, and to give timely warning to those lawfully passing along the street; and that, if by any neglect or omission that duty was not fulfilled, the company was liable, unless it was affirmatively shown that the deceased was not exercising ordinary care. *Id.*

24. **Streets.** The passage of two trains of cars in opposite directions, along contiguous tracks, in a populous city, so as to meet at or near a crossing properly used by foot passengers, without the presence of a flagman, and without lessening their speed, was *held* to justify a jury in determining that the railway company was guilty of culpable negligence, although flagmen were kept at the place, designated in a city ordinance, and the speed did not exceed what was authorized for one train by the ordinance. *West v. New Jersey R. R. Co.*, 3 Vroom (N. J.), 91, 1866.

25. — The jury were held to be justified in exonerating the plaintiff from the charge of negligence when he was struck by one of the trains, while he was endeavoring to guard against injury from the other. *Id.*

26. **Whistle.** The engine of defendant having given no notice of its approach, whistled under a bridge whilst a traveler was passing over it; his horses took fright, ran off and injured him. *Held*, that if danger might be reasonably apprehended, it was the duty of the company to give some warning. *Pennsylvania R. R. Co. v. Barnett*, 59 Penn. St., 259, 1868.

27. — It would have been negligence for the traveler to drive upon the bridge, knowing that the train was about to pass under it; it was the duty of the company to give notice. *Id.*

28. — Sounding the whistle under the bridge was a sufficiently proximate cause of injury to render the company liable. *Id.*

2. Negligence of injured party.

29. **Backing train.** While a train was standing upon the street on defendant's track, plaintiff, desirous of passing upon the street with his

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horse and wagon, asked a man who had got off the train, but who it did not appear was in defendant's employ, if he could pass. He was advised not to do so, as the train might back at any time. Plaintiff waited a few minutes, and then attempted to lead his horse across the track in the rear of the train, when the train moved backward, struck and injured the horse and wagon. *Held*, that this was not such evidence as constituted contributory negligence as matter of law, but the question was one of fact for the jury. *Eaton v. Erie R. R. Co.*, 51 N. Y., 544. 1873.

30. Defective crossings. Whether it was negligence in the plaintiff to walk upon a sidewalk, in a dark night, without a light, is a question of fact for the jury. *Maloy v. New York Central R. R. Co.*, 58 Barbour (N. Y.), 182. 1870.

31. Degree of care required. The degree of care required by persons about to drive a team across a railway, considered. *Wilds v. Hudson River R. R. Co.*, 29 N. Y., 315, 1864; see *Same v. Same*, 24 ib., 430, and 33 Barbour (N. Y.), 503; see *Same v. Same*, 23 Howard's Pr. (N. Y.), 492, 1862.

32. — Every person of ordinary intelligence is bound to know that a railroad crossing over a public highway, where cars are frequently passing, is a place of more than ordinary danger, and should use care accordingly. *Illinois Central R. R. Co. v. Baches*, 55 Ill., 379. 1870.

33. — If a person who is about to drive his team across a railway track, sees a train approaching, and determines to try the speed of his horses against that of the engine, he does it at his peril. *Wilds v. Hudson River R. R. Co.*, 29 N. Y., 315, 1864; see *Same v. Same*, 24 ib., 430, and 33 Barbour (N. Y.), 503; see *Same v. Same*, 23 Howard's Pr. (N. Y.), 492, 1862.

34. Double track. In an action for killing the plaintiffs' intestate by defendant's trains, while she was attempting to cross two adjacent tracks, it appearing that the deceased must have seen and known that two trains were approaching on said tracks side by side, and with the exercise of any care, must have known that they were running at a much greater rate of speed than usual, and the circumstances were such as would have prevented any prudent person from attempting to pass, the court should have set aside a verdict for the plaintiff and ordered a new trial. *Lunghoff v. Mil-*

waukee and Prairie du Chien R. R. Co., 23 Wis., 43. 1868.

35. Evidence of care of injured party. It is error to charge the jury that the plaintiff will be presumed free from fault, if nothing else appears in the case. Proof in some form, that the plaintiff was free from contributory negligence, constitutes a part of his case. This must appear, either from the circumstances, or from direct evidence. *Warner v. New York Central R. R. Co.*, 44 N. Y., 465. 1871.

36. — The foregoing is held to be dictum, and the contrary doctrine is sustained. *Robinson v. New York Central R. R. Co.*, 65 Barbour (N. Y.), 146. 1873.

37. — In an action against a railroad company for injuries caused by collision with a train, at a highway crossing, with an open wagon in which the plaintiff was being driven in the day-time, it appeared that the track and the sign over the highway were visible five rods or more off, in the direction from which the plaintiff approached the crossing. The plaintiff testified that he did not know of the crossing and did not look up, and that the driver was careful and the horse safe; but there was no evidence that the driver looked to ascertain whether a train was coming. *Held*, that there was no evidence for the jury that the plaintiff was in the exercise of due care. *Allyn v. Boston and Albany R. R. Co.*, 105 Mass., 77. 1870.

38. Master and servant. In an action brought against a railway company for damages caused by running a train of cars over plaintiff's wagon and horses, while they were being driven by the plaintiff's servant along a public highway, it was *held*, that if the servant contributed by his negligence to the accident, the plaintiff could not recover. *Toledo and Wabash R. R. Co. v. Goddard*, 25 Ind., 185. 1865.

39. — The statements made by the servant at the time, as to the cause of the accident, were a part of the *res gestæ*, and admissible in evidence against the plaintiff. *Ib.*

40. Obstructions to the view. Where a railroad company has obstructed the view of travelers upon the highway by piling its wood so that the approach of the train to the crossing cannot be seen until the traveler is upon the track, one who has driven upon the track

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with due care, and looked for the train as soon as looking could be of service, will not be deemed guilty of negligence in not stopping his team to ascertain if a train might be approaching. *Mackay v. New York Central R. R. Co.*, 35 N. Y., 75, 1866; reversing *Same v. Same*, 27 Barbour (N. Y.), 528, 1868; see *Brooks v. Buffalo and Niagara R. R. Co.*, 25 ib., 600; and *Brendell v. Buffalo and State Line R. R. Co.*, 27 ib., 534.

41. **Persons must look and listen.** It is the duty of one lawfully attempting to cross a railway, to stop and look both ways and listen for approaching trains. *Lehigh Valley R. R. Co. v. Hall*, 61 Penn. St., 361, 1869; *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Dunn*, 56 Penn. St., 280, 1867.

42. — If a traveler goes upon a track without negligence, and by a defect in the crossing, he is stopped on it, it is his duty to look out for a train, and use all his efforts to give notice to one coming, and to extricate himself as speedily as possible. *Ib.*

43. — A traveler approaching a railway should do so cautiously and should observe the approach of trains, and the company should give timely warning of the approach of the train. *Pennsylvania R. R. Co. v. Goodman*, 62 Penn. St., 329, 1869; *North Pennsylvania R. R. Co. v. Heilman*, 49 ib., 60, 1865; *Haught v. New York Central R. R. Co.*, 7 Lansing (N. Y.), 11, 1872; *Hewett v. Same*, 3 ib., 83, 1870; *Morse v. Erie R. R. Co.*, 65 Barbour (N. Y.), 490, 1873; *Gonzales v. New York and Harlem R. R. Co.*, 39 Howard's Pr. (N. Y.), 407, 1870; *Same v. Same*, 38 N. Y., 440, 1868; reversing *Same v. Same*, 6 Robertson (N. Y.), 93, 1868; see *Same v. Same*, 1 Sweeny (N. Y.), 506, 1869; see *Same v. Same*, 1 Jones and Spencer (N. Y.), 57, 1871; *Wilds v. Hudson River R. R. Co.*, 24 N. Y., 430, 1862; *Same v. Same*, 23 Howard's Pr. (N. Y.), 492; reversing *Same v. Same*, 33 Barbour (N. Y.), 503, 1860; *McCall v. New York Central R. R. Co.*, 54 N. Y., 642, 1873; *Toledo, Peoria and Warsaw R. R. Co. v. Riley*, 47 Ill., 514, 1868; *St. Louis, Alton and Terre Haute R. R. Co. v. Manly*, 58 ib., 300, 1871.

(See subdivision, III, *post*, 455, of this title.)

44. — Where a person, on approaching such a crossing with a team, does not avail himself of his sense of sight and hearing, when by

the proper exercise of it, he could have avoided a collision, he will be regarded as unusually negligent, though the bell was not continuously rung or the whistle sounded. *Chicago and Rock Island R. R. Co. v. McKean*, 40 Ill., 218, 1866.

45. — If it appear that the deceased would have seen the approaching cars, in season to have avoided them, had he first looked before attempting to cross, it will be presumed that he did not look; and he will be deemed to have been guilty of contributory negligence. *Wilcox v. Rome, Watertown and Ogdensburg R. R. Co.*, 39 N. Y., 358, 1868.

46. — At the intersection of a railway with a common road, there are concurrent rights; neither the traveler on the highway nor the company has the exclusive right of passage. *North Pennsylvania R. R. Co. v. Heilman*, 49 Penn. St., 60, 1865; *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Dunn*, 56 ib., 280, 1867; *Warner v. New York Central R. R. Co.*, 45 Barbour (N. Y.), 299, 1866; *Galena and Chicago Union R. R. Co. v. Dill*, 22 Ill., 264, 1859; *Toledo and Wabash R. R. Co. v. Goddard*, 25 Ind., 185, 1865.

47. — A traveler upon a highway who knows that he is near a railway crossing and yet does not look up to see if a train is coming, simply because there is a storm and the traveling is bad, is guilty of such negligence as to preclude a recovery for an injury sustained by him from a collision with a passing train. *Butterfield v. Western R. R. Co.*, 10 Allen (Mass.), 532, 1865.

48. — One who approached a railroad at a point in a town where he had often crossed, muffled in his coat within the covered top of his wagon, taking no notice of the railroad, and drove slowly upon the track without stopping or looking out, was guilty of negligence. *Hanover R. R. Co. v. Coyle*, 55 Penn. St., 396, 1867.

49. — It is not necessary to prove affirmatively that a person injured when crossing a railroad on a public highway had stopped and looked up and down the railroad; whether he used the proper precautions is to be determined by all the circumstances of the case. *Pennsylvania R. R. Co. v. Weber*, 72 Penn. St., 27, 1872.

50. — Where a person crosses a railway with a team, in ignorance of the approach of the

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cars, when the danger may be easily seen by looking for it, he is fairly chargeable with negligence. Much more so, if he drives on to the track and there stops, looking in an opposite direction from an approaching train, until the engine comes in contact with him, and throws him off. *Brooks v. Buffalo and Niagara Falls R. R. Co.*, 25 Barbour (N. Y.), 600. 1854.

51. — A person driving a heavy team, on a foggy morning, over a railroad, without waiting to ascertain whether an approaching train was near, having been struck by the engine and killed, *held*, to have contributed to the act by his own negligence. *Haslan v. Morris and Essex R. R. Co.*, 4 Vroom (N. J.), 147. 1868.

52. — In an action brought against a railroad company for negligently running over a passer-by at a crossing, it is error to grant a nonsuit, refusing to submit the question of concurring negligence on his part to the jury, merely because he did not look to see whether a train was approaching; if it appear that from the circumstances at the time—for example, the state of the weather—he could not have seen the train in time to avoid it. *Hackford v. New York Central R. R. Co.*, 13 Abbott's Pr. N. S. (N. Y.), 18. 1871.

53. — Where a person, knowingly about to cross a track, approaches it from a point where he may have an unobstructed view of the railroad, and know of the approach of a train a sufficient time to clearly avoid an injury from it, he cannot, as a matter of law, recover, although the company may also have been negligent in omitting to perform a statutory requirement, or otherwise. *Arts v. Chicago, Rock Island and Pacific R. R. Co.*, 34 Ia., 153. 1871.

54. — But if the view was obstructed, or if there were circumstances calculated to throw a person off his guard, then, whether it was negligence on the part of the person undertaking to cross, is a question of fact for the jury. *Id.*

55. — No neglect of duty on the part of a railway company will excuse any person, approaching on a highway a railway crossing, from using the senses of sight and hearing, when these may be available. *Bellefontaine R. R. Co. v. Hunter*, 33 Ind., 335. 1870.

56. — A person is not bound to stop his team and look and listen before attempting to cross the track. He may have satisfactory and sufficient evidence to justify him in attempting

to cross, without this. *Spencer v. Illinois Central R. R. Co.*, 29 Ia., 55. 1870.

57. — Although a person, about to cross a railway, must look and listen, yet this rule does not require the traveler to stop, or if he is with a team, to go out and leave his vehicle and go to the track, or to stand up, and go upon the track in that position in order to obtain a better view. *Davis v. New York Central and Hudson River R. R. Co.*, 47 N. Y., 400, 1872; *Duffy v. Chicago and Northwestern R. R. Co.*, 32 Wis., 269, 1873.

58. — A plaintiff, approaching a crossing, and stopping from four to six rods therefrom to look and listen, and neither seeing or hearing a signal of an approaching train, is not to be deemed guilty of such negligence as to justify a nonsuit. *Renwick v. New York Central R. R. Co.*, 36 N. Y., 132, 1867; *Same v. Same*, 34 Howard's Pr. (N. Y.), 91, 1867.

59. — Where a person, standing in a cart, and driving the horse which drew it, and at the same time leading by a strap in his hand another horse drawing another cart, attempted (after taking precautions by looking and listening to ascertain if a train was approaching) to pass over the track of a railroad at a place where it crossed at grade the street on which he was traveling, and the rear horse, becoming restive, rushed forward, so that both of the horses and carts were on the track, and in this position they were struck and injured by a train; it was *held*, that the question whether the traveler was in the exercise of due care at the time of the collision, was for the jury. *Eagan v. Fitchburg R. R. Co.*, 101 Mass., 315. 1869.

60. **Presumption.** A man was found dead on a railroad where it crossed a street, having been killed by a train of cars. *Held*, that whether he was lawfully on the railroad, and whether his own negligence contributed to his death, were for the jury. *Lehigh Valley R. R. Co. v. Hall*, 61 Penn. St., 361. 1869.

61. — Where there is evidence of negligence upon the part of the company, the law will not presume in the absence of proof that the negligence of the deceased contributed to his death. *Id.*

62. **Signals.** A person traveling on foot on the public highway, who is not aware of the vicinity of a passing train, is at liberty to assume that none is approaching, when no flag is displayed and no whistle or bell is sounded.

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Beisiegel v. New York Central R. R. Co., 34 N. Y., 622, 1866; *Same v. Same*, 31 Howard's Pr. (N. Y.), 181; reversing *Same v. Same*, 33 Barbour (N. Y.), 429, 1861; but see same case 40 N. Y., 9, and *Ernst v. Hudson River R. R. Co.*, 39 ib., 61; see *Beisiegel v. New York Central R. R. Co.*, 14 Abbott's Pr. N. S. (N. Y.), 29, 1870.

63. — As between him and the company, he is not bound to be on the alert for danger, when he has the assurance of the company that the crossing is safe. *Ib.*

64. — The citizen who, on a public highway, approaches a railroad track, and can neither see nor hear any indication of a moving train, is not chargeable with negligence for assuming that there is no car sufficiently near to make the crossing dangerous. He has the right to presume that in handling their cars, the railroad companies will act with appropriate care, and that the usual signals of approach will be seasonably given, and that the managers of the train will be attentive and vigilant. *Kennayde v. Pacific R. R. Co.*, 45 Mo., 255, 1870; *Tabor v. Missouri Valley R. R. Co.*, 46 ib., 353.

65. — It is incumbent on railway companies to exercise care and diligence; and unless the acts of a person killed by the cars were the direct and proximate cause of the disaster, the company will not be excused from liability. *Ib.*

66. — A defendant cannot impute a want of vigilance to one injured by his act, as negligence, if that very want of vigilance was in consequence of an omission of duty on the part of the defendant. As where a person driving a team, listened carefully at a highway crossing and hearing no train or whistle (the whistle not being sounded at the usual place, if at all), drove upon the track, and was killed. *Pennsylvania R. R. Co. v. Ogier*, 35 Penn. St., 60. 1860.

67. — Where three persons, having waited for a freight train to pass, at the crossing of a frequented street, then cross the track, and two of them are struck by a switch train, on an adjoining track, and killed, there being at the time a strong wind blowing, the bell on the switch train not having been rung, and the survivor having neither seen nor heard the switch train until after the accident, the circumstances are not such as to warrant the court

in instructing the jury in an action brought by the representative of one of the deceased persons that the plaintiff could not recover. *Whiton v. Chicago and Northwestern R. R. Co.*, 2 Bissell (U. S. C. C.), 282. 1870.

68. Speed of team. It is negligence in one knowing the position of the railroad and the frequent passage of trains, to approach the crossing at such speed as to be unable to stop his horses before actually getting upon the track. *Wilds v. Hudson River R. R. Co.*, 24 N. Y., 430, 1862; *Same v. Same*, 23 Howard's Pr. (N. Y.), 492; reversing *Same v. Same*, 33 Barbour (N. Y.), 503, 1860.

3. Rights of both parties.

69. Rights are mutual. Neither the company nor the public have the exclusive right of a clear passage. Both are restricted by public necessity and convenience. *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Dunn*, 56 Penn. St., 280, 1867; *North Pennsylvania R. R. Co. v. Heileman*, 49 ib., 60, 1865; *Toledo and Wabash R. R. Co. v. Goddard*, 25 Ind., 185, 1865.

70. — A railroad company, and a traveler on the highway, have correlative rights. Neither has a superior right, except as it results from the difficulties and necessities of the case. *Galena and Chicago Union R. R. Co. v. Dill*, 22 Ill., 264. 1859.

71. — It is not a question of superior, or subordinate right, in passing, which arises in an action for damages occasioned by a collision between a locomotive on the railroad and a vehicle upon the highway, but a question merely of the exercise of proper caution and prudence, by either party, in the exercise of a common and equal right. *Warner v. New York Central R. R. Co.*, 45 Barbour (N. Y.), 299. 1866.

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72. Backing train. The running of a train of cars backwards through a street of a city in the night time, without a light, signal or warning at the rear end of the train, is sufficient negligence to render the railroad company liable for an injury to one crossing the street. *Maginnis v. New York Central R. R. Co.*, 52 N. Y., 215. 1873.

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73. City ordinances. Where a train of cars is run at a speed forbidden by a city ordinance, that is evidence of negligence. *Jetter v. New York and Harlem R. R. Co.*, 2 Abbott's Ct. of Ap. Dec. (N. Y.), 458. 1865.

74. — If a railroad company do not conform to the city ordinances, providing certain safeguards in the use of its engines, it is not in the lawful pursuit of its business, and is responsible for any injury which it may occasion, if the party injured be not in fault. *Baltimore and Ohio R. R. Co. v. The State*, 29 Md., 252. 1868.

75. Culverts. A railway company constructed its road across the main street of a village, about a foot and a half above the street level. The street was twelve rods wide, with two traveled paths, one on each side of the street, and an open common between. The company was required by its charter to restore any highway intersected, so as not to impair its usefulness. The company put the two traveled tracks in proper condition for passing with vehicles, but made no other crossing. About midway between the two paths, it constructed a culvert under the timbers of its track, which was left uncovered. A person walking across the street upon the railroad track, at a time when the culvert was filled with snow and could not be seen, fell into it and was injured. *Held*, that the company was liable for the injury. *Judson v. New York and New Haven R. R. Co.*, 29 Conn., 434. 1861.

76. Degree of care required. As to persons not passengers, a railway company is only liable for ordinary care in moving its cars by horse power through a public street. *Baltimore and Ohio R. R. Co. v. Bahrs*, 28 Md., 647. 1868.

77. — Railway companies must run their trains with reference to persons who may be rightfully upon the streets used by their roads. *Kansas Pacific R. R. Co. v. Pointer*, 9 Kans., 620. 1872.

78. — Railway companies, in the lawful pursuit of their business, are only obliged to use such reasonable care and diligence as ordinary prudence would suggest and require, in the passage of their locomotives through the thoroughfares of a city. *Baltimore and Ohio R. R. Co. v. The State*, 29 Md., 252. 1868.

79. Neither party at fault. An action was

brought in the Marine Court, by the owner of a horse and cart, for injuries caused by a collision with one of the cars of the defendant, and the justice charged the jury, "that if the plaintiff was, in their opinion, doing his best to get out of defendant's way, it was all that could be required of him; that if he was so doing, the defendant was bound, at its peril, to stop its cars to avoid collision; and if it had not sufficient power to do so, or if it omitted to stop its cars, it was responsible." *Held*, that the charge being in effect that, if neither party was in fault, the plaintiff was entitled to recover, was palpably erroneous and unjust. *Altreuter v. Hudson River R. R. Co.*, 2 E. D. Smith (N. Y.), 151. 1853.

80. Obstructions to the view. It is a negligent act for a railway company to permit its cars to stand upon and obstruct a public street; and where, by reason of such obstruction, the view of the track is cut off in one direction, and it was rendered impossible for the plaintiff, in crossing the track, to see a train approaching in that direction, *held*, that it was not negligence, as matter of law, for the plaintiff to omit to look in the direction, the view of which was thus obstructed. *McGuire v. Hudson River R. R. Co.*, 2 Daly (N. Y.), 76. 1866.

81. Persons on foot. The liability for injuries to foot passengers, occasioned by a collision with carriages, or cars, or engines in the streets, is the same as that which arises in respect to a collision between two carriages meeting on the highway. *Brand v. Troy and Schenectady R. R. Co.*, 8 Barbour (N. Y.), 368. 1850.

82. — It is error to instruct that a railway company is bound to use the utmost care and diligence in such cases. *Id.*

83. Presumption. A horse car of the defendant was passing upon its railroad without lights or bells, on a dark evening, in a street of New York city, obstructed by a sewer in the process of construction. The plaintiff, a sober cartman, was found dead upon the track, under circumstances authorizing the inference that he had fastened his horse, and was groping in the dark to find a safe passage for his team, when struck by the defendant's car. There was no witness to the accident. *Held*, that the dangerous tendency of the defendant's conduct was such as, in the absence of any other evidence than the presumption that the

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plaintiff had the same regard for his safety as other men, to authorize the attributing of the accident to the negligence of the defendant. *Johnson v. Hudson River R. R. Co.*, 20 N. Y., 65, 1859; reversing, *Same v. Same*, 5 Duer (N. Y.), 21, 1855; *Same v. Same*, 6 ib., 633, 1857.

84. Rights of railway companies occupying streets. A railway company, which is permitted to lay its tracks upon a public highway, is not subject, in the running of its cars, to the ordinary law of the road. It has the exclusive right of way to that portion of the highway occupied by its tracks, and a truck or cart passing along the highway must turn out of the way for its cars, and the drivers of them cannot call upon the driver of the railroad company's cars to stop, or do any other act to avoid a collision, if the same result can be attained by their turning out. *Barker v. Hudson River R. R. Co.*, 4 Daly (N. Y.), 274, 1872.

85. Signals. It is gross negligence to permit a train of cars to move along without any signal, detached from the engine, and under the control of no one, in the streets of a populous city. *Chicago and Alton R. R. Co. v. Garvey*, 58 Ill., 88, 1871.

86. Statute. The act of March 20, 1845, forbidding the obstructions of streets, etc., is a general law, and applicable to a railway company subsequently incorporated. *Pennsylvania R. R. Co. v. Kelly*, 31 Penn. St., 372, 1858.

87. — Such obstruction being unlawful, the company is liable for any damages occasioned thereby, although the act imposes a specific penalty. *Id.*

88. — In such an action, the doctrine of remote and proximate cause has no application. *Id.*

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89. Burden of proof. Railroad companies are not liable for any and all damages a party may sustain, when they have omitted to give a required signal, nor is the *onus* thrown upon the company until some proof has been given, tending to show that the injury complained of resulted from the want of a signal. *Galena and Chicago Union R. R. Co. v. Loomis*, 13 Ill., 548, 1852.

90. Constitutional law. A general law which requires that a bell shall be rung or

whistle sounded before crossing any other road, is binding on railroad corporations created before the passage of such law. *Galena and Chicago Union R. R. Co. v. Loomis*, 13 Ill., 548, 1852.

91. Depot grounds. If at a railroad station the direct and usual course for passengers to reach from the station house cars waiting to receive them is by crossing one of the tracks, they have a right to rely, to some extent, upon proper and usual signals of warning to be given by trains or cars approaching. *Chaffee v. Boston and Lowell R. R. Co.*, 104 Mass., 108, 1870.

92. — The fact that such persons do not, at the instant of stepping upon the track, look to ascertain whether a train is approaching, is not conclusive of a want of due care on their part. *Id.*

93. Evidence. Where there was no pretense that there was any negligence on the part of the defendant, except in the omission of the engineer to ring the bell, or sound the whistle, at a street crossing; and the testimony of the engineer, upon that point, was positive and unqualified, that the whistle was blown and the bell rung, and another witness testified that he heard the bell ringing, and saw the engine pass; and this testimony was uncontradicted, except by the testimony of the plaintiff, and another person near by at the time, who swore that they heard no bell or whistle; *held*, that a verdict in favor of the plaintiff was not warranted by the evidence; and a new trial was granted. *Seibert v. Erie R. R. Co.*, 49 Barbour (N. Y.), 583, 1867.

94. — In respect to ringing the bell on the engine, positive evidence is entitled to more weight than negative evidence. *Chicago, Burlington and Quincy R. R. Co. v. Stumps*, 55 Ill., 367, 1870.

95. — It is competent for a railway company to show that the signals in use within a city were different from those set forth in its printed rules. *Chicago and Alton R. R. Co. v. Gretzner*, 46 Ill., 75, 1867.

96. — It is error for the court to permit the introduction of evidence showing that on former occasions the bell had not been rung or the whistle sounded as the trains passed the place where the accident occurred. *Chicago, Burlington and Quincy R. R. Co. v. Lee*, 60 Ill., 501, 1871.

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97. Flagmen. If a railroad company has made a private crossing over its track, at grade, in a city, and allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there is danger, it may be held liable in damages to one who, using due care, is induced to undertake to cross by a signal from the flagman that it is safe, and is injured by a collision which occurs through the flagman's negligence. *Sweeney v. Old Colony and Newport R. R. Co.*, 10 Allen (Mass.), 368. 1865.

98. Highway crossings. It is the duty of those in charge of a train, when approaching a public crossing, to give notice by whistling, ringing the bell or other device sufficient to warn of the approach of the train. *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Dunn*, 56 Penn. St., 280, 1867; *Renswick v. New York Central R. R. Co.*, 36 N. Y., 132, 1867; *O'Mara v. Hudson River R. R. Co.*, 38 ib., 445, 1868.

99. — The bell should be rung not only before crossing a street, but so long as there is danger of encountering passers by. *Whiton v. Chicago and Northwestern R. R. Co.*, 2 Bissell (U. S. C. C.), 282. 1870.

100. — The extent to which persons approaching a railway track have the right to rely upon signals — considered. *Mayo v. Boston and Maine R. R. Co.*, 104 Mass., 137. 1870.

101. — Where the engine driver sounds the whistle and rings the bell, and runs the train at a reasonable speed in approaching a crossing, he exercises reasonable and ordinary care, which is all the law requires. *Toledo and Wabash R. R. Co. v. Goddard*, 25 Ind., 185. 1865.

102. — A failure to give a signal, by sounding a bell or whistle, is not of itself evidence of negligence. *Galena and Chicago Union R. R. Co. v. Dill*, 22 Ill., 264, 1859; see *St. Louis, Jacksonville and Chicago R. R. Co. v. Terhune*, 50 Ill., 150, 1869.

103. — Neither the statute nor any rule of law requires the giving of a signal by the train on approaching a highway crossing. *Spencer v. Illinois Central R. R. Co.*, 29 Ia., 55, 1870; *Artz v. Chicago, Rock Island and Pacific R. R. Co.*, 34 Ia., 153, 1871.

104. — The omission to make such signals, if required by statute, would not render the company absolutely liable for injuries to persons crossing the track, unless such injury

results from the omission alone, without the negligence of the party injured. *Id.*

105. — Nor would the absence of such statute excuse the company from making such signals under all circumstances. *Id.*

106. — The failure of a railway train to give any signal when nearing a public crossing is not of itself negligence under the laws of Indiana unless the peculiar circumstances, the concealment of the train or the like, may render it necessary and proper. *Bellefontaine R. R. Co. v. Hunter*, 33 Ind., 335. 1870.

107. Persons walking along the track. A person who is injured by a locomotive whilst he is walking along the track of a railway, not at a crossing, cannot recover for such injury on the ground that it was caused by the neglect to ring the bell of the engine as required by the statute. *O'Donnell v. Providence and Worcester R. R. Co.*, 6 R. I. 211. 1859.

108. — Where the train is approaching a man walking along the track, and the bell is rung and the whistle sounded in time to enable him to get off, the company is not liable for an injury occurring to him. *Finlayson v. Railroad Co.*, 1 Dillon (8 U. S. Cir. Ct.), 579. 1871.

109. Starting of train. Although the statute does not require a signal to be given upon the starting of a train, still the common law requires the exercise of ordinary care, and in this particular case, it was held, that the jury should say whether the omission to give any signal was negligence, the party injured having been engaged in unloading the cars. *Barton v. New York Central R. R. Co.*, 1 N. Y. Sup. Ct., 297. 1873.

110. Statute. It is the imperative duty of a railroad company to sound the bell, and not merely the whistle of the locomotive, in passing through cities. (Wagn. Stat., p. 310.) *Kenayde v. Pacific R. R. Co.*, 45 Mo., 255. 1870.

111. — The statute requiring "blow posts" at points 200 yards from crossings, signals to be given, etc., may be looked to as indicating the legislative mind upon the question of negligence. *Augusta and Savannah R. R. Co. v. McElmurry*, 24 Ga., 75. 1858.

112. — The omission of a railroad company to have a sign board at a highway crossing to warn persons approaching, as required by § 1331 of the Revision, does not alone render the company liable for injuries to persons or prop-

Signals.

erty while attempting to cross the track at such point. The injured party must be free from contributory negligence. *Dodge v. Burlington, Cedar Rapids and Minnesota R. R. Co.*, 34 Ia., 276. 1872.

113. — The statute, § 55, ch. 28, G. S., requiring the bells of locomotives to be rung, or the whistle blown, for a certain distance at crossings, imposes a duty on railroad companies, not only in reference to persons approaching, or in the act of passing the crossing, but in reference to all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident and injury by the passing train. *Wakefield v. Connecticut and Passumpsic Rivers R. R. Co.*, 37 Vt., 330. 1864.

114. — A compliance with the provisions of the Rev. Sts., ch. 39, §§ 78, 79, respecting the putting up of notices at railroad crossings, and the ringing of a bell when engines are passing over the same, will not exempt a railroad company from its obligation to use reasonable care and diligence, in other respects, when running its engines over such crossings, if the circumstances of the case render the use of other precautions reasonable. *Bradley v. Boston and Maine R. R. Co.*, 2 Cushing (Mass.), 539, 1848; *Linfeld v. Old Colony R. R. Co.*, 10 ib., 562, 1852; *Webb v. Portland and Kennebec R. R. Co.*, 57 Me., 117, 1869.

115. — Whether or not it is negligence not to employ a flagman at such crossing, is a question of fact. *Webb v. Portland and Kennebec R. R. Co.*, 57 Me., 117. 1869.

116. — An action will not lie against a railroad company, under the § 39 of the general railroad act, for an injury caused by its neglect to ring the bell, or sound the steam whistle, after the cars have passed a crossing. The statute only requires the ringing of the bell, or the sounding of the whistle, when the cars are approaching a crossing. *Wilson v. Rochester and Syracuse R. R. Co.*, 16 Barbour (N. Y.), 167. 1853.

117. — The omission to give the signals at a highway crossing, as required by the statute, is not in itself evidence of gross negligence. *Leavenworth, Lawrence, etc. R. R. Co. v. Rice*, 16 Kans., 426. 1872.

118. — The failure of a railway company to comply with the statute by ringing the bell, etc., at a crossing, will not render it liable to

damages for an injury sustained by a person crossing the track, at such crossing, who has gone upon the track without looking for an approaching train. *Ernst v. Hudson River R. R. Co.*, 32 Barbour (N. Y.), 159, 1860; *Same v. Same*, 39 N. Y., 61, 1868; *Wilcox v. Rome, Watertown and Ogdensburg R. R. Co.*, ib., 358; *Harty v. Central R. R. Co. of N. J.*, 42 ib., 468, 1870; *Havens v. Erie R. R. Co.*, 41 ib., 296, 1869; *Baxter v. Troy and Boston R. R. Co.*, 41 ib., 502; *Gorton v. Erie R. R. Co.*, 45 ib., 660, 1871. *Dascomb v. Buffalo and State Line R. R. Co.*, 27 Barbour (N. Y.), 221, 1858; *Havens v. Erie R. R. Co.*, 53 Barbour (N. Y.), 328, 1869; *Ernst v. Hudson River R. R. Co.*, 19 Howard's Pr. (N. Y.), 205, 1860; *Same v. Same*, 24 ib., 97, 1862; *Same v. Same*, 31 ib., 637n; 35 ib., 641n; 32 ib., 61, 1866; 32 ib., 262, 1862; 36 ib., 84, 1868; *Same v. Same*, 3 Abbott's Pr. N. S. (N. Y.), 82, 1866.

119. — The gross negligence of the person injured at a railway crossing by a passing train will defeat his action for damages, notwithstanding the omission of those running the train to ring the bell or sound the whistle as required by law. *Steves v. Oswego and Syracuse R. R. Co.*, 18 N. Y., 422. 1858.

120. — A charge to the jury, in an action brought against a railway company for negligently causing the death of the plaintiff's intestate, at a railway crossing in a city, to the effect that even if it appeared from the evidence that the signals were not given for the entire distance required by law, it would not necessarily follow that the company would be liable, if the bell was rung or whistle sounded for such a distance from the place of the accident as fully and fairly to give the deceased timely and sufficient warning that the train was approaching, in time to prevent him from crossing or attempting to cross the track, sustained as correct. *Cook v. New York Central R. R. Co.*, 5 Lansing (N. Y.), 401. 1871.

121. — The provision of the code giving a cause of action in case of injuries arising from neglect of a railway company to have the whistle blown at a highway crossing does not require that there should be an actual collision with the cars or engine and the injured person. *Georgia R. R. Co. v. Wynn*, 42 Ga., 331. 1871.

Negligence.

IV. NEGLIGENCE.

(See subdivision I, Street and Highway Crossings, ante, 447.)

1. Contributory negligence.

122. Comparative negligence. If a collision occurs at a public crossing, and the plaintiff, by the exercise of common care, might have avoided the injury, he cannot recover although the railway company was also in fault. *Macon and Western R. R. Co. v. Winn*, 19 Ga., 440. 1856.

123. — Railroad companies are under the same obligations with other persons to use their own property so as not to injure others, and though a person be injured while unlawfully on their track, or contributes to the injury by his own carelessness, or negligence, yet the injury might have been avoided by the use of ordinary care and caution by the railroad company, it is liable for damages for the injury. *Brown v. Hannibal and St. Joseph R. R. Co.*, 50 Mo., 461. 1872.

124. — A railroad company has a right to stop its train at a public crossing for a reasonable time for proper purposes, but passengers are not obliged to wait until the train is removed; and if the passengers are obliged to cross at other points than the public crossing on account of such obstruction, the company is bound to use ordinary care and diligence to prevent injuries to them; and when persons were in the habit of crossing the track at another than the public crossing, the agent's and servants of the company were bound to take notice of the fact, and use a precaution commensurate with it. *Ib.*

125. — It appeared that the deceased was a track repairer in the service of another company, with whose road the defendant's track connected at the place where the accident occurred. It was a point where the tracks were numerous, and engines constantly in motion in great numbers. While cars were being pushed by an engine, the deceased stepped upon the track in front of the moving cars, with his back to them, and his cap drawn closely over his ears, not looking about to see if there was danger, which he could easily have discovered, though he well knew the danger of the place. The cars overtook him, and he was killed. He was held to have been guilty of such recklessness, that there could

be no recovery, unless a greater degree of negligence on the part of the company could be shown. *Chicago and Northwestern R. R. Co. v. Sweeney*, 52 Ill., 325. 1869.

126. Depot grounds. One of the defendant's tracks, connecting two depots near a city, ran within six or eight feet of the top of steps leading to the basement of a flouring mill; and plaintiff's decedent passed over the track and down the steps into the mill, and soon after returned with two bags of flour on his right shoulder, which completely obstructed his view on that side; and stepping in front of a train approaching from the right at a speed of four miles an hour, he was immediately run over and killed. Held, that there was such contributory negligence on the part of the deceased that the administrator could not recover. *Rothe v. Milwaukee and St. Paul R. R. Co.*, 21 Wis., 256. 1866.

127. Effect of contributory negligence. There can be no recovery if the injured party was guilty of contributory negligence. *Telfer v. Northern R. R. Co.*, 1 Vroom (N. J.), 188, 1862; *Runyon v. Central R. R. Co.*, 1 Dutcher (N. J.), 556, 1856; *Moore v. Same*, 4 Zabriskie (N. J.), 268, 1854; *Baltimore and Ohio R. R. Co. v. Breinig*, 25 Md., 378, 1866; *Same v. Fryer*, 30 ib., 47, 1868; *Lafayette and Indianapolis R. R. Co. v. Huffman*, 28 Ind., 287, 1867; *Spencer v. Utica and Schenectady R. R. Co.*, 5 Barbour (N. Y.), 337, 1849; *McGrath v. Hudson River R. R. Co.*, 32 ib., 144, 1860; *Carroll v. Minnesota Valley R. R. Co.*, 13 Minn., 30, 1868.

128. — Any degree of contributory negligence will prevent a recovery on the part of the plaintiff. *O'Brien v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 3 Phila. Rep. (Penn.), 76. 1858.

129. Empty cars. Where a person, who has just alighted from a train, for a personal necessity of his own steps behind some empty cars standing upon the track, and while thus engaged, the empty cars are struck by another train and backed over him and he is killed, he is guilty of such contributory negligence as to exonerate the railway company from responsibility for the injury. *Van Schaick v. Hudson River R. R. Co.*, 43 N. Y., 527. 1871.

130. Evidence. In an action brought to recover damages arising from negligence, the plaintiff must prove the defendant's negligence, and his own freedom from any negligence con-

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tributing to the injury. *McGrath v. Hudson River R. R. Co.*, 32 Barbour (N. Y.), 144, 1860; *Same v. Same*, 19 Howard's Pr. (N. Y.), 211, 1860; *Spencer v. Utica and Schenectady R. R. Co.*, 5 Barbour (N. Y.), 337, 1849.

131. Exposure in efforts to save life. Where the plaintiff's intestate, seeing a little child on a railway track and a train swiftly approaching, so that the child would be almost instantly crushed unless an immediate effort was made to save it, and thereupon, in the sudden exigency of the occasion, rushing to save the child, and succeeding in that, lost his own life by being run over by the train; it was held, that his voluntarily exposing himself to the danger, for the purpose of saving the child's life, was not, as matter of law, negligence on his part precluding a recovery. *Eckert v. Long Island R. R. Co.*, 43 N. Y., 502, 1871; see *Same v. Same*, 57 Barbour (N. Y.), 555. 1870.

132. — A locomotive and gravel train were standing, temporarily, on the railroad track at a station on the line of a railroad; and about the time the train started to back down the road, two persons, a father and son, started to come up toward the station on the track, from a mill, a short distance below. As the train approached them, the son stepped off the track, but seeing that his father was still on the track, and in the way of the train, the son stepped back and took him off the track, but was not able, himself, to avoid the train, but received an injury resulting in the loss of his leg. The train was not moving faster than four miles per hour, and the persons managing the train, when they perceived that both persons did not leave the track, reversed the engine, and made every effort to stop the train. Held, that the injury complained of did not result from any want of care, on the part of the company or its employes, and hence, the company was not liable for damages. *Evansville and Crangfordville R. R. Co. v. Hiatt*, 17 Ind., 102. 1861.

133. — When a plaintiff is in fault, but the defendant is aware of it in time to avoid injuring him, by reasonable diligence, the failure to use such diligence is held to be, alone, the proximate and immediate cause of the injury. *Ib.*

134. Failure to stop team. The plaintiff was, under the facts of this particular case,

held to be guilty of contributory negligence, he having seen the smoke of the approaching train, but made no effort to stop his team to prevent a collision. *Chicago and Alton R. R. Co. v. Fears*, 53 Ill., 115. 1870.

135. Jury to determine the question of negligence. The question of contributory negligence is a question for the jury to determine from the evidence, under proper instructions. *Webb v. Portland and Kennebec R. R. Co.*, 57 Me., 117. 1869.

136. Nonsuit. Where the plaintiff was clearly guilty of contributory negligence, he should be nonsuited, but not so where there is a conflict of evidence upon that point. *Hackford v. New York Central and Hudson River R. R. Co.*, 53 N. Y., 654, 1873; *Haring v. New York and Erie R. R. Co.*, 13 Barbour (N. Y.), 9, 1852; *New Jersey R. R. Co. v. West*, 4 Vroom (N. J.), 430. 1867.

137. Passing through or under train. It was held to be negligence for a person to attempt to climb through a freight train in the evening without looking to ascertain if an engine is attached to the train. *Lewis v. Baltimore and Ohio R. R. Co.*, 38 Md., 588. 1873.

138. — An attempt to pass between cars in motion, propelled by an engine, if no reason appears to justify the attempt, shows such want of care as to prevent the plaintiff from recovering for an injury received while making such attempt. *Gahagan v. Boston and Lowell R. R. Co.*, 1 Allen (Mass.), 187. 1861.

139. — The act of passing under a train of cars after dark, is an act of gross negligence, and where a person is injured while engaged in such an act, he cannot recover. *Central R. R. Co. v. Dixon*, 42 Ga., 327. 1871.

140. Persons should look and listen. It is negligence for a person to drive a team upon a railway track and stop it there, without looking for the cars. *Brooks v. Buffalo and Niagara Falls R. R. Co.*, 1 Abbott's Ct. of Ap. Dec. (N. Y.), 211. 1855.

(See sub-divisions I and III, ante, 447, 455, of this title.)

141. — It is no excuse for a plaintiff that he was absent minded, and did not look to see, or stop to hear, the cars. *Lake Shore and Michigan Southern R. R. Co. v. Miller*, 25 Mich., 274. 1872.

142. — Where it appeared that there were five parallel tracks, and a space of five feet be-

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tween the tracks, next to the track on which the plaintiff was injured, on which the plaintiff might have stood, and looked up and down the track far enough to have seen the approaching train, and it also appearing that until reaching the space of five feet, the view had been obstructed by standing cars, and that the plaintiff, in crossing the space of five feet on the track, was engaged in looking up and down the track, and was looking in the opposite direction when struck by the engine, it was held, that the question of contributory negligence belonged to the jury, and that a motion for a nonsuit was properly denied. *Beistegel v. New York Central R. R. Co.*, 14 Abbott's Pr. N. S. (N. Y.), 29. 1870.

143. Side tracks. Where it appeared upon the trial that an engine and cars were on a side track of the defendant, and one of the cars was to be loaded with lumber by N. and Co., who had a contract with the defendant for its transportation; that the plaintiff, being employed by N. and Co. to assist in placing the car opposite to their lumber, which was on an adjacent wharf of the defendant, uncoupled the car and pushed it opposite to the lumber, not knowing that there was an engine on the track; that, in uncoupling the cars, he went between them; that he pushed the car down, walking on the track; and that the defendant's servants backed the engine and other cars upon him, and he was jammed between the cars and injured. Held, that these facts disclosed such negligence on the part of the plaintiff as to prevent him from recovering. *Burns v. Boston and Lowell R. R. Co.*, 101 Mass., 50. 1869.

144. Snow storm. What facts and circumstances ought to be submitted to the jury upon the question of contributory negligence, examined with relation to a particular case, where the party injured attempted to cross the track during a snow storm. *Hackford v. New York Central and Hudson River R. R. Co.*, 43 Howard's Pr. (N. Y.), 222, 1871; *Same v. Same*, 6 Lansing (N. Y.), 381, 1871.

145. Teamster. In an action brought against a railway company, for injuries received by the plaintiff, in a collision between a locomotive and the wagon in which he was riding, negligence on the part of the person owning and driving the team, affects the right of the plaintiff to recover, equally with his own neg-

ligence. *Lake Shore and Michigan Southern R. R. Co. v. Miller*, 25 Mich., 274. 1872.

146. Uncoupling cars. A railway company is not liable for injuries occasioned by the negligence of its servants upon a stranger to the company, while engaged in the voluntary act of uncoupling its cars, if, by his negligence, he contributed to the injury complained of. *New Orleans, etc., R. R. Co. v. Harrison*, 48 Miss., 112. 1873.

2. Comparative negligence.

(See *ante*, 458, in this subdivision, under head of Contributory Negligence.)

147. Crossing track with team. The doctrine of comparative negligence affirmed with reference to injuries sustained in crossing a railway with a team. *Chicago, Burlington and Quincy R. R. Co. v. Payne*, 59 Ill., 534. 1871.

148. Degrees of care. Where there is mutual fault, the party guilty of the greater wrong is to be considered the aggressor. *Macon and Western R. R. Co. v. Davis*, 27 Ga., 113. 1859.

149. — In case of mutual neglect, to authorize a recovery by the plaintiff, the negligence on the part of the defendant must be so much greater than that of the plaintiff, as to clearly preponderate. *Chicago, Burlington and Quincy R. R. Co. v. Payne*, 49 Ill., 499. 1869.

150. — If the plaintiff has exercised reasonable care, though he may have been guilty of some negligence, he is still entitled to recover for any injury sustained in consequence of the defendant's negligence. *Baltimore and Ohio R. R. Co. v. Fitzpatrick*, 35 Md., 32. 1871.

151. — Railroad companies should use reasonable care, and although the plaintiff may have been at fault, yet if the injury could have been prevented by the exercise of ordinary care upon the part of the railway company, it will be liable. *Macon and Western R. R. Co. v. Davis*, 18 Ga., 679. 1855.

152. — A person who, in crossing a railroad track, could have seen the cars approach, but turned his back to that direction, and had his ears so bandaged that he could not hear, is guilty of such negligence as will prevent his recovery for injuries, unless he can prove a greater degree of negligence on the part of the railroad company. *Chicago and Rock Island R. R. Co. v. Still*, 19 Ill., 499, 1858.

153. Gross negligence. A railroad com-

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pany is not liable for injuries occurring to persons who are guilty of gross negligence when the company exercises ordinary care. *Sims v. Macon and Western R. R. Co.*, 28 Ga., 93. 1859.

3. Negligence of railway company.

154. Train cut in two. Since the business of railway companies involves great risk to human life, especially in running trains across highways in populous places, the law requires the utmost care. *Butler v. Milwaukee and St. Paul R. R. Co.*, 28 Wis., 487. 1871.

155. — Where a train, in passing through a populous village, was cut in two, and ten rear cars, being separated from the ten front cars and engine by a distance of fifteen or twenty rods, while running across a public street, struck and killed plaintiff's intestate, there being no person on the front car of said rear section on the look out for, and ready to warn, persons approaching, and no flagman at the crossing: *Held*, that these facts were evidence of gross negligence on the part of the company. *Ib.*

156. — When the engine and first section of cars passed the street, deceased was standing at the head of his horse, harnessed to a buggy, about twenty-seven feet from the track, facing towards the rear section, but with his horse's head and neck intervening. The horse endeavored to escape, and in the effort to hold him, deceased was drawn upon the track and killed by collision with the rear section of the cars. *Held*, that if he actually saw the cars approaching, he was chargeable with negligence. *Ib.*

157. — It was not error to refuse to instruct the jury, that "if he saw the cars approaching, or might have seen them by looking," he was guilty of negligence. *Ib.*

158. — The court cannot say against the verdict, either that the deceased did see the cars approaching, or that he was chargeable with negligence in not seeing them. *Ib.*

159. — The fact that the deceased incurred great risk from his own horse, while lawfully endeavoring to prevent its escape, is not proof of negligence on his part such as will discharge the railroad company from liability. *Ib.*

160. Backing train. Where an action was brought against a railway company for negli-

gently causing the death of A., and it appeared from the evidence that A. and others in the employment of a union railway company were at work at a certain point on the track of such union company over which trains could pass at that point; that a train of cars owned and run by defendant was backing at the time; that the bell of the locomotive was ringing; that there were four or five cars in the train and no method of communicating with the engineer from the rear of the train; nor was there any brake in working order on the car farthest from the locomotive, although a brakeman was on the rear end of the car, the locomotive being at the other end of the train; nor was any person in advance of the train to warn others of its approach. The engine was in charge of the fireman, the engineer being absent to procure a drink. The other persons employed with B. at work on the track stepped off, and some one called to him to "look out," when B., instead of stepping back, stepped forward, and was struck and killed. The fireman and one brakeman were the only persons in charge of the train. This instruction was asked and refused: "If, at the time deceased was killed, it was his duty to be engaged upon the track at that place, and he might have seen the approach of the train by exercise of reasonable care, as by looking up, then the failure to do so, if he did so fail, was negligence on his part; and if such negligence contributed to his injury, then the jury should find for the defendant." *Held*, that there was no error in this ruling. *Held*, also, that this evidence was sufficient to sustain a finding against the railway company. *Indianapolis, Bloomington and Western R. R. Co. v. Carr*, 35 Ind., 510. 1871.

161. Particular case. The question of negligence in crossing a railway discussed with reference to the facts of a particular case. *Chicago and Alton R. R. Co. v. Gretzner*, 46 Ill., 75. 1867.

4. Gross Negligence.

(See *ante*, 460, in this subdivision of the present title.)

162. Effect of gross neglect. If the deceased came upon the railroad track, at the crossing, without ordinary care, — still, if the servants of the road, after they saw his danger, might have avoided the fatal result by the

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exercise of ordinary care, and through their gross negligence, drove upon him and killed him, defendant would be liable. *State v. Manchester and Lawrence R. R. Co.*, 52 N. H., 528. 1873.

163. — Where the safety of a person is put in imminent danger, by the gross negligence or want of ordinary care of the employes of a railroad company, and in attempting to escape danger, such person is seriously injured, it is no relief to the company that the person misjudged as to the danger, unless the plaintiff acted from a rash misapprehension as to the true situation. *Macon and Western R. R. Co. v. Winn*, 26 Ga., 250. 1858.

164. — Where the neglect of the defendant is so gross as to imply a disregard of consequences, or a willingness to inflict the injury, the plaintiff may recover, though he be a trespasser, or did not use ordinary care to avoid the injury. *Lafayette and Indianapolis R. R. Co. v. Adams*, 26 Ind., 76. 1866.

165. **Intoxicated person.** Where an intoxicated person places himself, in the dusk of the evening, upon the track of a railway, in a city, and is there run over and killed, the railway company is not liable for the injury, unless it is guilty of gross negligence or willful neglect of duty. *Illinois Central R. R. Co. v. Hutchinson*, 47 Ill., 408. 1868.

5. By whom the question of negligence is to be determined.

(Decisions upon this question will also be found under the various other heads of this Digest.)

166. **Death.** In a suit by the legal representatives of A., against a railway company for damages caused by his death, the question whether the facts constituted such negligence as to render the corporation responsible, was exclusively for the jury to determine. *Kenayde v. Pacific R. R. Co.*, 45 Mo., 255. 1870.

167. **Degrees of care.** One who passes along an obstructed highway is bound to observe ordinary care, that is, such care as a reasonably prudent man, under the peculiar circumstances of the case, would exercise to preserve himself and property from injury. *Pennsylvania R. R. Co. v. McTigue*, 46 Penn. St., 316. 1863.

168. — In an action against a railway company to recover damages for an injury sus-

tained by a collision with cars standing on the track in a public highway, in the daytime, in view of a witness who testified as to all the particulars, it was held immaterial upon whom the onus of proving or disproving negligence was cast by the court, as it was for the jury to determine, under the circumstances, whether or not the plaintiff had been guilty of inexcusable negligence. *Ib.*

169. — In such case, it is not error to refuse to instruct the jury that "it lay upon the plaintiff to show that he had used that degree of care and prudence which was necessary to have prevented a collision with defendant's cars, and that he must show this affirmatively;" nor that "in a public street and not dangerous *per se*, if a person comes against an obstruction in the day time and receives injury, he cannot recover against the wrong doer, without showing affirmatively that he had used that amount of care which was required under the peculiar circumstances of the case to pass by it, and having used the same, is nevertheless damaged;" such standards of care are not reasonable, as, under them, the occurring of the accident would have been proof of negligence. *Ib.*

170. **When it is for the court to decide.** Negligence is, in all instances, a question of fact, and it is only where a question of fact is entirely free from doubt that the court has the right to apply the law without the action of the jury. *Bernhardt v. Rensselaer and Saratoga R. R. Co.*, 32 Barbour (N. Y.), 165, 1860; see *Same v. Same*, 18 Howards's Pr. (N. Y.), 427, 1859; 19 *ib.*, 199, 1860; 23 *ib.*, 166, 1861; *Central R. R. Co. v. Moore*, 4 Zabriskie (N. J.), 824, 1854.

V. INJURIES TO CHILDREN.

171. **Climbing upon the cars.** Where two boys, without the knowledge of the train men, climbed upon the rear car of a train that was being slowly moved around a curve by an engine used for making up trains, and by a sudden jolt, the boys were thrown from the car and run over, it was held, that they were guilty of contributory negligence, and no cause of action arose against the company on account of the injury. *State v. Baltimore and Ohio R. R. Co.*, 24 Md., 84, 1865; *Bannon v. Same*, *ib.*, 108, 1865.

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172. Damages. In an action brought to recover damages for the loss of service of the plaintiff's son, caused by an injury received through the negligence of the defendant's servant, the plaintiff is confined to loss of service before suit brought, together with reasonable compensation for the expenses incurred, and care bestowed by himself and servants during the illness of the child. He cannot recover for the prospective loss during the minority, unless he has declared specially therefor. *Gilligan v. New York and Harlem R. R. Co.*, 1 E. D. Smith (N. Y.), 453. 1852.

173. Defective roadway. Where a boy, sixteen or seventeen years of age, in running with a fire engine at night, upon an alarm of fire, in the road bed of a railway company, in a street which the company was required to keep in repair, stepped into a hole therein, fell across the track, and was run over by the engine and injured; the rule of damages in an action by the father against the company, was compensation for the loss of services, for nursing and for medical attendance. *Oakland R. R. Co. v. Fielding*, 48 Penn St., 320. 1864.

174. Ditch left open. It is not negligence for a railway company to leave open a ditch across its track, two feet wide and eight inches deep, to carry off the surface water, and where a child was playing in such a ditch, and was thereby concealed from view of the engineer until too late to stop the train, and was injured, the company was held not liable. *Meyer v. Midland Pacific R. R. Co.*, 2 Neb., 320. 1871.

175. Duty of railway companies. It is not a part of the duty of a railway company to maintain a guard over its cars left standing upon its track, in order to keep children, playing about them, from getting upon or under them, and thereby save them from injury. *Chicago and Alton R. R. Co. v. McLaughlin*, 47 Ill., 265. 1868.

176. Evidence. In an action by a youth for damages for a personal injury, it was held proper to show the means of support of the father, and the number of his children. This testimony, however, should not affect the question of damages. It could only be offered to show the probable pursuits and occupation of the plaintiff. *Baltimore and Ohio R. R. Co. v. Shipley*, 31 Md., 368. 1869.

177. How far age is to be considered. If an infant insists on a right of action, it is in-

cumbent on him to show compliance with the conditions on which his right of action is to arise, irrespective of his age. *Honegsberger v. Second Avenue R. R. Co.*, 1 Keyes (N. Y.), 570, 1864; *Same v. Same*, 33 Howard's Pr. (N. Y.), 193, 1864; reversing, *Same v. Same*, 1 Daly (N. Y.), 89. 1860.

178. — The infancy of the injured party does not change the degree of care and diligence required of a railway company in the management of its trains. *Bannon v. Baltimore and Ohio R. R. Co.*, 24 Md., 108. 1865.

179. Negligence of child. Contributory negligence cannot be shown as against a child of tender years. *Mahoney v. Railroad Co.*, 6 Philadelphia Rep. (Penn.), 242, 1867; *Kay v. Pennsylvania R. R. Co.*, 65 Penn. St., 269, 1870; *North Pennsylvania R. R. Co. v. Mahoney*, 57 ib., 187, 1868; *Schmidt v. Milwaukee and St. Paul R. R. Co.*, 23 Wis., 186, 1868; *Chicago, etc., R. R. Co. v. Gregory*, 53 Ill., 226, 1871.

180. — When the question is one of simple negligence, there is no distinction between the case of a child unnecessarily exposed and that of a grown person, but where the question is one of gross neglect or willful misconduct, the rules applicable to the two cases are different. *Lafayette and Indianapolis R. R. Co. v. Huffman*, 28 Ind., 287. 1867.

181. — The same strict rules as to contributory negligence do not prevail as to children that are in force as to adults. *Railroad Co. v. Stout*, 17 Wallace (U. S.), 657, 1873; *Boland v. Missouri R. R. Co.*, 36 Mo., 484, 1865; *Pendril v. Second Avenue R. R. Co.*, 2 Jones and Spencer (N. Y.), 481, 1872; *Warner v. Railroad Co.*, 6 Philadelphia Rep. (Penn.), 537, 1868.

182. — The terms, ordinary and reasonable care are relative and dependent, and in determining whether such care has been used, the age and capacity of the person injured should be considered. *Baltimore and Ohio R. R. Co. v. The State*, 30 Md., 47. 1868.

183. — An infant, when suing in his own behalf for injuries to his person arising from the negligence of others, must be free from contributory negligence on his part. The rule is the same whether the action be by an infant or an adult. *Burke v. Broadway and Seventh Avenue R. R. Co.*, 49 Barbour (N. Y.), 529, 1867; *Same v. Same*, 34 Howard's Pr. (N. Y.), 239, 1867.

184. — The father of an infant, suing for

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damages sustained by the latter through the negligence of others, can recover only under such circumstances of prudence as would be required if the action were in behalf of the infant. *Ib.*

185. — If the neglect of a boy (of six years of age) to exercise the ordinary degree of prudence of an adult contributed to the injury, the father cannot recover. *Honegsberger v. Second Avenue R. R. Co.*, 2 Abbott's Ct. of Ap. Dec. (N. Y.), 378. 1864.

186. — Where an infant, 18 months of age, gets upon a railroad track in consequence of the failure of the company to erect a fence as required by law, and is injured, the parents being in the exercise of ordinary care, the company is liable to it for the injury. *Schmidt v. Milwaukee and St. Paul R. R. Co.*, 23 Wis., 186. 1868.

187. — A child of tender years was taken for the purpose of protection, into the arms of a person to whose care she was not entrusted, and by the negligence of such person in falling on the track was injured by an engine. *Held*, that such negligence was not contributory negligence so as to discharge the railway company, its servants being also negligent. *North Pennsylvania R. R. Co. v. Mahoney*, 57 Penn. St., 187. 1868.

188. — Though an action in such case would lie at the suit of the child against the person who took her into her arms, yet suit could be brought against either or both. *Ib.*

189. — Where due diligence is exercised in running a train across a street in a city, the company is not liable, simply because it was running there, for an injury to a child which suddenly placed itself on the track in front of the cars. *Meyer v. Midland Pacific R. R. Co.*, 2 Neb., 319. 1871.

190. — It is not the duty of an engineer to stop the train whenever he sees a child of tender years running towards it. The situation of the parties is to be considered, and the engineer must exercise the judgment of a prudent person, having due regard to all the circumstances and to the safety of the passengers. *Ib.*

191. — The rules which regulate the distance at which trains shall run from each other are intended solely for the protection of the property of the company, and the safety of its employes and passengers, and not for

persons who may be traveling along the highway; and no inference of negligence can be drawn from the proximity of trains, in an action to recover damages for an injury done to a person while crossing the track at a place not known or used as a public crossing. *Philadelphia and Reading R. R. Co. v. Spearen*, 47 Penn. St., 300. 1864.

192. — Where a child about five years of age, in attempting to run across a railway between a coal train and an engine which was following close behind it, was struck and injured, it was *held*, that the company was not liable for the damages without proof of want of ordinary care in the engineer at the time and place of the accident. *Ib.*

193. Negligence of parents. If parents permit a child of tender years to run at large without a protector, in the streets of a city traversed by cars and other vehicles, they are guilty of contributory negligence, in case of injury to the child. *Pittsburg, etc., R. R. Co. v. Pearson*, 72 Penn. St., 169, 1872; see *Kay v. Pennsylvania R. R. Co.*, 65 ib., 269, 1870; *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Vining's Adm.*, 27 Ind., 513, 1867; *Lafayette and Indianapolis R. R. Co. v. Huffman*, 28 ib., 287, 1867; *Jeffersonville, etc., R. R. Co. v. Bowen*, 40 ib., 545, 1872.

194. — The negligence of a parent or custodian of child cannot be imputed to the child, to bar its right of action. *Bellefontaine and Indiana R. R. Co. v. Snyder*, 18 Ohio St., 399, 1868; *Daley v. Norwich and Worcester R. R. Co.*, 26 Conn., 591, 1858.

195. — It is the duty of persons in charge of cars passing along streets to exercise great caution; and if, by failure to do so, a child of tender years is injured, the company represented is liable in an action by the child, notwithstanding the negligence of the parent in permitting it to be upon the track, or of the person in charge of the child in not keeping a proper look-out for the cars. *Ib.*

196. — A person injured by the negligence of another is not barred of his remedy by the fact that at the time of the injury he was nominally trespassing upon the premises of the person injuring him, if his trespass does not involve negligence on his own part, substantially contributing to produce the injury. *Daley v. Norwich and Worcester R. R. Co.*, 26 Conn., 591. 1858.

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197. — If the plaintiff, although an infant, was unlawfully upon the track, the company is not liable. *Crawford v. Railroad Co.*, 5 Philadelphia Rep. (Penn.), 359. 1864.

198. — Though an infant of tender years may recover for an injury, partly caused by his own imprudent act, the father cannot. *Glassey v. Hestonville, Mantua and Fairmount R. R. Co.*, 57 Penn. St., 172. 1868.

199. — It makes no difference whether the injury was to the father's absolute or relative rights. *Id.*

200. — It is negligence for a father to permit a child of four years of age to run unprotected in the streets of a city traversed by cars and other vehicles. *Id.*

201. — The fact that such child is thus found is presumptive evidence that he was exposed voluntarily or negligently. *Id.*

202 — **pleading.** In a complaint for damages for an injury to a child of tender years, it is sufficient to aver that the injury happened without the fault of the parents with whom the child resided. *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Vining's Adm'r*, 27 Ind., 513. 1867.

203. — In an action for injuries to a child resulting in death it appeared that the child killed was sent across defendant's track unattended except by a child nine and one-half years old. *Held*, that this was not *per se* such negligence as would defeat a recovery. *Ihl v. Forty-second Street R. R. Co.*, 47 N. Y., 317. 1872.

204. — If the deceased child was exercising due care, and the injury was caused solely by the negligence of defendant's driver, the defendant was liable without regard to the question whether it was negligence in the parents to let the child go with so young an attendant. *Id.*

205. — Negligence upon the part of so young a child as the deceased, when there was no negligence upon the part of the parents or the attendant, would not absolve the defendant from liability. *Id.*

206. — The question of negligence of parents determined with reference to the facts of a particular case. *Pittsburgh, Ft. Wayne and Chicago R. R. Co., v. Bumstead*, 48 Ill., 221. 1868.

207. **Negligence of railway company.** In the exercise of his lawful rights, every man has a right to act on the belief, that every other

person will perform his duty and obey the law. *Jetter v. New York and Harlem R. R. Co.*, 2 Keyes, (N. Y.), 154. 1865.

208. — If there be no negligence the incapacity of the child creates no liability on the company. *Kay v. Pennsylvania, R. R. Co.*, 65 Penn. St., 269. 1870.

209. **State railways.** The conductor of a train, on a railway belonging to the state, has the right to direct all the movements of the train; and the engineers and teamsters employed, whether the motive power be furnished by the Commonwealth or not, are regarded as agencies employed by him and are under his control. *Rauch v. Lloyd & Hill*, 31 Penn. St., 358. 1858.

210. — For an injury resulting to a person through the negligence of any of the agencies employed by him in the management of the cars the conductor and his employers are responsible. *Id.*

211. — Where the conductor permitted the train to stand on the crossing of a public street and absented himself from it and the teamster attached the horses to the train which was usually moved at that point by horsepower, and moved it and injured a child who was attempting to pass under the train at the crossing, it was *held* that it was as much the act of the conductor and his employes as if they had been present, and that the owners of the cars were liable. *Id.*

212. — A child is not to be judged by the same rule as an adult, and cannot be regarded as guilty of negligence for attempting to pass under a car, left standing across a street where he had a right to pass. *Pennsylvania R. R. Co., v. Kelly. Id.*, 372. 1858.

213. **Turn table.** Under certain circumstances, a railroad company may be liable, on the ground of negligence, for a personal injury to a child of tender years, in a town or city, caused by a turn table, built by the company upon its own uninclosed land, and which is left unguarded and unlocked in a situation which renders it likely to cause injury to children. *Stout v. Sioux City and Pacific R. R. Co.*, 2 Dillon (U. S. C. C.), 294. 1872.

VI. INJURIES CAUSING DEATH.

214. **Child.** A boy about twelve years old was killed at a highway crossing by defend

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ant's railroad train; *held*, that the boy was bound to exercise only such care as a person of his age, of ordinary prudence, would exercise, and under such rule, it was for the jury to say whether the deceased was guilty of contributory negligence. *Reynolds v. New York Central and Hudson River R. R. Co.*, 2 N. Y. Sup. Ct., 644. 1874.

(See next subdivision, *ante*, 462.)

215. — A child of from six to seven years of age was run over and killed by one of the defendant's cars, and plaintiff, as administrator of the child, brought suit to recover damages for the death of the child. *Held*, that no proof of any pecuniary or special damage to the plaintiff, or next of kin, in consequence of the death of the child, was necessary to sustain the action under the statute, *Oldfield v. New York and Harlem R. R. Co.*, 14 N. Y., 310, 1856; *Same v. Same*, 3 E. D. Smith (N. Y.), 103, 1854; *Ihl v. Forty Second Street R. R. Co.*, 47 ib., 317, 1872.

216. — *statute.* Under § 27 of the code, an action for damages for causing the death of a child, must be brought by the father, or in case of his death or desertion of his family, by the mother, or by the guardian for his ward. *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Vining's Adm'r*, 27 Ind., 513. 1867.

217. — If there be no father, or mother, or guardian, then an administrator may sue, under § 784 of the code. And, in either event, the limitation of the action, the amount of recovery, and the distribution thereof, will be governed by the provisions of § 784. *Ib.*

218. — The word "child," as used in § 27, is not equivalent to the word "minor," but must be limited to persons under age who are dependent for support, protection, etc., upon their parents. It would not include one who, though a minor, had assumed the responsibilities of the head of a family. *Ib.*

219. Common law rule. The cause of action for an injury to the person dies with the person; though a husband may maintain a civil action for an injury to the wife, so far as medical service and funeral expenses were incurred, or a parent for a child up to its death, but not for the loss of life. *Eden v. Lexington and Francfort R. R. Co.*, 14 B. Monroe (Ky.), 204. 1853.

220. Contributory negligence. In an action by an administrator to recover damages

for the negligent killing of his intestate by running over him with a street car, if the negligence of the deceased contributed to the injury, the plaintiff is not entitled to recover. *Kelly v. Hendrie*, 26 Mich., 255. 1872.

221. Damages. In an action brought under the statute for the death of a person, the only question to be determined in estimating the damages, is the pecuniary loss resulting from his death to the widow and next of kin of such deceased person. *Illinois Central R. R. Co. v. Baches*, 55 Ill., 379. 1870.

222. — Evidence is admissible in mitigation of damages to show that the deceased was a drunken man and a burden on his family. *Nashville and Chattanooga R. R. Co. v. Prince*, 2 Heiskell (Tenn.), 580. 1871.

223. — It is not error in an action by a widow for the death of her husband, for the court, after giving correct instructions as to the measure of damages to add "much is left, and much must always be left to your sound discretion." It must be intended that this discretion is to be exercised, within the limitations previously prescribed to them by the court. *Pennsylvania R. R. Co. v. Ogier*, 35 Penn. St., 60. 1860.

224. Evidence. In an action for wrongfully killing the plaintiff's intestate by running cars over him while crossing the track, it is incumbent on the plaintiff to show by direct testimony, or by presumptions arising from facts and circumstances, that the deceased was, at the time, rightfully and not negligently or improperly on the track. *Donaldson v. Mississippi and Missouri R. R. Co.*, 18 Ia., 280. 1865.

225. — burden of proof. Where a person has been killed on the track of a railway by a passing train, the burden of proof is upon the railway company to show that it had complied with the requirements of the statute. *Smith v. Nashville and Chattanooga R. R. Co.*, 6 Coldwell (Tenn.), 589. 1869.

226. Husband and wife. The statute providing a cause of action in cases of homicide does not give a husband a cause of action for the death of his wife. *Georgia R. R. Co. v. Wynn*, 42 Ga., 331, 1871; *Same v. Same*, 43 ib., 163, 1871.

227. Illegitimate child. In an action by the administrator of a woman killed by the negligence of the employés of a railroad com-

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pany in running its locomotive, the petition alleging and the proof showing the deceased to have left a son as her sole surviving heir: *held*, that it is error to order a nonsuit, on the ground that such child is illegitimate. The fact of such child's legitimacy or illegitimacy can in no respect effect the right of action in his behalf. *Muhl's Adm'r v. Southern Michigan R. R. Co.*, 10 Ohio St., 272. 1859.

228. Indictment. An indictment to recover the penalty imposed by the statute need not negative the existence of circumstances which, under a proviso contained in the statute, would exonerate the defendant from liability. *Commonwealth v. Fitchburg R. R. Co.*, 10 Allen (Mass.), 189. 1865.

229. Instantaneous death. An action lies in behalf of the administrator of the person killed although his death was instantaneous. *Nashville and Chattanooga R. R. Co. v. Prince*, 2 Heiskell, Tenn., 580, 1871; overruling *Louisville and Nashville R. R. Co. v. Burke*, 6 Coldwell (Tenn.), 45, 1868.

230. — The statute (Rev. Stat., tit. 1, § 83), provides that "actions for injuries to the person, whether the same do or do not result in death, shall survive to the executor or administrator." Under this statute an action can be maintained where the death was instantaneous. *Murphy v. New York and New Haven R. R. Co.*, 30 Conn., 184. 1861. See also *Same v. Same*, 29 Conn., 496, 1861.

231. — It is immaterial, under the statute (ch. 256 of 1849), whether the death was instantaneous or consequential. *Brown v. Buffalo and State Line R. R. Co.*, 22 N. Y., 191. 1860.

232. Neglect of employés after the injury. The deceased was run over and injured by a train of cars of the Northern Central R. R. Co. After the train was stopped, the injured man was found upon the pilot of the engine in a helpless and apparently lifeless condition, and was removed from thence by the employés of the railroad company, and locked up in a warehouse at night. On opening the warehouse in the morning, he was found to have come to life during the night, and to have afterwards died from hemorrhage of an artery which had been severed by the collision. *Held*, that from whatever cause the collision occurred that thereupon at once it became the duty of the railway company's agents in charge of the train, to remove the

injured person, and to do it with a proper regard to his safety and to the laws of humanity. And if in removing and locking him up, although he was apparently dead, negligence was committed whereby his death was caused, there is no principle of reason or of justice upon which the railroad company can be exonerated from responsibility. *Northern Central R. R. Co. v. The State*, 29 Md., 420. 1868.

233. Pleading. In an action against a railroad company for the killing of plaintiff's husband, the petition contained two counts, framed respectively on the second and third sections of the act relating to damages, Wagn. Stat., 519-20.) The first count charged that the killing was caused indirectly by the corporation, through the negligence, unskillfulness, and criminal intent of its employés: the second, that the death was owing directly to the neglect or default of the company. *Held*, that the two counts contained but one subject matter of complaint, viz: the killing of complainant's husband; and therefore but one cause of action, although stated in different ways to meet the evidence. Hence there could be but one verdict and one assessment. *Brownell v. Pacific R. R. Co.*, 47 Mo., 239. 1871.

234. — A verdict on one action would be a complete bar to an action on the other. *Ib.*

235. — In an action brought against a railroad company for causing the death of a person by carelessly and negligently running over him with a locomotive, the general averment that the defendant, by its agents and servants, did carelessly and negligently run over, etc., is sufficient, without stating the particular acts constituting such negligence. *Indianapolis, Pittsburgh and Cleveland R. R. Co. v. Keely's Adm'r*, 23 Ind., 133. 1864.

236. — The complaint must aver that the deceased did not, by his own fault or negligence, contribute to his death; and the averment that "he was at the time lawfully on the track of said railroad," etc., is not sufficient. *Ib.*

237. — A plaintiff cannot include in the same action, claims in his individual right, and as administrator of another. *Lucas v. New York Central R. R. Co.*, 21 Barbour, (N. Y.), 245. 1855.

238. — Where a complaint alleges that the plaintiff's wife was killed instantly, by the careless act of the defendant, the complaint is

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substantially defective. This allegation will not give the plaintiff an action for the loss of his wife's services. *Ib.*

239. Signals. Where a person, walking upon a railroad track, is run over and killed by an engine belonging to the railroad company, the company is responsible in damages for such killing, though the deceased was guilty of a want of ordinary care and prudence in so walking on the track, provided that it appear that the accident would not have occurred if the agents of the railroad company had used, in running the engine which occasioned the killing, ordinary prudence and care in giving reasonable and usual signals of its approach, and in keeping a reasonable lookout. *Baltimore and Ohio R. R. Co. v. The State*, 36 Md., 366. 1872.

240. Statute. Under the act of December 13, 1847, providing for compensation for causing death by wrongful act, neglect or default, if there is neither wife nor next of kin, there can be no such pecuniary damages to be recovered as the act contemplates. *Lucas v. New York Central R. R. Co.*, 21 Barbour (N. Y.), 245. 1855.

241. — The statute requiring compensation for injuries resulting in death, considered. *Oldfield v. New York and Harlem R. R. Co.*, 3 E. D. Smith (N. Y.), 103, 1854; *Same v. Same*, 14 N. Y., 310, 1856; *Keller v. New York Central R. R. Co.*, 24 Howard's Pr. (N. Y.), 172, 1861.

242. — Before recovery under the statute, it must be averred and proved, that the deceased left a widow or next of kin. *Chicago and Rock Island R. R. Co. v. Morris*, 26 Ill., 400. 1861.

243. — In an action brought under the statute, "for causing death by wrongful act, neglect or default," a declaration which does not aver, that the railroad causing the death was used in the state and county in which the action was brought, would be defective on demurrer, but is good after verdict. *Ib.*

VII. DAMAGES.

(For further decisions in relation to damages, see the other subdivisions of this title.)

244. Child. An infant having recovered \$8,000 for the loss of its right arm, the court refused to disturb the verdict as excessive. *Schmidt v. Milwaukee and St. Paul R. R. Co.*, 23 Wis., 186. 1868.

245. Death of a woman. Where the jury rendered a verdict for the highest sum allowed by statute, \$5,000, it appearing that the person killed was a superior woman, as wife, mother, and member of society, there is nothing in the amount of the verdict to authorize the court to interfere. *Whiton v. Chicago and Northwestern R. R. Co.*, 2 Bissell (U. S. C. C.), 282. 1870.

246. Evidence. In an action brought for damages caused by injury to the person, the jury in estimating damages, cannot take into consideration the fact that the plaintiff is a man who has to depend on his manual labor for a living. *Shea v. Potrero and Bay View R. R. Co.*, 44 Cal., 414, 1872; see *Hunt v. Chicago and Northwestern R. R. Co.*, 26 Iowa, 363, 1868, where proof of the financial condition of the injured party was permitted in order to show the nature of his business and value of his services.

247. Exemplary damages. An administrator brought suit against a railway company for its negligence in running its cars by means of which the intestate was run over and killed. On a hearing in damages the court found that the death was not instantaneous, but that there was a brief period of suffering, and assessed damages for the blow and the pain suffered, and in view of the negligence of the defendant assessed punitive damages. *Held*, on a motion of the defendant for a new trial — I. That this court could not review the finding of the court below as to the death not being instantaneous. II. That there was no error in the assessment of punitive damages in such a case. *Murphy v. New York and New Haven R. R. Co.*, 29 Conn., 496. 1861.

248. — In an action brought against the proprietor of a railroad by the personal representative of one killed by reason of the negligence or carelessness or unfitness of the servants or agents of the company, exemplary damages may be given by the jury. *Bowler v. Lane*, 3 Metcalfe (Ky.), 311. 1860.

249. Injured arm. The evidence in this case tended to show that the injury to plaintiff's arm and wrist, was very severe and probably permanent in its character: *held*, that \$2,500 was not excessive damages. *Maloy v. New York Central R. R. Co.*, 40 Howard's Pr. (N. Y.), 274. 1870.

250. Pain and suffering. The bodily pain or suffering, which is an element in estimating

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damages for bodily injuries, is not confined to that which may have been incurred before the trial, but includes such future suffering as it is reasonably certain from the evidence must result from the injury. *Aaron v. Second Avenue R. R. Co.*, 2 Daly (N. Y.), 127. 1367.

VIII. DEFECTS IN ROADWAY, MACHINERY, ETC.

251. Borrowed car. Where the injury was occasioned by a defective car, the fact that the car was a borrowed one will not excuse the company. *Jetter v. New York and Harlem R. R. Co.*, 2 Abbott's Ct. of Ap. Dec. (N. Y.) 458, 1865; *Same v. Same*, 2 Keyes (N. Y.), 154, 1865.

252. Bridge. The duty of a railroad company to keep in repair a bridge with its abutments, which it has constructed over its railroad at a place where the railroad crosses the highway through a cut, in order to allow the crossing of the highway over the same, under Rev. Sts., ch. 39, § 72, extends beyond the abutments to the line of the excavation made by the company in constructing its railroad. And if a traveler has received an injury within the line, through a defect in the railing, a verdict in his favor, in an action against the company, will not be set aside on account of an instruction to the jury that the liability of the company extends to the line of the location of the railroad. *Titcomb v. Fitchburg R. R. Co.*, 12 Allen (Mass.), 254. 1866.

253. — If the injury at such place occurred by reason of the want of a sufficient railing, and would not have occurred if the railing had been suitable and proper for the place, the traveler may recover damages therefor against the railroad company, although his horse became frightened without the fault of anybody, and ran against the railing and broke through it, and thus caused the injury complained of. *Ib.*

254. Car brakes. A railway company should use all the known improvements in machinery which will contribute to the safe operation of its road; it will not be excused for using an old car brake when other companies use one of much better design. These requirements are not for the benefit of passengers only. *Costello v. Syracuse, etc. R. R. Co.*, 65 Barbour (N. Y.), 92. 1873.

255. Platform. The platform of a railway company at a station is in no sense a public highway. There is no dedication to public use as such. *Gillis v. Pennsylvania R. R. Co.*, 59 Penn. St., 129. 1868.

256. — The platform is for the accommodation of passengers, and being unenclosed, persons have the privilege, but have not the legal right, of walking over it for other purposes. *Ib.*

257. — After requesting such persons to leave, the company may remove them by force if necessary. *Ib.*

258. — To persons who come upon the platform to meet or part with passengers, or who stand in such relation to the company as requires care, the company is bound to have a structure strong enough to bear all who could stand upon it. *Ib.*

259. — Where an immense crowd gathered at a railway station to see the President of the United States, and the platform broke down, killing and injuring many persons, it was held, that the company was not liable. *Ib.*

260. — The owner of a house is bound to have the approach safe for visitors on business or otherwise, but if a crowd gather on it to witness a parade, and it break down, though not sufficient even for its ordinary use, he is not liable to one of the crowd who might be injured. *Ib.*

261. Splintered rail. A railroad company having a right to lay tracks in a public street is bound to lay them in a proper manner, and to keep them in repair. *Rockwell v. Third Avenue R. R. Co.*, 64 Barbour (N. Y.), 438. 1873.

262. — The plaintiff, while lawfully passing along the street, was injured by a splinter projecting from a rail upon the defendant's railroad. It appeared from the evidence that the defendant was in the habit of allowing such defective rails to remain, after its officers knew of their condition. *Held*, that under such circumstances, notice to the company of the defect was unnecessary. *Ib.*

263. Streets and highways. Where a boy was injured while running at night with a fire engine, by stepping through a hole in defendant's roadway in a public street, and the injury would not have occurred but for the hole in the road bed, the defendant's negligence in suffering it to be there was held to be a

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cause of injury sufficiently proximate to entitle the plaintiff to maintain his action. *Oakland R. R. Co. v. Fielding*, 48 Penn. St., 320. 1864.

264. — Though the defect in the road bed was not caused by any act of the company, it was its duty to have it repaired. *Ib.*

265. — Whether or not the injured party was guilty of contributory negligence was a question for the jury. *Ib.*

266. — In estimating the degree of care required, it was proper for the jury to consider the age, intelligence and physical strength of the boy, and apply to his conduct the same standard that they would in judging boys of like age, strength and intelligence; and if it was common for boys of like age to run with fire engines, the jury should take that fact into consideration. *Ib.*

267. — For the purpose of enabling a third person to move a building across a place where a railroad track crossed a highway at grade, the railroad company took down a post and thereby made a hole within its location in the highway, into which a traveler fell and was injured, several days after the building was moved. Held, that the railroad corporation was responsible to the town for damages recovered against the town by the traveler in an action on the Gen. Sts., ch. 44, § 22. *Woburn v. Boston and Lowell R. R. Co.*, 109 Mass., 283. 1872.

IX. DEPOT GROUNDS.

268. **Cars standing upon depot grounds.** A possibility, or even probability, of injury to any one who may happen to be behind stationary cars in a railroad depot, does not make it incumbent on the employes of a railroad company, as a duty, to ascertain that no one is there, before they move any of such cars. *Lehey v. Hudson River R. R. Co.*, 4 Robertson (N. Y.), 204. 1866.

269. **Contributory negligence.** Where a person of mature years knows a freight train is standing ready to move between himself and the passenger train, in the night time, and he attempts to pass and is injured, it will amount to such negligence on his part as to defeat a recovery. *Chicago, Burlington and Quincy R. R. Co. v. Dewey*, 26 Ill., 255. 1861.

270. **Detached car.** The company having

allowed the neighboring population to use its track as a way across its lot, there is no presumption of a clear track, and it is negligence to detach a car and permit it to run down a grade on tracks through such lot, without a brakeman. *Kay v. Pennsylvania R. R. Co.*, 65 Penn. St., 269. 1870.

271. **Obstruction of view by train.** Where a person at a railroad station, where there is a convenient place of egress to the highway from the platform on which he has alighted from a train, but which he does not observe, attempts to cross the double track of the railroad in order to reach another place of egress from the platform opposite, he is not in exercise of due care if he steps down upon the first track at a time when the train by which he has arrived hides the tracks wholly from his view in the direction in which it is moving, and then crosses the intervening space and steps upon the second track at a time when this train, moving slowly off, and a high bank wall, obstruct his view in that direction further than from eighty to a hundred feet. *Bancroft v. Boston and Worcester R. R. Co.*, 97 Mass., 275. 1867.

272. **Particular case.** The circumstances considered under which the question of the plaintiff's care may be submitted to the jury, where he has been injured by an approaching train, while crossing the track at a station. *Wheelock v. Boston and Albany R. R. Co.*, 105 Mass., 203. 1870.

273. **Persons about to take passage.** Crossing a railroad track without looking to see if a train is coming, is not conclusive proof of negligence; and if it appears that there is a double track, and a person has just bought a ticket at a station for a train which is to pass upon the further track, and the station agent says to him, "The train is coming, we will cross over," and he attempts to follow the agent, to take his place in the train, which meanwhile has arrived, and, in crossing over the nearer track for that purpose, is struck by a train coming from the other direction, and partially behind him, which he did not look for or see until too late to save himself, it is proper to submit it as a question of fact for the jury, to determine whether he was careless. And while so going from the ticket office to take his seat in the cars, he is to be considered as a passenger, and it is the duty of the railroad company to use the utmost care and dili-

Evidence.

gence in providing for him a safe and convenient way and manner of access to the train. *Warren v. Fitchburg R. R. Co.*, 8 Allen (Mass.), 227. 1864.

274. — The plaintiff, without having first procured a ticket, was crossing a side track of a railroad, in the night, to get upon a passenger train at its usual place of stopping, on the main track, but by the negligence of the employes of the company, a switch had been left open, and the train was thrown upon the side track, and ran against the plaintiff, and broke his leg. *Held*, I. That he was not a passenger at the time of the injury. II. That he had the same right to cross the side track as he did, that persons have to cross a railroad upon a public street or highway. III. The company having the legal right to run its train upon the side track, it is immaterial whether it was run upon that track by accident or design, if run with due care. No greater care would be required in case of such accident than if the train were thrown upon the track by design. IV. If the train, in running upon the side track, was managed with due care, the plaintiff cannot recover. *Indiana Central R. R. Co. v. Hudelson*, 13 Ind., 325. 1859.

275. Persons standing on depot platform. An action was brought to recover for injuries received while standing on the platform of one of the stations of a railroad company, by the falling of wood from a train of the company, passing the station, alleged to have been carelessly loaded, run and managed. The defendant answered, 1. That the injury was the result of the plaintiff's own carelessness; 2. That the train was skillfully loaded and managed; but, that by reason of frost upon the rails, and a down-grade, it could not be checked in passing the station, and that the injury happened without defendant's fault. *Held*, that if the injury was the result of carelessness on the part of the plaintiff, and could have been avoided by the exercise of ordinary vigilance, he was not entitled to recover. *Ohio and Mississippi R. R. Co. v. Guillett*, 15 Ind., 487. 1860.

X. EVIDENCE.

(See *ante*, 458, of this title, subdivision IV, Negligence.)

276. Burden of proof. In an action against a railroad company for an injury oc-

casioned by its engine, the burden of proof is upon the plaintiff to show want of due care on the part of the defendant, as well as ordinary care in himself. *Robinson v. Fitchburg and Worcester R. R. Co.*, 7 Gray (Mass.), 92. 1856.

(See *post* in this subdivision.)

277. Crossings. In an action against a railroad corporation to recover damages for an injury occasioned by its engine to a man delivering wood by the side of the track, the plaintiff, after having introduced evidence which tended to show that there was at the time of the accident a traveled crossing at that place, was not allowed to show that such a crossing was there before the railroad was made, and also at the time of the trial. *Held*, that the exclusion of this evidence was no ground of exception. *Id.*

278. Flagmen. In an action for running a train over the plaintiff at a crossing where there was a single track and no flagman, a witness, called as an expert by the defendant, cannot be asked what is the custom of railroads in maintaining a flagman at crossings similar to the one in question. *Bailey v. New Haven and Northampton R. R. Co.*, 107 Mass., 496. 1871.

279. General reputation. In an action against a railroad company to recover damages sustained by a person in a carriage on a highway, by means of a collision with a locomotive engine of the defendant, the carelessness of the driver of the carriage cannot be proved by common reputation. *Baldwin v. Western R. R. Co.*, 4 Gray (Mass.), 333. 1855.

280. Inference of care. The absence of any fault on the part of the plaintiff may be inferred from the circumstances, in connection with the ordinary habits, conduct and motives of men. *Johnson v. Hudson River R. R. Co.*, 20 N. Y., 65, 1859; reversing *Same v. Same*, 5 Duer (N. Y.), 21, 1855; see *Same v. Same*, 6 ib., 633, 1857.

281. — It cannot be said as a universal rule either that it is incumbent upon the plaintiff to prove affirmatively that he was not guilty of negligence, or upon the defendant to prove the contrary, in order to establish his defense. *Id.*

(See *ante* in this subdivision.)

282. Proposition to take care of injured person. An unauthorized proposition to the president of a railroad company, that a person

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injured by a train of the company should be sent to a hospital, is improper to go to a jury as evidence, in an action by the injured party against the company. *Galena and Chicago Union R. R. Co. v. Dill*, 22 Ill., 264. 1859.

283. Usage. When, in a suit against a railroad company for an injury received while passing along a highway, an issue is made upon the negligent conduct of the company in the use of the highway at the time complained of, the usage of the corporation at other times is incompetent. *Gahagan v. Boston and Lowell R. R. Co.*, 1 Allen, (Mass.), 187. 1861.

XI. FRIGHTENED TEAMS.

284. Insufficient room left by train. If a railway company leaves its trains standing at a street or highway crossing, with scarcely room for a team to pass, and in consequence a team becomes frightened in passing such crossing and oversets the vehicle, and the team and a person in it are injured, the railway company will be held liable for the damages. *Ogle v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 3 Houston, (Del.), 267. 1865.

285. — Otherwise if the street or highway is not a legal one. *Same v. Same*, 3 Ib. 302. 1866.

286. Noise and steam. Where a train is passing through a city at the usual speed the railway company is not responsible for injuries to teams occasioned by fright at the steam or noise. *Burton v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 4 Harrington, (Del.), 252. 1845.

287. — In an action brought against a railway company, for injuries to the plaintiff, caused by negligence in blowing the whistle on an engine, at a time and place, however, when and where it was customary to blow it, while too near a team of mules attached to a wagon in which the plaintiff was riding, it was held, that compensatory damages only should be given. A verdict for \$1,525 was regarded as excessive, the injury received being only a sprained ankle. *Chicago, Burlington and Quincy R. R. Co., v. Dunn*, 52 Ill., 451. 1869.

288. Teams used in unloading cars. N. was unloading the defendant's cars at the place on a side track where, by agreement

with the owners of the freight, they had been left for unloading, and at the very point designated by the defendant's agent, using his team for that purpose, as all the parties contemplated when the arrangement was made. While N. was thus engaged, a locomotive approached, on the main track, and his horses became frightened, he received an injury resulting in his death. Held, that it was a part of the agreement between the owners of the freight and the railroad company that the person going for the freight should not be endangered in his person or property by any act of the company. *Newson v. New York Central R. R. Co.*, 29 N. Y., 383. 1864.

XII. GENERAL MATTERS.

289. Connecting lines. The defendant made a verbal arrangement with the D., X. and B. R. R. Co., giving to the latter company the right to construct a track on the side of defendant's road bed, for the purpose of connecting the road of the said D., X. and B. company with defendant's road. The connecting track passed over a bridge previously constructed by defendant for its track, and which foot passengers had been permitted to use for the purpose of transit. The plaintiff, in passing on foot, over said bridge at night, fell through the same, between the rails of the connecting track, by reason of its imperfect covering, and was injured. Held, that if the nuisance complained of was created solely by the D., X. and B. company in the construction of said connecting track, and said company had the sole ownership, possession, and use of said track, the contract between the two companies giving the defendant no power of control in the construction or use thereof, the defendant cannot be held liable for the plaintiff's injury, although the defendant may have had a reversionary interest in the premises, subject to the easement of the D., X. and B. company. *Gwathney v. Little Miami R. R. Co.*, 12 Ohio St., 92. 1861.

290. Contractors. D. and M. made an absolute contract with a railroad company to draw its cars, over a certain portion of the road, to furnish the horses and drivers for that purpose, and assume the entire control of the work. Held, that while D. and M. were in the performance of this contract, the railroad

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company could not be made liable for their negligent acts. *Schular v. Hudson River R. R. Co.*, 38 Barbour (N. Y.), 653. 1862.

291. — Where the plaintiff was run over by a locomotive engine of the defendant, while he was at work, on a side track of the railroad, in the employment of a contractor who, under an agreement with the defendant, was building a wall to support the road bed, there was evidence that at the time of the accident the plaintiff and other servants of the contractor were standing on the side track and holding one of the guys of a derrick; that the work required the derrick and the guy to be in the position in which they were, and the plaintiff and his comrades to stand where they did and concentrate their attention on it; and that the engine, after having just before moved a train of freight cars from the side track to the main track, was detached from the train and backed down the side track, without any signal of its approach, until it struck the plaintiff, who knew and relied upon a usage of the defendants to ring the bell or sound the whistle whenever one of their engines approached men working upon the railroad. *Held*, that on this evidence a jury would be warranted in finding that there was due care upon the part of the plaintiff. *Goodfellow v. Boston, Hartford and Erie R. R. Co.*, 106 Mass., 461. 1871.

292. Deaf persons. In an action brought against a railway company to recover damages caused to third persons by a train while in motion, no recovery can be had unless the employes were, at the time, guilty of negligence or want of due care; nor if the party injured was also guilty of negligence, contributing directly to the injury. *Cleveland, Columbus and Cincinnati R. R. Co. v. Terry*, 8 Ohio St., 570. 1858.

293. — Where the party injured is an adult of ordinary mental capacity, but partially deaf, her infirmity not being known to the servants of the company, will not increase their responsibilities as to care; nor will it excuse her from the full measure of care which prudent persons, partially deaf, but conscious of their infirmity, would ordinarily observe under similar circumstances. *Ib.*

294. — Where evidence of such deafness and evidence that the party injured at the time of crossing the track, was prevented from

observing the proximity of the train, by reason of a veil drawn and retained over her face, has been submitted to the jury, it is the right of the defendant to require the court to charge the jury that neither such deafness nor voluntary obscuration of vision, will excuse the party injured from the observance of such ordinary care, "by the more cautious exercise of her remaining faculties;" and the court, on being requested so to charge, cannot, without comment, refer the whole matter to the jury. *Ib.*

295. — Where a deaf mute slave, who was walking on a railroad track from the direction of an approaching train, was killed by the train, it not appearing that the engineer knew of the slave's infirmity, and it appearing that the usual warning was given by the steam whistle for one endowed with hearing to have made his escape, it was *held*, that the company was not liable for the loss. *Poole v. North Carolina R. R. Co.*, 8 Jones' Law (N. C.), 340. 1861.

296. — It is negligence for a deaf person to drive an unmanageable horse across a railroad track, when a train is approaching. It is no excuse that the horse rushed upon the track near a crossing, or was driven there to avoid the engine. *Illinois Central R. R. Co. v. Buckner*, 28 Ill., 299. 1862.

297. Employes — unfitness. In an action by a personal representative against the proprietor of a railroad for the carelessness, negligence, and unfitness of his employes and agents in running an engine over and killing the deceased, the fitness or qualification of the employes, who were acting as engineers at the time the accident occurred, for the business in which they were engaged, is properly a subject of inquiry for the jury, and instructions, limiting their inquiry as to whether the accident was the result of carelessness or negligence alone, are improper. *Bowler v. Lane*, 3 Metcalfe (Ky.), 311. 1860.

298. Engine. In an action against a railroad corporation to recover damages sustained by the negligent management of its engine, evidence of specific acts of negligence of the engineer on other occasions, previous and subsequent, is admissible. *Robinson v. Fitchburg and Worcester R. R. Co.*, 7 Gray (Mass.), 92. 1856.

299. Flying switch. The making of a "run-

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ning" or "flying switch" in the limits of a populous town, is negligence *per se*. *Illinois Central R. R. Co. v. Baches*, 55 Ill., 379, 1870; *Chicago, Rock Island and Pacific R. R. Co. v. Dignan*, 56 ib., 487, 1870.

300. — For a railroad company to make what is denominated "a running switch" over the crossing of the track by a public road, in the populous part of a village, is of itself an act of gross and criminal negligence on the part of such company. *Brown v. New York Central R. R. Co.*, 32 N. Y., 597, 1865; *Stillwell v. Same*, 34 ib., 29; see also *Brown v. New York Central R. R. Co.*, 31 Barbour (N. Y.), 385, 1860.

301. — Any person who, without negligence on his part, is injured at such crossing by the act of the "running switch," may recover of such company for the damages sustained, without other proof of negligence. *Ib.*

302. **Hand cars.** It is the duty of all persons on the track of a railway, and rightfully there, but in subordination of the right of passing trains, to exercise that care which prudence would suggest, measured by the standard of care that a prudent man would naturally adopt under the circumstances. *Catawissa R. R. Co. v. Armstrong*, 49 Penn. St., 186. 1865.

303. — Therefore, where a track repairer was killed at night by the collision of a backing train of cars with a hand car, in which he with others was approaching the station at which the train had been standing, it was held, that it was error to instruct the jury, that if the deceased knew that the train was at the station, he was not guilty of negligence in approaching it in a hand car, unless he knew the train was in motion; for though the court might have declared it not negligence to approach the train, at the station, yet the instruction given placed the question of negligence on the knowledge of the moving train brought home to the deceased, and not on the degree of care which he should, as a prudent man, have exercised. *Ib.*

304. — The question of negligence should have been referred to the jury. *Ib.*

305. — Whether a given state of facts constitutes negligence, is generally a question of law, but whether a particular negligence contributed to the catastrophe, is a question of fact. *Same v. Same*, 52 ib., 282. 1866.

306. **Joint occupancy.** Where both par-

ties are at fault, no action for damages will lie. *Railroad Co. v. Norton*, 24 Penn. St., 465. 1855.

307. — Where a person places himself on the track of a railroad, he can claim no damages, except for wanton injury, and not from injury sustained in the pursuit of the company's lawful business in the ordinary manner, even though the negligence of the company's agent contributed to the result. *Ib.*

308. — The plaintiff, in the employ of a contractor with a railway company, owning the road, fastened upon the road a machine for sawing wood, and whilst there, was injured by a train of another company having the right by contract to use the track. Held, that though he were upon the track by authority of the superintendent of the company owning the road, he could not recover against the other company for the injury sustained, even though the conductor of the train previously knew of the machine being on the track, and was guilty of negligence on the occasion. *Ib.*

309. — The plaintiff was thrown out of his wagon and injured by a collision with a railway car. The car was the property of one company, but was drawn by horses of another, and under the control of the latter company. Held, that the latter company was liable for the injury. *Weyant v. New York and Harlem R. R. Co.*, 3 Duer (N. Y.), 360. 1854.

310. **Pleading.** Trespass *vi et armis* will not lie against a railroad company, for an injury done to the plaintiff by its locomotive, whether such injury be wilful or accidental on the part of the servants of the company, where it does not appear that the particular injury was done by the command or with the assent of the defendant. *Philadelphia, Germantown, etc., R. R. Co. v. Wilt*, 4 Wharton (Penn.), 143. 1838.

311. — In an action against a foreign corporation, operating a railroad within New Jersey, by legislative authority, when the action is not founded on any special statutory provisions, but is brought to enforce the common law liability of the defendant, it is not necessary to aver in the declaration upon what road the injury was sustained. *Austin v. New York and Erie R. R. Co.*, 1 Dutcher (N. J.), 381. 1856.

312. — A variance between the verdict and the pleadings as to the precise spot where an accident occurred will be disregarded, where the case declared upon and that proved would

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require the same evidence. *Webb v. Portland and Kennebec R. R. Co.*, 57 Me., 117. 1869.

313. — Case cannot be maintained against a corporation for injuries, willfully and intentionally committed by its servants, and not occasioned in the course of their employment in the pursuit of their regular business. *Illinois Cent'l R. R. Co. v. Downey*, 18 Ill., 259. 1857.

314. Rate of speed. That a train was run in Buffalo at a rate of speed prohibited by a city ordinance, passed in pursuance of legislative authority to prescribe a pecuniary penalty for such excess of speed, is not evidence of negligence in fact, and of itself involves no consequence except liability for the penalty, to the municipal corporation. *Brown v. Buffalo and State Line R. R. Co.*, 22 N. Y., 191. 1860.

315. — The authority of the above case seems to be doubted. *Jetter v. New York and Harlem R. R. Co.*, 2 Keyes (N. Y.), 154. 1865.
(See ante, 451.)

316. — The speed of a train in a city or town must be regulated with a due regard to the safety of the passengers and the inhabitants. *Meyer v. Midland Pacific R. R. Co.*, 2 Neb., 319. 1871.

317. — The running of a train at a rate of speed of over twenty-five miles an hour in the populous neighborhood of a city is an act of negligence. *Hagan v. Railroad Co.*, 5 Philadelphia Rep. (Penn.), 179. 1863.

318. — The law not having fixed the rate of speed at which cars may be run upon a railroad, in and across the streets of a city, it is generally a question of fact, in such case, whether the actual rate was dangerous. *Wilds v. Hudson River R. R. Co.*, 29 N. Y., 315, 1864; see *Same v. Same*, 24 ib., 430, and 33 Barbour (N. Y.), 503; see *Same v. Same*, 23 Howard's Pr. (N. Y.), 492, 1862.

319. — Although one who knows that a train of cars is moving at a greater rate of speed than is lawful, is not authorized to go upon the track, or attempt to cross merely because he might do so with safety if the cars were moving at a lawful rate of speed; still he has the right to assume that the train is moving at a lawful rate until the contrary appears; and the fact that the speed was unlawful must therefore be considered in determining the question of negligence. *Langhoff v. Milwaukee and Prairie du Chien R. R. Co.*, 19 Wis., 489. 1865.

320. Scales by the track. In an action for negligence from cars striking a cart on scales near a railroad track, evidence was proper, that after the accident the track was removed to a greater distance. *Westchester and Philadelphia R. R. Co. v. McElwhee*, 67 Penn. St., 311. 1871.

321. — If the track was too near the scales, a higher degree of care was necessary to avoid the accident. *Ib.*

322. Side track. Railroad companies are liable to persons not passengers for the slightest negligence, when the injured party had not equal means with the company to avoid the accident, or where the company at the time of the injury, or its agents, were not engaged in a lawful employment. *New Orleans, Jackson and Great Northern R. R. Co. v. Bailey*, 40 Miss., 395. 1866.

323. — B., by a contract with the Central R. R. Co., had the right to use a certain portion of the side-track for the purpose of loading and unloading freight. The N. O., etc., R. R. Co. had the right to use this side-track when nothing was in the way. B. was engaged in unloading cars on this side-track, and while thus engaged, a train of cars of the N. O., etc., R. R. Co. came in collision with the car upon which B. was standing, and seriously injured him. *Held*, that the company was liable, although the employé of the company may have given the usual signals, that he was about to move the train upon the side-track. *Ib.*

324. Slaves. Where the slave of the plaintiff, endowed with ordinary intelligence, and acquainted with the nature and manner of using a railroad, voluntarily laid himself down on the road and went to sleep, and in this situation, without any fault of the engineer, the engine going at the ordinary speed, passed over the body and killed the slave. *Held*, that the plaintiff could not recover against the company for the value of the slave. *Felder v. Louisville, Cincinnati and Charleston R. R. Co.*, 2 McMullan (So. Car.), 403, 1841; *Richardson v. Wilmington and Manchester R. R. Co.*, 8 Richardson's Law (So. Car.), 120, 1854; *Fleytas v. Pontchartrain R. R. Co.*, 18 La. (O. S.), 339, 1841.

325. — Where a slave, eight years of age, was asleep on the track and the employés of the railway company thought the object was the coat of a workman and made no signal

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and the lad was run over and killed, it was held, that the company was liable for the value of the slave. *East Tennessee and Georgia R. R. Co. v. St. John*, 5 Sneed (Tenn.), 524. 1858.

326.—Where the evidence shows that a slave, mules and cart were run over and destroyed, through the fault and folly of the slave in driving across the railroad when the engine was approaching and near, the owner cannot recover. *Lesseps v. Pontchartrain R. R. Co.*, 18 La. (O. S.), 361. 1841.

327.—A new trial granted upon the facts in the case of the killing of a slave. *Holmes v. Central R. R. Co.*, 37 Ga., 593. 1868.

328.—To render a railway company liable for running over and killing a slave, it should be shown that the injury was the result of carelessness upon the part of the company. *Mann v. Macon and Western R. R. Co.*, 32 Ga., 345. 1861.

329. Statutory liability. By statute, in Indiana, 1 G. & H. 342, railroad companies are liable for animals, but not persons injured upon their roads, where they might be, but are not fenced, irrespective of the question of negligence. *Thayer v. St. Louis, Alton and Terre Haute R. R. Co.*, 22 Ind., 26. 1864.

330.—The 44th section of the general railroad act (Laws of 1850, p. 233), requiring railway companies to fence in their roads, is inapplicable to depots in cities. *Lehey v. Hudson River R. R. Co.*, 4 Robertson (N. Y.), 204. 1866.

331.—The statute of Georgia of 1847, providing that railway companies shall be liable for all damages done to property in running their cars, is only declaratory of the common law. If the plaintiff is negligent he cannot recover. *Macon and Western R. R. Co. v. Davis*, 13 Ga., 68. 1853.

332.—Under Art. 65, § 1, of the Code of Pub. Gen'l Laws, persons and corporations are accountable for all damages occasioned by any neglect on their part, where the other party was not in fault and had not contributed to his own injury. *Baltimore and Ohio R. R. Co. v. The State*, 29 Md., 460. 1868.

333. Street railway crossing. Instructions upon the degree of care to be exercised by conductors of railway trains and street cars at a crossing commented upon. *Madison and*

Indianapolis R. R. Co., v. Taffe, 37 Ind., 361. 1871.

334. Trespassers. A party should cross a railroad track at the usual crossing. An unauthorized person cannot go on the track elsewhere except at his own hazard, unless it be under certain qualifications. *Galena and Chicago Union R. R. Co., v. Jacobs*, 20 Ill., 478. 1858.

335.—The use of a railroad track, cutting, or embankment, except at lawful crossings of public roads or highways, is exclusively for the company and its employés. Hence, where want of ordinary care is not shown, a railroad company is not liable for an injury to a person on a road, where he had no right to be. *Philadelphia and Reading R. R. Co. v. Hummell*, 44 Penn. St., 375. 1863.

336. Trustees operating railway. If a mortgage of a railway has been executed to trustees, for the benefit of bondholders, and the trustees, after entering into possession, lease the railroad to others, but, under a verbal agreement, continue to operate the road for the lessees and receive the earnings, pay the expenses, select, contract with and discharge the persons employed on the road, and exercise all the powers usually exercised by railroad companies over their own roads, the trustees are personally responsible for an injury sustained by reason of the negligence of one of the persons so employed. *Ballou v. Farnum*, 9 Allen, (Mass.), 47. 1864.

337. Willful act of employe. A railway company is not liable for damages resulting from a willful and malicious trespass committed upon a stranger to the company by its engineer or conductor, outside of and beyond his line of duty. *New Orleans, etc., R. R. Co., v. Harrison*, 48 Miss., 112, 1873; *Ryan v. Hudson R. R. Co.*, 1 Jones & Spencer (N. Y.), 137, 1871.

(See *ante*, 475.)

338. Willful act of third person. Where the injury results from the wanton act of a third person, as where such third person wantonly attacks the team of a railway company and causes it to take fright, and a party is injured thereby, the company will not be responsible for the damages. *Weldon v. Harlem R. R. Co.*, 5 Bosworth (N. Y.), 576. 1859.

Contributory Negligence — Verdict.

INJURIES TO TEAMS AND OTHER PROPERTY.

1. Contributory negligence. Any contributory negligence, however slight, on the part of the plaintiff, arising from the want of ordinary care, will prevent his recovery. *Strader v. Marietta and Cincinnati R. R. Co.*, 2 Cincinnati Superior Ct. Rep., 268. 1872.

2. Crossing the track. An action was brought to recover damages against a railway company for injuries to property of the plaintiffs by a train of the former, where the latter while driving in a wagon upon the highway, attempted to cross the track in the day-time, and seeing at a distance of forty feet, a train approaching, turned their horse's head towards the engine and attempted to back him from the train, but he being frightened, they turned his head away towards a neighboring fence, in a narrow space where the passage was obstructed, and the wheel of their wagon was struck by the train. *Held*, to be a case of contributory negligence on the part of the plaintiffs, or of unavoidable accident on the part of the defendant, unless there were other proof of defendant's negligence. *Schwartz v. Hudson River R. R. Co.*, 4 Robertson (N. Y.), 347. 1867.

3. Damages. The plaintiff below came to the depot of the defendant's railroad at S., with his team, to haul a load of dry goods to the town of R., and was directed by the defendant's agent who had charge of the depot, where to back his wagon and receive the load. While he was engaged in loading the wagon, at the place designated, through the defendant's negligence his wagon was run into by the defendant's cars and seriously damaged, so as to be unable to carry its load. In an action on the case the court, upon these facts appearing, instructed the jury that the measure of damages was the damage done to the wagon, the loss of the trip in which the plaintiff was engaged, and the loss of the use of the wagon until, by proper diligence, the plaintiff could get it repaired. *Held*, that the instruction was correct. *Shelbyville Lateral Branch R. R. Co. v. Newark*, 4 Ind., 471, 1853; *Same v. Lynch*, ib., 494.

4. Freight. An engineer, while his locomotive was standing near a crossing at the time a person was crossing the track in front

of his engine, negligently or maliciously caused the steam to escape, whereby the team was made to run off and injury inflicted; *held*, that the company was liable. *Toledo, Wabash and Western R. R. Co. v. Harmon*, 47 Ill., 298. 1868.

5.—The company is not released from responsibility by having rules against such an act. *Id.*

6. Horse left unfastened. Evidence that a servant, employed by traders to deliver goods, upon stopping with his horse and wagon to deliver a parcel at a house from fifty to a hundred rods from a railroad crossing, left the horse unfastened for four or five minutes while he was in the house, knowing that it was not afraid of cars, and having used it for three or four months without ever hitching it or knowing it to start, is not conclusive, as matter of law, of a want of due care on his part; but the question is for the jury. *Southworth v. Old Colony and Newport R. R. Co.*, 105 Mass., 342. 1870.

7.—It is not negligence *per se* to have a horse and wagon unhitched in a public street, unless the horse is vicious or restive. *Albert v. Bleeker Street, etc., R. R. Co.*, 2 Daly (N. Y.), 389. 1868.

8. Stalled team. As a railroad train rounded a curve in the road in the city of Chicago, a heavily loaded wagon, with horses attached, was in plain view, a few hundred feet distant, stationary across the track. When the engine driver first saw the wagon he observed there was no one near it, and he must have observed that it was loaded. He saw the wagon in time to have avoided a collision by stopping the train, but did not attempt to do so until it was too late, supposing the wagon would be removed. The wagon, however, was stalled, and could not be removed in time to avoid a collision, and the train ran into it, injuring the wagon and horses attached to it. It was *held*, in an action against the railroad company, to be culpable negligence on the part of the engine driver. *Chicago and Alton R. R. Co. v. Hogarth*, 38 Ill., 370. 1865.

9.—comparative negligence. If the defendant was chargeable with a far greater degree of negligence than plaintiff, and thereby caused the injury, he would be liable. *Id.*

10. Verdict. Where, in an action to recover for damages occasioned by a collision between

Miscellaneous.

the defendant's cars and the plaintiff's horse and wagon, there is evidence on both sides, in regard to the negligence of the defendant, a verdict of the jury in favor of the plaintiff will be regarded as settling the question in his favor. *Sheffield v. Rochester and Syracuse R. R. Co.*, 21 Barbour (N. Y.), 339. 1856.

INSANITY.

1. Husband and wife. It is not ground to vacate a decree appointing a guardian of a wife as insane, that her husband, after making the application and before the decree, joined with her in a conveyance of land, and represented, in conversation, that the application was abandoned. *Brigham v. Boston and Albany R. R. Co.*, 102 Mass., 14. 1869.

2. Rights of insane persons. Whenever a man loses his memory and understanding, he is entitled to legal protection, whether such loss is occasioned by his own imprudence or misconduct, or by the act of providence. *Bliss v. Connecticut and Passumpsic Rivers R. Co.*, 24 Vt., 424. 1852.

INSOLVENCY.

1. Assumption of debts. An assumption to pay the debts of an insolvent company, ratably according to the value of its assets, is not substantially an agreement to pay its debts in full, "whether bonded or floating, ascertained or to be ascertained." *Lyons v. Orange, Alexandria, etc. R. R. Co.*, 32 Md., 18. 1869.

2. Distribution. The act of March 16, 1848, for the purpose of distributing the assets of the M. G. R. R. Co., authorized an equitable compromise between the state and other claimants of the funds; but a compromise by which about one-half the funds were relinquished to one of them, who claimed only \$16,000, while the claim of the state was for \$100,000, was inequitable. The funds should have been divided

pro rata. *State v. Mexican Gulf R. R. Co.*, 5 La. An., 333. 1850.

3. New promise. A promise to pay after a discharge under the insolvent laws, is a waiver of the discharge, and the prior debt is a sufficient consideration for the new promise; but the new promise thus made to charge the party, must be an express promise, and must be absolute and unconditional. *Baltimore and Ohio R. R. Co. v. Clark*, 19 Md., 509. 1862.

4. Proceedings. The New York and Boston R. R. Co., a domestic corporation, became consolidated under the same name, with a railroad corporation of the state of Rhode Island, and the corporation thus formed became again consolidated, under still the same name, with a Massachusetts company; which consolidation was affected in each instance by proceedings authorized by the respective charters of the companies, and confirmed by subsequent acts of the legislatures of Connecticut and Massachusetts. Proceedings in insolvency instituted against the New York and Boston R. R. Co., in which it was described as a corporation organized under the laws of Connecticut, and as a corporation created by the general assembly of Connecticut, and located in that state, were held to be proceedings against the original New York and Boston R. R. Co., and not against the consolidated company. *Platt v. New York and Boston R. Co.*, 26 Conn., 544. 1857.

5. Report. Where a judgment against the account of a liquidator has become final, he cannot afterwards go behind it in an answer to a rule requiring him to show cause why a creditor's claim should not be paid. *State v. Clinton and Port Hudson R. R. Co.*, 21 La. An., 156. 1869.

6. Stockholder's liability. The stockholders of an insolvent corporation, who have not paid the full amount of their stock, are liable to the creditors of the corporation to the extent of what remains unpaid, upon their several shares. *Morgan v. New York and Albany R. R. Co.*, 10 Paige Ch. (N. Y.), 290. 1843.

7. Street railway companies. Before the enactment of St. 1866, ch. 113, street railway corporations could not be the subject of proceedings in insolvency in Massachusetts. *Central National Bank of Worcester v. Worcester Horse R. R. Co.*, 13 Allen (Mass.), 105. 1866.

Additional Instructions asked by Jury — Issues.

INSTRUCTIONS.

[Instructions upon different branches of law will be found distributed through this work under the various different titles.]

1. Additional instructions asked by jury.

When additional instructions are asked by the jury it is proper for the court to give them without sending for the attorneys who are not present at the time the request is made. *Chapman v. Chicago and Northwestern R. R. Co.*, 26 Wis., 295. 1870.

2. Conflicting instructions. It is improper to give instructions to the jury which announce irreconcilable legal principles. *Mississippi Central R. R. Co. v. Miller*, 40 Miss., 45. 1866.

3. Disputed facts assumed. A party should not, in his instructions, assume disputed facts to be proved, but must state them hypothetically. *Pennsylvania R. R. Co. v. McTighe* 46 Penn. St., 316. 1863.

4. Error not presumed. An exception to a refusal to give instructions will not be considered when it does not appear distinctly that the instructions asked for were pertinent. *Milk v. Middlesex R. R. Co.*, 99 Mass., 167. 1868.

5. Error without prejudice. Error in the instructions is not ground for reversal where it is manifest that the verdict was correct upon the facts appearing in the record. *Memphis and Charleston R. R. Co. v. Whitfield*, 44 Miss., 466. 1870.

6. — A party cannot complain of an erroneous instruction in his own favor. *Milwaukee and Mississippi R. R. Co. v. Fairchild*, 6 Wis., 403. 1859.

7. Evidence. Where the testimony in a cause fails to make a case of liability against the defendant within the issue, it is the duty of the court to so instruct the jury. *Grand Trunk R. R. Co. v. Nichol*, 18 Mich., 170. 1869.

8. — Where the plaintiff, by his own testimony, shows that he has no cause of action, and there is no attempt to explain his testimony by other witnesses, he cannot complain if the court charge the jury that he cannot recover. *Davis v. Detroit and Milwaukee R. R. Co.*, 20 Mich., 105. 1870.

9. — Instructions which are rendered relevant by the evidence should be given without regard to the weight of the evidence. *DeCamp*

v. Mississippi and Missouri R. R. Co., 12 Ia., 348. 1861.

10. — An instruction relating to the evidence in the case, will be presumed to have been correct, if the evidence is not set out in the record. *Ketcham v. New Albany and Salem R. R. Co.*, 7 Ind., 391. 1856.

11. Exceptions. A general exception to the charge of the court is not sustainable. *Reynolds v. Boston and Maine R. R. Co.*, 43 N. H., 580. 1862.

12. — An exception to the "last half" of the charge was held to be too indefinite. *Bigelow v. West Wisconsin R. R. Co.*, 27 Wis., 478. 1871.

13. Immaterial matters. It is not erroneous to refuse to instruct the jury as to the matters not material to the issue. *Kennebec and Portland R. R. Co. v. White, et al.*, 38 Me., 63, 1854; *Rogers v. Kennebec and Portland R. R. Co.*, ib., 227, 1854.

14. Inapplicable instructions. A charge not warranted by the facts should not be given to the jury. *Lewis, Sup't, v. Whidbee*, 36 Ga., 371. 1867.

15. Issues. An instruction that all allegations in the petition not specifically denied in the answer, are to be taken as true, is erroneous; the issues should be specifically stated. *Missouri Coal and Oil Co. v. Hannibal and St. Joseph R. R. Co.*, 35 Mo., 84. 1864.

16. Misleading. It is error to give instructions which are calculated to mislead the jury, as that affirmative evidence is of greater weight than negative, where the evidence is all affirmative. *Great Western R. R. Co. v. Hanks*, 25 Ill., 241. 1861.

17. — If the instructions of the court are so general in their nature as not to draw necessary distinctions, or are indefinite in their language, and strongly tend to mislead and divert attention from the real issues, or are not applicable to the testimony, a new trial will be ordered. *Meyer v. Midland Pacific R. R. Co.*, 2 Neb., 319. 1871.

18. — Where no particular instructions are prayed, the court is responsible only for the general effect of the charge. If the whole charge was calculated to mislead the jury, it is error, not otherwise. The mere omission to say what might have been properly said, is no just ground of complaint by a party who submitted no points to the court. *Reeves v. Dela-*

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ware, *Lackawanna and W. R. R. Co.*, 30 Penn. St., 454. 1858.

19. — Each party has the right to have the jury instructed upon the law of the case, clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake; and, if the instructions of the court fail thus to charge, it is error to refuse one calculated to cure the omission. *Muldowney v. Illinois Central R. R. Co.*, 32 Ia., 176. 1871.

20. **Refused instructions given to jury by mistake.** Where an erroneous instruction, offered by the successful party, is by mistake handed by the court to the jury, and by them taken to their room, and there is no showing but that it was read and considered by them, the case will be reversed. *Carlin v. Chicago, Rock Island and Pacific R. R. Co.*, 31 Ia., 370. 1871.

21. **Review of.** If the plaintiff is not entitled to recover upon his own showing, the Supreme Court will not review the instructions given to the jury. *Enright v. San Francisco and San Jose R. R. Co.*, 33 Cal., 230. 1867.

22. — A court will not reverse for errors in the instructions or rulings of the court, where it is clear that the verdict and judgment could not have been different on the evidence. *Kellogg v. Chicago and Northwestern R. R. Co.*, 26 Wis., 223. 1870.

23. **Specific acts.** The practice of singling out in instructions specific acts, and asking the court to say, as a matter of law, that if these acts were established, there could be no recovery, is not permissible. *Meyer v. Pacific R. R. Co.*, 45 Mo., 137. 1869.

24. — It is error for the court to give instructions stating a portion of material facts and omitting others of equal importance, which, if stated, would lead the mind of the jury to a different conclusion. *New Orleans, Jackson and Great Northern R. R. Co. v. Statham*, 42 Miss., 607. 1869.

25. **Too general instructions.** Where the law is correctly stated by the inferior court, but in such a manner that it might have been misunderstood by the jury, it is no ground for reversal. The party objecting to the charge had the right to apply to the court for a clearer statement at the time. *Milne v. Pontchartrain R. R. Co.*, 9 La. (O. S.), 252, 1835; *Webb v. Portland and Kennebec R. R. Co.*, 57 Me., 117, 1869.

26. **Waiver of exceptions.** Before commencing his argument, the defendant presented written prayers for instructions to the jury. During the argument, the judge said that he should rule as requested, but with a modification of one of the instructions, and the defendant replied that he took no exception to the qualification. When the judge charged the jury, he stated the qualification in writing; and the defendant then said that he took exception. The judge thereupon remarked that if the defendant would point out wherein the written statement of the qualification differed from the oral statement of it assented to, the court might revise the phraseology; but the defendant declined to suggest any change. *Held*, that the refusal of the defendant to point out the alleged variance was a waiver of any right of exception. *Coleman v. New York and New Haven R. R. Co.*, 106 Mass., 160. 1870.

27. **Written instructions.** Where the statute requires that all instructions shall be reduced to writing and filed, but not taken to their rooms by the jury, it is no error for the court to read a section of the statute to the jury, without copying it into his written charge. *Swartwout v. Michigan Air Line R. Co.*, 24 Mich., 389. 1872.

INSURANCE.

I. FIRE INSURANCE.

II. LIFE INSURANCE.

III. ACCIDENT INSURANCE.

IV. MARINE INSURANCE.

I. FIRE INSURANCE.

1. **Action against railway company.** A.'s house, which was insured, was injured by a fire communicated by a locomotive, and the underwriters paid to A. the amount of his loss, for which the railroad company was also by law responsible to him. *Held*, that such payment did not bar A.'s right to recover of the railway company, and that A., by receiving payment of the underwriters, became trustee for them, and that the underwriters, on indemnifying A., might bring an action, in his name, for their own benefit, against the

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railroad company, and that A. could not legally release such action. *Hart v. Western R. R. Co.*, 13 Metcalf (Mass.), 99, 1847; *Weber v. Morris and Essex R. R. Co.*, 6 Vroom (N. J.), 409, 1872.

2. — An insurer of goods, consumed and totally destroyed by fire in course of transportation by a common carrier, is entitled, after he has paid the loss, to recover what he has paid, by suit in the name of the assured against the carrier. It is not necessary, in order to sustain such suit, to show any positive wrongful act by the carrier. *Hall and Long v. Railroad Cos.*, 13 Wallace, 367. 1871.

3. Assignment. Where the owner of the goods had a policy of insurance which had been paid, and he had assigned to the insurers the statutory claim, with the stipulation that he should have any excess recovered over and above the amount of the policy, it was held that the insurance company might recover, in the name of the plaintiff, for the whole injury. *Bean v. Atlantic and St. Lawrence R. R. Co.*, 58 Me., 82. 1870.

4. — Where a contract of affreightment contained a provision entitling the carrier, in the event of his own liability for damages, against which the consignor had obtained an insurance to recover the amount from the underwriter, it was held, the carrier must pay the damage before he can claim such right. *Cincinnati, Hamilton and Dayton R. R. Co. v. Spratt*, 2 Duvall (Ky.), 4. 1865.

5. — In such case the consignor may bring suit against either the carrier or underwriter, and a judgment in favor of the carrier against the underwriter, or *vice versa*, would not bar the right of the consignor to recover against the carrier. *Id.*

6. Policy. A policy on certain cars, and an engine, "contained in" car house No. 1, was held, not to protect the property when not contained in such building. *Annapolis and Elk Ridge R. R. Co. v. Baltimore Ins. Co.*, 32 Md., 37. 1869.

7. — construction. The terms of a policy of insurance issued to a railroad company — construed. *Eastern R. R. Co. v. Relief Fire Ins. Co.*, 98 Mass., 420, 1868.

8. Proof of loss. Under the circumstances of this particular case, the general agent of a fire insurance company was held to have au-

thority to waive the preliminary proof of loss required by the printed conditions of the policy. (See *Same v. Same*, 98 Mass., 420.) *Eastern R. R. Co. v. Relief Fire Ins. Co.*, 105 Mass., 570. 1870.

II. LIFE INSURANCE.

9. Rights of insurance company. Where an insurer has been compelled to pay the insurance upon the life of a person whose death has been caused by the unlawful act of a third person, and where there is no privity of contract between the insurer and the wrong doer, and no direct obligation of the latter to the former, growing out of the relation of the wrong doer to the insured, by contract or otherwise; though the loss of the insurer is due to the acts of the wrong doer, yet, as those acts affect the insurer only through his artificial relation of contractor with the insured, the loss is a remote and indirect consequence of the act of the wrong doer, and no action therefor can be sustained against him by the insurer. *Connecticut Mutual Life Ins. Co. v. New York and New Haven R. R. Co.*, 25 Conn., 265. 1856.

10. — Therefore, where the defendant, by its negligence, had caused the death of A., a passenger on its road, and the plaintiff had been compelled in consequence to pay the amount of an insurance upon the life of A., previously made; in an action brought by the latter company against the railroad company to recover the amount so paid, it was held, that the wrong complained of was not the subject of a suit at law, for reasons appertaining both to the peculiar nature of the wrong, and to the manner in which its consequences were brought home to the party claiming redress. *Id.*

11. — The principle upon which in any case an insurer is permitted to recover against a party, whose wrongful act has caused the loss which the insurer has been compelled to pay, is not based upon the idea of a direct legal right of the insurer against the wrong doer, but upon the equitable doctrine of subrogation, under which such insurer succeeds to, and is entitled to a cession of, all the means of redress held by the party indemnified, against the party whose act has occasioned the loss. And the insurer can enforce this right only in the name of the insured. *Id.*

Accident Insurance—Marine Insurance, etc.

III. ACCIDENT INSURANCE.

12. Negligence. The contract of insurance is an exception to the rule which denies compensation for injuries of which the party's own negligence or want of due care has been the primary cause. So held as to accident insurance. *Champlin v. Railway Passenger Ins. Co.*, 6 Lansing (N. Y.), 71. 1872.

13. Parol contract. In the absence of any statutory requirement to the contrary, contracts for insurance may be by parol. *Rhodes v. Railway Passengers' Ins. Co.*, 5 Lansing (N. Y.), 71. 1871.

14. — Where there is an agreement to issue a policy, under which the delivery is due and alone remains unperformed, equity will decree payment of the insurance according to the conditions of the policy. *Ib.*

15. Payment by railway company does not discharge insurance. The liability of a railway company to respond in damages for an injury, occasioned by accident to a passenger on its road, is not discharged *pro tanto* by the payment of any sum, on account of such injury, by an accident insurance company. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Thompson*, 56 Ill., 138. 1870.

16. Policy. A policy insured the holder against death or injury "by violent and accidental means, within the meaning of the contract and conditions annexed." The conditions specified sundry means and modes of violent injury and death which were excluded from the scope of the policy. *Held*, that these specific exclusions did not operate to make the principal terms more largely inclusive, but that the death or injury, though violent, must still fall strictly within the principal terms, and be caused by means that were accidental as well as violent. (U. S. Dist. Ct.) *Southard v. Railway Passengers Assurance Co.*, 34 Conn., 574. 1868.

17. — Where a person insured by such policy was internally injured by jumping in great haste from a railroad car at a station, and running a considerable distance, but which action was not necessary to his safety, but was voluntarily undertaken to effect an important object, which required haste, it was held that the injury was not caused by "accidental means," within the meaning of the policy. *Ib.*

18. — A policy, issued by the defendant, in-

sured the holder (plaintiff's intestate) in the sum of \$5,000 in the event of her death from personal injury, "when caused by any accident while traveling by public or private conveyances provided for the transportation of passengers." In the course of a journey by a connecting steamboat and railway line, she fell upon a slippery sidewalk, while walking from the steamboat landing to the railway station, as was customary for travelers on that route, and thereby received injuries which caused her death. *Held*, that as it appeared she was so walking in the actual prosecution of her journey, the death was covered by the terms of the policy. *Northrup v. Railway Passenger Assurance Co.*, 43 N. Y., 516, 1871; reversing *Same v. Same*, 2 Lansing (N. Y.), 166, 1869.

IV. MARINE INSURANCE.

19. General average. Expenses incurred for seamen's wages and subsistence are proper items of charge to be included in the adjustment of general average. *Barker v. Baltimore and Ohio R. R. Co.*, 22 Ohio St., 45. 1871.

INTEREST.

See BONDS OF RAILWAY COMPANIES; EXISTENT DOMAIN; JUDGMENT; STOCK AND STOCKHOLDERS.

1. Bank discount. The legal interest on a sum discounted by a bank is that established by its charter. *Com'rs Clinton and Port Hudson R. R. Co. v. Kernan*, 10 Robinson (La.), 174, 176. 1845.

2. Grace. Where a company was authorized to charge seven per cent. interest for notes running four months, and eight per cent. for notes at a longer time, it was *held*, that grace, at the end of the four months, did not justify taking the interest at eight per cent. *Forniquet v. West Feliciana R. R. Co.*, 6 Howard (Miss.), 116. 1842.

3. Unliquidated damages. It seems that the rules as to interest on unliquidated damages have been so modified by modern decisions that interest is now recoverable on the value of property lost by a bailee from the date of such loss. *Mote v. Chicago and Northwestern R. R. Co.*, 27 Iowa, 22. 1869.

Miscellaneous.

4. Where contract does not specify interest. If a contract is silent upon the subject of interest, and does not by implication exclude it, the law implies that interest shall be paid on money due and payable after it falls due. *Vermont and Canada R. R. Co. v. Vt. Cent. R. R. Co.*, 34 Vt. 1, 1861.

INTERPLEADER.

1. Estates of decedents. Where an administrator, who was also an heir to the estate, brought a bill in chancery, setting forth among other things, that the commissioners allowed a claim against the estate in favor of the R. and B. R. R. Co., for \$1,000, being ten shares of corporation stock, and that orator at the time did not deem it his duty to appeal, and the time of appeal had expired, and since that, the company had commenced suit upon the administrator's bond to recover this allowance, and that the heirs insisted the \$1,000 should be distributed, and that the allowance was made by fraud, and that legal proceedings would be obtained for that purpose; and that plaintiff is ready to pay it to whomsoever is entitled; and praying that the parties may interplead and that orator may be permitted to deposit the money in court to await its orders; also praying an injunction. *Held*, on demurrer, that the facts alleged did not entitle plaintiff to relief, nor will the facts lay the ground of an independent jurisdiction in equity, for a bill of interpleader. *Lincoln v. Rutland and Burlington R. R. Co.*, 24 Vt. 639. 1852.

INTERNAL REVENUE.

SEE MORTGAGE; TAXATION.

INTOXICATING LIQUORS.

1. Contractor. Under the "Ohio Liquor Law" a railroad contractor can recover damages from a person who sells his hands intoxicating liquor whereby they became intoxi-

cated and their work delayed. *Duroy v. Blinn*, 11 Ohio St. 331. 1860.

2. License. In an indictment, under the act of 1868-9 ch. 213, for selling spirituous liquors within three miles of the Western N. C. Railroad, during the period of its construction, "unless licensed by the state," it is a complete defense to show that a license has been granted by the county commissioners of the county in which the selling takes place, as such commissioners are the agents of the state for that purpose. *State v. Dobson*, 65 N. C., 346. 1871.

3. Search warrant. An officer, acting under a warrant for the search of intoxicating liquors, is justified in forcibly breaking open the depot of a railway in which the liquors are stored, if such forcible entry is necessary to the execution of the warrant. *Andros-coggin R. R. Co. v. Richards*, 41 Maine, 233. 1856.

JOINDER OF ACTIONS.

SEE INJURIES TO DOMESTIC ANIMALS.

JOINT LIABILITY.

SEE CARRIAGE OF MERCHANDISE.

1. Connecting lines. The S. C., the G., and the W. and A. railway companies entered into an arrangement to carry cotton from Chattanooga to Charleston at 65 cents per 100 pounds. The S. C. company published a notice, stating the arrangement, requesting shippers to take duplicate receipts, and forward one by mail to its agent at Hamburg "in order to fix the responsibility on this company. With these precautions, the business can be transacted mutually satisfactory to all concerned. The roads pledge themselves to give all practicable despatch to cotton shipped under the arrangement." *Held*, that the three companies were joint contractors, and that the S. C. company was liable for damages which occurred in the transportation before the cotton reached its road. That, as oral evidence was required to construe the contract, it was proper to submit to the jury the question

Confession — Interest.

as to whether the contract was joint or not. *Bradford v. South Carolina R. R. Co.*, 7 Richardson's Law (So. Car.), 201. 1854.

2. — Subsequently, a notice was published that the company would only be liable after the goods came into its possession, and receipts for cotton were also given stating that fact, and it was accordingly *held*, that the three companies were not joint contractors. *Bradford, Patton and Co. v. Same*, 10 ib., 221. 1857.

JUDGES.

See INJUNCTION.

1. **Pro tempore.** A judge who is called to preside, under the act of 1855, at the trial of a cause, in the place of another judge who is disqualified, derives his power from the statute, and not from the notice given to him by the disqualified judge. The object of the notice is simply to secure the attendance of a competent judge, and the notice is not part of the record. *Benjamin v. Evansville, Indianapolis, etc. R. R. Co.*, 28 Ind., 416. 1867.

JUDGMENT.

See CONTRACTOR; EMINENT DOMAIN; GARNISHMENT; INJUNCTION; JURISDICTION; MANDAMUS; MORTGAGE; PLEADING; WRIT OF ASSISTANCE.

1. **Confession.** The court will not reopen a judgment by confession for the payment of money in installments, with power to issue execution for the whole amount on the failure to pay one of the installments. *Malone v. Philadelphia and Reading R. R. Co.*, 1 Penn. Law Jour. Rep., 380. 1843.

2. **Consent.** Where the record shows a judgment or decree against a corporation, and further shows that such judgment was rendered "by consent of the parties," to the action, there is no presumption that such consent was given by the attorney of the corporation, notwithstanding the rule that "there can be no appearance of a corporation in court but by attorney." *Union Pacific R. R. Co. v. McCarty*, 8 Kans., 125. 1871.

3. **Correction of judgment.** An error of

fact, made by the High Court of Appeals, may be corrected by motion, giving ten days' notice thereof to the opposite party. The more correct practice would be by a writ of error *coram nobis*. *Mississippi and Tennessee R. R. Co. v. Wynne*, 42 Miss., 315. 1868.

4. **Creditor's suit.** In a creditor's suit, the judgment debtors must be served with process. *Monroe v. Galveston R. R. Co.*, 19 Abbott's Pr. (N. Y.), 90. 1862.

5. **Death of party.** A judgment against one who, though cited, dies before issue joined, is a nullity. *New Orleans and Carrollton R. R. Co. v. Bosworth*, 8 La. An., 80. 1853.

6. **Foreign corporation.** The service of summons upon an officer of a foreign corporation, who happens to be temporarily in another state, and who does not voluntarily appear to the action, does not give jurisdiction to the court of that state for the purpose of rendering personal judgment upon contracts made in that state, for debts due to residents thereof. *Latimer v. Union Pacific R. R. Co.*, 43 Mo., 105. 1868.

7. **Form.** All judgments for money must be certain, and find the sum for which they are rendered. If they fail to do so, they are fatally defective. Without either the dollar mark or other term indicating the amount, they will be held void. *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Chicago*, 53 Ill., 80. 1869.

8. — The reasons for a judgment are not a necessary part of the record. *West Feliciana R. R. Co. v. Thornton*, 12 La. An., 736. 1857.

9. — Upon a trial by the court, the successful party is under no obligation to submit a draft of the judgment to the adverse party, for amendments. *People v. Albany and Susquehanna R. R. Co.*, 57 Barbour (N. Y.), 204. 1870.

10. **Interest.** Where at the Nov. term, 1857, judgment was rendered upon a verdict returned at May term, 1856, without adding interest upon the amount of the verdict, the plaintiff's motion for interest having been denied, but no exception taken or reserved, it was *held*, on motion at April term, 1861, that interest ought to have been added to the verdict; but that, having failed to procure any bill of exceptions and transfer of the question, the party had lost his remedy and the whole matter must be regarded as *res adjudicata*. *Johnson v. Atlantic and St. Lawrence R. R. Co.*, 43 N. H., 410. 1861.

11. — Where a verdict has been found for

Justice of the Peace — Reversal.

the plaintiff for a certain sum, and the defendant moves for a new trial and in arrest of judgment, and these motions are overruled and judgment entered on the verdict, interest will not be allowed on the sum ascertained by the verdict, for the time between the date of the verdict and the entry of the judgment. *Baltimore City R. R. Co. v. Sewell*, 37 Md., 443. 1872.

12. Justice of the peace. Where a justice of the peace has jurisdiction of the parties and subject matter, and renders a judgment, the law presumes all the prerequisites necessary to the validity of the judgment. The errors of the justice must be corrected by a direct proceeding for that purpose, and cannot be set up in any collateral action. *Hendrickson v. St. Louis and Iron Mountain R. R. Co.*, 34 Mo., 188. 1863.

13. Lien. The sale of property under a junior judgment discharges it from the lien of an older judgment, but the proceeds of the sale must be applied upon the latter, unless the creditor be guilty of some negligence, which will postpone his lien. *Mobile and Ohio R. R. Co. v. Trotter*, 36 Miss., 416. 1858.

14. — The failure of the sheriff to levy an execution in his hands at the same time that he levies the execution issued on the junior judgment, is not an act of negligence of the creditor, and does not affect his lien. *Id.*

15. — In Wisconsin, a judgment is a lien from the time it is rendered, upon a railroad, and upon the rolling stock, which is a fixture by statute. *Railroad Co. v. James*, 6 Wallace, 750. 1867.

16. — The lien of a judgment upon real estate is purely statutory, and it is within the power of the legislature to abolish this lien at any time before rights have become vested, or estates acquired under it. A provision, therefore, causing the lien of a judgment which has not ripened into a title, to be superseded by the taking of the land under proceedings in the exercise of the right of eminent domain, on payment of compensation to the owner of the land, is valid. *Watson v. New York Central R. R. Co.*, 47 N. Y., 157. 1872.

17. — In proceedings for the condemnation of lands, under the provisions of the acts incorporating the B. and A. R. R. Co., (Laws of 1836, ch. 242, and of 1843, ch. 169.), judgment creditors were not required to be made parties. They are in no sense "owners." *Id.*

18. Mistake. The facts with relation to an alleged mistake in a judgment—considered. *Buffalo, New York and Erie R. R. Co., v. Stevens*, 51 N. Y., 659. 1873.

19. Motion to set aside. Where there is any irregularity in the proceedings, a court may, on motion, at a subsequent term, set aside the judgment, or do whatever the justice of the case may require; but where the proceedings are regular, however erroneous, the power of the court to interfere ceases with the term. *Harbor v. Pacific R. R. Co.*, 32 Mo., 423. 1862.

20. Note. Where a judgment is rendered upon a note, the note is merged in the judgment. *West Feliciana R. R. Co., v. Thornton*, 12 La. An., 736. 1857.

21. Nunc pro tunc. A final judgment cannot properly be entered *nunc pro tunc*, without a special order of the court. *Erie R. R. Co. v. Ackerson*, 4 Vroom (N. J.), 33. 1863.

22. Personal judgment. There cannot be any valid personal judgment without notice. *Kansas Pacific R. R. Co. v. Streeter*, 8 Kan., 133. 1871.

23. Pleading. A judgment is not void because no complaint has been filed. *Leach v. Western North Carolina R. R. Co.*, 65 N. C., 486. 1871.

24. Presumption. Where a court, having jurisdiction of the case and of the parties, enters a judgment, there is a presumption that all the facts necessary to warrant the judgment have been found, if they are sufficiently averred in the pleadings. *Miller v. United States*, 11 Wallace, 268. 1870.

25. Publication of notice. A personal judgment obtained in a sister state, upon notice to the defendant by publication only, there being no appearance of defendant, will be deemed null and void outside the state in which it was rendered, and will support no action in Missouri. *Latimer v. Union Pacific R. R. Co.*, 43 Mo., 105. 1868.

26. Quashing writ. That judgment is rendered upon motion to quash the writ, when the proper judgment would be, upon nonsuit, is no error of which defendants can complain. *Darwin v. Tusculumbia, Courtland and Decatur R. R. Co.*, 4 Porter (Ala.), 160. 1836.

27. Reversal. Where a judgment is reversed and declared null and void by the supreme court on appeal, the defendant is en-

Contract—Right of Way.

titled to be restored to the condition in which he stood previous to the judgment, and to restitution of everything which he had lost and which remained in the hands of the adverse party, his agents, attorneys or privies; and no suit is required to set aside a deed of land bought by an attorney of plaintiff, upon executive sale under said judgment. *Hannibal and St. Joseph R. R. Co. v. Brown*, 43 Mo., 294. 1869.

28. Sister state. A final judgment in a sister state is conclusive in the absence of evidence impeaching it. *West Feliciana R. R. Co. v. Thornton*, 12 La. An., 736. 1857.

29. Transfer of corporate rights. A recovered a judgment against the Terre Haute, Alton and St. Louis R. R. Co., for work and labor performed for it, and subsequently the road was sold, and its purchasers were, by an act of the legislature, passed Feb., 1861, incorporated as the St. Louis, Alton and Terre Haute R. R. Co., under which they organized, and which act provided, among other things, that, as a condition precedent to its operation, they should pay all unsatisfied judgments which had been recovered against the former company for work and labor done for it. In an action of debt, brought against the latter company, upon this judgment, *held*, that it was liable, it having succeeded, under said act, to all the corporate powers, privileges and franchises of the former company, and having assumed, in consideration of such grant, to pay and discharge all judgments of such a character, remaining unsatisfied against said company last named. *St. Louis, Alton and Terre Haute R. R. Co. v. Miller*, 43 Ill., 199. 1867.

JUDICIAL NOTICE.

See CHARTER.

JUDICIAL SALE.

See APPRAISEMENT LAWS; EMINENT DOMAIN; EXECUTION; MORTGAGE.

1. Contract. A railway company contracted by articles for land and entered under the articles. Having failed to pay the purchase money according to the articles, the

court decreed specific performance with leave for the vendor to issue execution, if the purchase money found due should not be paid within a certain time. The money was not paid and the whole tract was sold under execution. Before the sale, the company had laid a track, etc., on a strip of the land. *Held*, that the sale vested the whole interest of the company, legal and equitable, including the strip occupied by the track, etc., in the sheriff's vendee, subject to no easement by the company. *Pittsburgh and Steubenville R. R. Co. v. Jones*, 59 Penn. St., 433. 1868.

2.—The company entered and constructed its track as the equitable owner of the land, and had no right to its use except as such equitable owner. *Ib.*

3.—The supreme court however ordered a stay of proceedings until there should be an opportunity to assess the owner's damages and make compensation. *Ib.*

4.—A sale upon his judgment under the decree was an election by the vendor to sell his legal as well as the company's equitable title, and was a virtual rescission of the contract. *Ib.*

5. Corporations. Solvent corporations are subject to the ordinary forms of execution. Act June 16, 1836, § 72. *Oakland R. R. Co. v. Keenan*, 56 Penn. St., 198. 1867.

6.—All the provisions of the act for delivering possession to the purchaser at sheriff's sale apply the same in corporation cases as in others. *Ib.*

7.—The finding of the inquisition, that legal demand had been made for possession by the purchaser, is conclusive of the question of notice. *Ib.*

8.—If a railroad company be interrupted in the exercise of its franchises by the levy and sale of a private creditor, he would be restrained and denied the remedial provisions of the act of 1836. *Ib.*

9.—A corporation exists in legal contemplation for the public benefit, and can only be put out of existence, or stripped of what is essential to its existence, by public authority and not by a private suitor. *Ib.*

10. Right of way. The charter, under the railroad act of 1849, gives a railway company only an easement in the land occupied by it. *Western Pennsylvania R. R. Co. v. Johnston*, 59 Penn. St., 290. 1868.

Administrator — Cause of Action arising in Foreign State.

11. — Such interest is not the subject of lien or sale under execution. *Ib.*

12. — An interest which is the subject of a lien and execution must be an interest in the land itself. *Ib.*

13. — A judicial sale extinguishes liens not estates. *Ib.*

14. **Payment of bid.** The purchaser, at a sheriff's sale made on time, cannot tender in payment an obligation of the judgment creditor, the creditor being an insolvent corporation, and the sale being made under the commissioners of the corporation. *Felps v. Com'rs of Clinton and Port Hudson R. R. Co.*, 10 Robinson (La.), 89. 1845.

JURISDICTION.

See **BANKRUPTCY; EMINENT DOMAIN; EXECUTION; FEDERAL COURTS; HIGHWAYS; INJUNCTION; STATE RAILWAYS; STOCK AND STOCKHOLDERS.**

1. **Administrator.** No suit can be maintained or brought by an executor or administrator, in his official capacity, in the courts of any other county, except that from which he derives his authority. *Southwestern R. R. Co. v. Paulk*, 24 Ga., 356. 1858.

2. **Agreement to confer jurisdiction.** All civil suits shall be tried in the county of the defendant's residence as provided by the constitution. *Held*, accordingly, that where a defendant agreed to submit to the jurisdiction of the court of another county, and judgment was rendered against him therein, such judgment was void as against other judgments subsequently regularly obtained. *Georgia R. R. Co. v. Harris*, 5 Ga., 527. 1848.

3. — Consent cannot confer a jurisdiction to render judgment, when not authorized by law. *Bell v. Tombigbee R. R. Co.*, 4 Smedes and Marshall (Mis.), 549. 1845.

4. **Amendment.** A party cannot be permitted to amend his pleadings by adding a nominal sum to increase his demand above \$300, so as to give jurisdiction to the supreme court. Such a course would be an evasion of the constitution. *Red River R. R. Co. v. Williams*, 16 La. (O. S.), 182. 1840.

5. **Appeal.** A plea to the jurisdiction comes too late upon appeal. *Muscogee R. R. Co. v. Neal*, 26 Ga., 120. 1858.

6. — The objections that there is no jurisdiction, and no cause of action, may be raised upon appeal. *Terre Haute and Richmond R. R. Co. v. Smith*, 19 Ind., 42. 1862.

7. **Appearance.** The defendant may appear to object to the jurisdiction of the court, without waiving his right, but if he seek to call into action any power of the court except jurisdiction, his appearance is general. *Porter v. Chicago and Northwestern R. R. Co.*, 1 Neb., 14. 1870.

8. — Where the court has jurisdiction of the subject matter of an action, consent will confer jurisdiction of the person, and in case of a foreign corporation, such consent may be expressed by appearing by attorney and answering generally in the action. *McCormick v. Pennsylvania Central R. R. Co.*, 49 N. Y., 303. 1872.

9. **Boundary of a state.** Two states made an agreement as to a boundary line, and congress gave its assent as to the agreement. After the agreement, one of the states sued a corporation for taking possession of land and water which the state suing alleged were in its territory. The corporation asserted, in defense, that under the agreement, the land and water were within the jurisdiction of the other state, and the state court, in which the suit was brought, sustained the defense. *Held*, that this was an adjudication of the meaning of an agreement, and not the construction of the statute, and that a writ of error would not lie to the supreme court of the United States. *People v. Central R. R. Co.*, 12 Wallace, 455. 1870.

10. **Brooklyn city courts.** The city court of Brooklyn has no jurisdiction of an action unless the cause of action originated within the territorial limits of the city, and the defendant is a corporation not located nor having a place of business therein. *Landers v. Staten Island R. R. Co.*, 14 Abbott's Pr. N. S. (N. Y.), 346. 1873.

11. — The city court of Brooklyn had no jurisdiction of an action against a corporation for negligence as a common carrier, where the cause of action arose, and the business of the corporation was transacted, and its offices located, outside of the limits of said city. *Same v. Same*, 53 N. Y., 450. 1873.

12. **Cause of action arising in foreign state.** An action may be brought by petition and process in the usual way by a citizen of

Chief Place of Business—Depot.

Georgia against the Montgomery and West Point R. R. Co., even though the cause of action originated in Alabama. *Berry v. Montgomery and West Point R. R. Co.*, 39 Ga., 554. 1863.

13. — The plaintiff was injured by carelessness of defendant while riding in the cars of the defendant, situate in New York. *Held*, the action was properly brought in New Jersey. *Akerson v. Erie R. R. Co.*, 2 Vroom (N. J.), 303. 1865.

14. — Such action is transitory, and the venue may be laid in the county in which the defendant was served with process. *Ib.*

15. Chief place of business. The Aurora Railway runs through the counties of DuPage, Kane and La Salle, but it has its chief office for business in Cook county; this gives the courts of Cook county jurisdiction over it. *Bristol v. Chicago and Aurora R. R. Co.*, 15 Ill., 436. 1854.

16. Common pleas. The right of way of a railroad company is such an interest in real estate as may not be put in issue in the pleadings of a cause in the Court of Common Pleas. *Cincinnati, Union and Fort Wayne R. R. Co. v. Sipe*, 11 Ind., 67. 1858.

17. Conflict of. The state and national courts are independent of each other, and neither can arrest or impede the action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees. *Riggs v. Johnson County* (6 Wallace, 165), affirmed. *Amy v. The Supervisors*, 11 Wallace, 136. 1870.

18. Corporation existing in two states. Corporations owing their corporate existence, in part, to the state of Maryland, and exercising their franchises therein, may be restrained there from expending their funds for any other than corporate purposes. *State v. Northern Central R. R. Co.*, 18 Md., 193. 1861.

19. — A plea, by such corporation, to the jurisdiction of a Maryland court, on the ground that the corporate property lies partly in another state, or that its corporate existence is derived, in part, from a charter of another state, is not tenable. *Ib.*

20. — The Vt. and Mass. Railway lying partly in Vermont and partly in Massachusetts, the courts of Vermont have jurisdiction of the corporation as well as the courts of Massachusetts. *Richardson v. Vermont and Massachusetts R. R. Co.*, 44 Vt. 613. 1872.

21. Costs. Where the complaint shows *prima facie* the jurisdiction of the court, but upon the trial the plaintiff admits facts showing a want of jurisdiction, and the complaint is dismissed on that ground, the defendant is entitled to a judgment for costs. *Harriott v. New Jersey R. R. Co.*, 1 Daly, (N. Y.), 377, 1860; reversing *Same v. Same*, 2 Hilton, (N. Y.), 262. 1858.

22. County court. A corporation may be properly sued in the county court, in any county in the state, where the plaintiff resides. *Morehead v. Atlantic and North Carolina R. R. Co.*, 7 Jones' Law, (N. C.), 500. 1860.

23. Courts of inferior jurisdiction. The proceedings of courts of inferior jurisdiction will be deemed of no validity unless their jurisdiction is affirmatively shown. *Ohio and Mississippi R. R. Co. v. Shultz*, 31 Ind., 150. 1869.

24. Crossing of railways. Although a court of chancery, having jurisdiction *in personam*, may exercise its jurisdiction in a case of contract, fraud, or trust, concerning land out of its jurisdiction, it cannot make a decree to restrain, or give compensation for a nuisance, or tort to real property lying in another jurisdiction; and of this character is a bill, by one railway company, to restrain another from doing acts continually injurious to the estate and franchise of the complainants, by crossing their railroad and intruding within their exclusive limits. *Northern Indiana R. R. Co. v. Michigan Central R. R. Co.*, 15 Howard, 233. 1853.

25. Dalton and Gadsden R. R. Co. The Dalton and Gadsden R. R. Co., cannot bring a suit against a stockholder in a county where its principal office is not situated. *Ross v. Harvey*, 32 Ga., 388. 1861.

26. Demurrer. Demurring to a bill in chancery for want of equity in it, is submitting to the jurisdiction of the court. The question of jurisdiction should be presented by plea. *Bank of Bellows Falls v. Rutland and Burlington R. R. Co.*, 28 Vt., 470. 1856.

27. Depot. The Marietta and Cincinnati R. R. Co., having perfected an arrangement with other lines to run its trains into Cincinnati, and having a depot in that city is liable to process there. *Athens Branch of State Bank v. Marietta and Cincinnati R. R. Co.*, 2 Disney, (Ohio), 425. 1858.

Equity — Federal Courts.

28. **Equity.** Though usually where a case is not cognizable in a court of equity the objection must be made in the first instance, yet if a plain defect of jurisdiction appears at the hearing on appeal, such court will not make a decree. *Thompson v. Railroad Companies*, 6 Wallace, 134. 1867.

29. — The abolition of the distinction between actions at law and in equity will not affect the two forms of proceedings in the federal courts. *Ib.*

30. **Exclusive jurisdiction.** After the passage of the act creating the eighth district, the other district courts were divested of jurisdiction over such cases in which exclusive jurisdiction was given to the eighth district court. The signing of a judgment in one of said causes by the judge of the sixth district, after the passage of the act creating the eighth district court, was void for want of jurisdiction. *Hoyle v. New Orleans City R. R. Co.*, 23 La. An., 502, 535. 1871.

31. **Federal courts.** Where three aliens and one citizen of the state of New York brought, in one of the courts of that state, a suit against a Connecticut corporation, upon a claim in which they had a united interest, *held*, that the defendant was not entitled under § 12 of the Federal Judiciary Act of 1789, to have the cause removed to the United States circuit court. *Denniston v. New York and New Haven R. R. Co.*, 2 Abbott's Pr. (N. Y.), 278, 1855; *ib.*, 415, 1856: *Same v. Same*, 1 Hilton (N. Y.), 62, 1856.

32. — A suit by a corporation created by the concurrent legislation of two states, is a suit in which citizens of each state are joined as plaintiffs. If the defendant is a citizen of either of those states, the suit cannot be sustained in the United States courts. *Alleghany County v. Cleveland and Pittsburgh R. R. Co.*, 51 Penn. St., 228. 1865.

33. — Where a case is brought up to this court by a writ of error issued to the supreme court of a state, under the twenty-fifth section of the judiciary act, if it appears that the judgment of the state court only involved the question of the construction of state statutes which both parties admitted to be valid, the writ of error will be dismissed on motion. *Michigan Central R. R. Co. v. Michigan Southern R. R. Co.*, 19 Howard, 378. 1856.

34. — A railroad corporation, chartered by

the state of South Carolina, to build and manage a railroad therein, may be sued in the circuit court of the United States for the district of South Carolina, although some of the shareholders are not citizens of said state, and although the state owns some of the shares. *Louisville, Cincinnati and Charleston R. R. Co. v. Letson*, 2 Howard, 497. 1844.

35. — An averment that the plaintiff is an alien, and the defendants are the "Pennsylvania Railroad Company," without saying whether a corporation or not, will not support jurisdiction. *Piquignot v. Pennsylvania R. R. Co.*, 16 Howard, 104. 1853.

36. — The jurisdiction of the circuit courts of the United States, where a corporation is a party, is held to attach, where it is averred that a citizen of one state sues a corporation created by the laws of another state. *Marshall v. Baltimore and Ohio R. R. Co.*, 16 Howard, 314. 1853.

37. — Where one of the plaintiffs resided in New Hampshire, and the other in Vermont, and the defendant in New York, *held*, that the circuit court of the United States for the district of Vermont had no jurisdiction of the cause; and where the suit was originally brought in the state court, it was *held*, that it could not be removed to the federal court. *Hubbard v. Northern R. R. Co.*, 25 Vt., 715. 1853. Cir. Ct. U. S.

38. — Under the act of congress of April 29, 1802, § 6, providing, "that whenever any question shall occur before a circuit court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall be certified to the supreme court, and shall be by the said court finally decided" — the court will not even by consent of parties take jurisdiction, unless the certificate of division present in a precise form a point of law upon a part of the case settled and stated. *Daniels v. Rock Island R. R. Co.*, 3 Wallace, 250, 1865; *Havemeyer v. Iowa County*, *ib.*, 294, 1865.

39. — An act of congress (July 15, 1862) repealed all circuit court powers given to certain district courts. A subsequent statute (March 3, 1863) enacted "that in all cases wherein the district court had rendered final judgments or decrees prior to the passage of the act, said district court shall have power to issue writs of execution or other final pro-

Foreign Corporations.

cess, or to use such other powers and proceedings as may be in accordance with law, to enforce the judgments and decrees aforesaid." *Held*, that the district court only had the power necessary to insure the execution of any final process that it might issue. That even if the statute in question conferred larger powers, and gave the court more general jurisdiction over its former cases, such court could not, pending an appeal by a party in whose favor it had decreed, exercise them in favor of such party. *Bronson v. La Crosse R. R. Co.*, 1 Wallace, 405. 1863.

40. — In a case taken to the supreme court of the United States from a state court, under the twenty-fifth section of the judiciary act, the record must show that some one of the matters mentioned in that section was necessarily decided by the court. *Mississippi and Missouri R. R. Co. v. Rock*, 4 Wallace, 177. 1866.

41. — If it appear from the record that the state court might have decided the case on some other ground, this court has no jurisdiction. *Ib.*

42. — The circuit court will give relief under the laws of the state, the same as a state court. *Paine et al. v. Wright and the Indianapolis and Bellefontaine R. R. Co.*, 6 McLean, 395. 1855.

43. — The circuit court takes jurisdiction where a suit is brought by a corporation, from the place where it is located, and where its corporate functions are discharged. No further allegation of citizenship is required. *New York and Erie R. R. Co. v. Shepard*, 5 ib., 455. 1853.

44. — This court cannot entertain jurisdiction of a case from a state court because the judgment of that court impairs or fails to give effect to a contract. The judgment must give effect to some state law impairing the obligation of a contract to entitle this court to jurisdiction. *Northern R. R. Co. v. The People*, 12 Wallace, 384. 1870.

45. — The legal presumption is that the members of a corporation are citizens of the state that created it; and no evidence or averment to the contrary is admissible for the purpose of withdrawing the suit from a court of the United States. *Allegheny County v. Cleveland and Pittsburgh R. R. Co.*, 51 Penn. St., 228. 1865.

46. — Under the act of congress creating the Union Pacific railroad company, the federal courts have jurisdiction in actions by and against that corporation whenever these courts would have jurisdiction of the same class of actions between other parties. *Smith v. Union Pacific R. R. Co.*, 2 Dillon (U. S. C. C.), 278. 1872.

47. — In a suit, brought in the circuit court for the purpose of setting aside a judgment therein, a cross bill was filed to have it enforced. *Held*, that the citizenship of the parties to this suit was immaterial, as it was but ancillary to the original suit in which the court had jurisdiction. *Railroad Company v. James*, 6 Wallace, 750. 1867.

48. — This court will not entertain jurisdiction if it appears that, besides the Federal question decided by the state court, there is another and distinct ground on which the judgment or decree can be sustained, and which is sufficient to support it. 6 Wallace, 142; 13 ib., 257; 14 ib., 15. *Kennebec R. R. Co. v. Portland R. R. Co.*, 14 Wallace, 23. 1871.

49. **Foreign corporations.** Foreign corporations have the right to bring suits in the state of New York. *Bank of Commerce v. Rutland and Washington R. R. Co.*, 10 Howard's Pr. (N. Y.), 1. 1854.

50. — A foreign railroad corporation having its whole road and traffic without the limits of the state of New York, and having no office there, is not a corporation doing business in that state, although tickets for passage over its road are sold by its agent there. *Doty v. Michigan Central R. R. Co.*, 8 Abbott's Pr. (N. Y.), 427. 1859.

51. — To enable a non-resident plaintiff to maintain an action in the New York Common Pleas against a foreign corporation, it must appear either that the action is upon a contract made, executed, or delivered in that state; or, that the cause of action arose therein; or, that the subject of the action is situated therein. *Harriott v. New Jersey R. R. Co.*, 8 Abbott's Pr. (N. Y.), 284. 1858.

52. — The defendant does not, by appearing and answering, waive the objection that none of such grounds of jurisdiction exist. *Ib.*

53. — Where a railroad terminates opposite the city of St. Louis, and has its chief office for the transaction of business in St. Louis, then the law regards it as a domestic corpora-

Mortgage: Receiver — Place of bringing Suit.

tion, and amenable to the jurisdiction of the courts of Missouri by ordinary process. It is otherwise where the chief office is in Chicago, and there is only an office for the sale of tickets and for receiving and handling freight in St. Louis. *Robb v. Chicago and Alton R. R. Co.*, 47 Mo., 540. 1871.

54. — Where the court has jurisdiction of the subject matter and of the parties to the suit, it will render its judgment without waiting to inquire whether either party have sufficient property in the jurisdiction to respond to the judgment. The question as to how his judgment shall be satisfied when he gets it, is for the party who obtains it, and not for the court. *March v. Eastern R. R. Co.*, 40 N. H., 548. 1860.

55. When a contract is made and is to be performed within a foreign jurisdiction, yet a court of equity will enforce it here, if it has or can acquire jurisdiction of the person. *Ib.*

56. — In suit against a foreign corporation, where it is not alleged or anywhere shown that defendant had its chief office or place of business in the state of Missouri, the petition will be dismissed for want of jurisdiction. *Mid-dough v. St. Joseph and Denver R. R. Co.*, 51 Mo., 520. 1873.

57. — A foreign corporation can be sued in Massachusetts only by means of an attachment of its property, unless jurisdiction otherwise is expressly given by statute. *Andrews v. Michigan Central R. R. Co.*, 99 Mass., 534. 1868.

58. — In the absence of a voluntary appearance, a Court of Wisconsin can only acquire jurisdiction of a foreign corporation in the manner pointed out by the statute. *Congar v. Galena and Chicago Union R. R. Co.*, 17 Wis., 477. 1863.

59. — But a general appearance by the corporation gives the court jurisdiction to render a personal judgment against it. *Ib.*

60. — The principle that the objection to the jurisdiction of the court may be taken at any time, applies only to the subject matter of the action. *Ib.*

61. — The courts of Iowa cannot, in an ordinary personal action, acquire jurisdiction of the person of a nonresident defendant, so as to proceed to judgment, when such nonresident is, without more, served with notice out of the state. *Bates v. Chicago and Northwestern R. R. Co.*, 19 Iowa, 260. 1865.

62. — *Semble*, that a foreign corporation may be sued in a state, other than the one in which it exists, where personal service is had on its officers in such state where they had gone on official business. *North Missouri R. R. Co. v. Akers*, 4 Kansas, 453. 1868.

63. — It is too late to raise the question of jurisdiction after appearing and submitting the case to the court. *Ib.*

64. **Injunction.** The circuit court of Baltimore has no jurisdiction to enjoin proceedings for the condemnation of land for railway purposes, the superior court having special and competent authority. *Western Maryland R. R. Co. v. Patterson*, 37 Md., 125. 1872.

65. **Mortgage: receiver.** A state court has no jurisdiction of an action to foreclose a mortgage, or to avoid or set aside an alleged foreclosure and sale by the mortgagee under a power, where the premises were, at the commencement of the action, in the hands of a receiver appointed by a federal court having jurisdiction to make such appointment; and this, whether the lien which such receiver was appointed to enforce was prior or subsequent to that sought to be enforced in the state court. *Milwaukee and St. Paul R. R. Co. v. Milwaukee and Minnesota R. R. Co.*, 20 Wis., 165. 1865.

66. **New York City courts.** A suit may be maintained in a district court of the city of New York, against a corporation which has any place for the transaction of business in that city. It is not necessary that its general business should be transacted within the city; nor is it necessary that it should be sued in the district in which its general business is transacted. It may be sued in any district in which it has a place of business. *Jay v. Long Island R. R. Co.*, 2 Daly (N. Y.), 401. 1868.

67. **Place of bringing suit.** Under a proper construction of the statute (W. S., 847, § 3) for the purpose of bringing action, the residence of a railroad corporation is in any county through which its line of road passes, and in which it has an agent upon whom process can be served. *Slavens v. South Pacific R. R. Co.*, 51 Mo., 308. 1873.

68. **Plea.** A plea to the jurisdiction should be pleaded in person, not by attorney. *Mineral Point R. R. Co. v. Keep*, 22 Ill., 9. 1859.

69. — A plea to the jurisdiction of the circuit court, after a defense to the merits of the action, unless for want of jurisdiction over

Miscellaneous

the subject matter of the action, comes too late. *Baker v. Louisville and Nashville R. R. Co.*, 4 Bush (Ky.), 619. 1868.

70. — In an action on contract in the Warren circuit court against the Louisville and Nashville R. R. Co., objection to the jurisdiction, because it did not have its principal office or place of business in that county, and that its chief officer did not reside therein, is waived, by answer to the merits of the action. *Ib.*

71. — The court cannot judicially know that the principal office or place of business of a corporation is not in the county in which an action is brought against such corporation. *Ib.*

72. Process: service. The service of a declaration as commencement of a suit by a nonresident, against a corporation created by a foreign government, the cause of action arising within the jurisdiction of such government, upon an officer of the corporation, then casually within this state, but not here in the performance of the duties of his office, nor authorized by the corporation to submit to such service, confers no jurisdiction. *Newell v. Great Western R. R. Co.*, 19 Michigan, 336. 1869.

73. — A judgment rendered without notice is void. *Penobscot R. R. Co. v. Weeks*, 52 Maine, 456. 1864.

74. Right of way proceedings. A party alleged to have been divested of his land, under the order or decree of a county judge authorized to take proceedings to appraise his damages from the appropriation of the land by a railroad company, may prove the falsity of all or any of the recitals in the order, of facts necessary to give the judge jurisdiction. *Adams v. Saratoga and Washington R. R. Co.*, 10 N. Y., 328, 1852; reversing *Same v. Same*, 11 Barbour (N. Y.), 414. 1851.

75. State a party. The state of Georgia cannot be made a party defendant in a suit in any court, except by consent, nor can this be done so as to affect the rights of the state by making the agent of the state, appointed by its authorities, a party; and any judgment against such agent cannot affect the rights of the state, or affect its position. *Printup v. Cherokee R. R. Co.*, 45 Ga., 365. 1872.

76. Supplemental proceeding. A bill in

equity, to have a construction of the orders, decrees and acts of a federal court, may be filed in such court although the parties might not, for want of proper citizenship, be entitled to proceed by an original bill. *Minnesota Co. v. St. Paul Co.*, 2 Wallace, 609. 1864.

77. Supreme court. The supreme court has no original jurisdiction in equity on the ground of fraud. *Crawford County v. Pittsburgh and Erie R. R. Co.*, 32 Penn. St., 141. 1858.

78. — The original jurisdiction of this court over private corporations does not authorize the joinder of individuals, as defendants, who are not necessary parties to such suit. *Ib.*

79. — The supreme court has no original jurisdiction in equity of a bill for specific performance. *Sunbury and Erie R. R. Co. v. Cooper*, 33 Penn. St., 278. 1859.

80. — The chancery powers of the supreme court, as to supervising and controlling the proceedings of corporations, are no greater while sitting at Harrisburg than those of a court of common pleas, and hence it cannot control the proceedings of the Penn. R. R. Co., beyond the limits of Dauphin county. *Hays v. Pennsylvania R. R. Co.*, 17 Penn. St., 9. 1851.

81. Trespass. A railroad company may be sued in any county in which its agents may have committed a trespass. *Bartee v. Houston and Texas Central R. R. Co.*, 36 Tex., 648. 1871.

JURY.

See EMINENT DOMAIN.

1. Argument to: time of. It is within the discretion of the court to limit the time for the argument of counsel to the jury, and such discretion will not be reviewed by the supreme court, unless it has been unsoundly exercised to the prejudice of the rights of the party. *Trice v. Hannibal and St. Joseph R. R. Co.*, 35 Mo., 416. 1865.

2. Baggage. The jurors, when the property is described, may have a proper measure of damages in their own knowledge of values. *Illinois Central R. R. Co. v. Copeland*, 24 Ill., 332. 1860.

 Bailiff unsworn — Instructions.

3. Bailiff unsworn. The objection, that the officer into whose charge the jury is given, is not specially sworn, must be taken at the time, or it is waived. *Chapman v. Chicago and Northwestern R. R. Co.*, 26 Wis., 295. 1870.

4. — The objection that the jury, after being put into the sheriff's charge, was left by him for three hours in charge of his deputy, is not sufficient, unless it is shown that appellant was in some manner prejudiced thereby. *Id.*

5. Challenge. A party is not bound in a civil action to exercise his right of peremptory challenge to jurors, until there are in the jury box, twelve persons whom the court has adjudged to be competent jurors. *Taylor v. Western Pacific R. R. Co.*, 45 Cal., 323. 1873.

6. — A juryman who, on his *voir dire*, was asked if the evidence was evenly balanced, which way he would be inclined to find, answered that in such case he would "lean against the defendant;" *held*, such juryman was incompetent, and it was error to refuse his challenge by the defendant. *Chicago and Alton R. R. Co. v. Adler*, 56 Ill., 344. 1870.

7. — Where, in the effort to get a perfectly impartial jury, a challenge to a juror for a cause which did not render him incompetent, is sustained, and the result is achieved, the cause will not be reversed. *Heaston v. Cincinnati and Ft. Wayne R. R. Co.*, 16 Ind., 275. 1861.

8. Change of jurors during trial. In a case of necessity, as when a coronor is a member of a jury, and is unexpectedly called to hold an inquest, the presiding judge may authorize him to withdraw, and direct another juror, who had heard the evidence, to take his place, and such an act is not ground for a new trial, especially where no objection was made at the time. *Boland v. Greenville and Columbia R. R. Co.*, 12 Richardson's Law (So. Car.), 368. 1859.

9. Constitutional law. In trials at common law in courts of record, the parties are entitled to a jury of twelve men as a matter of constitutional right, and any consent to waive this right must be entered of record. If such consent do not appear of record, the party may avail himself of the objection by motion in arrest of judgment. *Brown v. Hannibal and St. Joseph R. R. Co.*, 37 Mo., 298. 1866.

10. — The term "jury," as used in the constitution, means twelve good and lawful men.

May v. Milwaukee and Mississippi R. R. Co., 3 Wis., 219. 1854.

11. — A statute providing for a trial by a jury of six men is unconstitutional. *Id.*

12. — The constitutional provision "that the right to jury trial shall remain inviolate," secures the right to a jury trial in all cases where a jury was necessary according to the principles of the common law. *Isom v. Mississippi Central R. R. Co.*, 36 Miss., 300. 1858.

13. — The clause of the constitution of the United States touching jury trials does not operate upon the courts of the several states. *Lake Erie, Wabash and St. Louis R. R. Co. v. Heath*, 9 Ind., 558. 1857.

14. — The clause of the constitution of Indiana which provides that in civil cases, the right of trial by jury shall remain inviolate, embraces, it seems, such cases as were treated as civil cases in this state when the constitution was adopted. *Lake Erie, Wabash and St. Louis R. R. Co. v. Heath*, 9 Ind., 558. 1857.

15. — Appeals to the Circuit Court from proceedings to assess damages to real estate taken for public works, have been uniformly tried by jury in this state, and are civil cases within the above constitutional provision. *Id.*

16. — The right of trial by jury in such cases may be waived as in other civil cases. *Id.*

17. — On appeal to the Circuit Court from report of appraisers, in such proceedings, a complaint is unnecessary. The party has a right to appear in the Circuit Court and demand a jury to retry the question of damages. *Id.*

18. Documentary evidence. If a jury take a paper which is given in evidence in the cause, with the concurrence of the judge, it is not error; that proceeding resting entirely in the exercise of his sound discretion. *Schappner v. Second Avenue R. R. Co.*, 55 Barbour (N. Y.), 497. 1870.

19. Equity. Where a proceeding has been commenced in equity, which should have been at law, the proper remedy is to move to transfer it to the proper docket. If this is not done, the defendant will be held to have waived his right to a jury trial. *Richmond v. Dubuque and Sioux City R. R. Co.*, 33 Ia., 422. 1871.

20. Instructions. It is not error for the court to instruct the jury, when they have failed to agree, that they should make further efforts to harmonize, and to indicate that they

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will be kept together until they do agree. *Pacific R. R. Co. v. Nash*, 7 Kans., 280. 1871.

21. Judge's notes of evidence. Where it appeared that the jury were allowed, during an intermission of court, to occupy the court room, and that, having accidentally got possession of the judge's notes of the evidence, they read them, but that they were not in any way affected thereby to appellant's injury, *held*, that the court did not err in refusing to set aside the verdict. *Chapman v. Chicago and Northwestern R. R. Co.*, 26 Wis., 295. 1870.

22. Marine Court. The Marine Court of New York city being of limited jurisdiction, a jury trial therein can only be had in the manner provided by the statute. *Mooney v. Hudson River R. R. Co.*, 3 Daly (N. Y.), 105. 1869.

23. Motion. In a motion against a sheriff and his sureties for failing to return an execution, where there was no fact disputed but the want of notice, it was *held*, that the defendants were not entitled to a jury trial. *Coleman v. Mississippi and Alabama R. R. Co.*, 5 Howard (Miss.), 419. 1841.

24. Number of jurors. In trials in the circuit court, the parties are entitled to demand a jury of twelve men. *Henning v. Hannibal and St. Joseph R. R. Co.*, 35 Mo., 408. 1865.

25. Qualifications. The fact that a juror sitting upon a trial is ignorant of the English language, is sufficient ground for granting a new trial. *Lafayette Plank Road Co. v. New Albany and Salem R. R. Co.*, 13 Ind., 90. 1859.

26. — The failure to examine the juror upon this point before accepting him cannot be imputed as negligence. It may be presumed that the officer has called a jury competent in this respect. *Ib.*

27. — The fact of such incompetence may be proven by the juror's statement under oath, without a violation of the rule that jurors are incompetent to impeach their verdicts. *Ib.*

28. — interest of juryman. That a juryman had an interest in the cause is no ground for a new trial. *Boland v. Greenville and Columbia R. R. Co.*, 12 Richardson's Law (So. Car.), 568. 1859.

29. — The smallest pecuniary interest in the result of a case disqualifies a juror. *Page v. Contoocook R. R. Co.*, 1 Foster (N. H.), 438. 1850.

30. Rejection of juror. If, in the rejection of a juror, a sufficient cause is assigned, the

decision of the court upon the facts on which the exclusion is based, cannot be reversed in error. *March v. Portsmouth and Concord R. R. Co.*, 19 N. H., 372. 1849.

31. Separation of jury. The separation of the jury for a short time for a necessary purpose is no cause for setting aside their verdict, where there is no prejudice shown to the party complaining. *Boggs v. Chicago and Northwestern R. R. Co.*, 29 Iowa, 577. 1870.

32. Struck jury. A struck jury, empaneled in conformity with the act of March 12. 1853, is not subject to peremptory challenge. *Cleveland, Painesville and Ashtabula R. R. Co. v. Stanley*, 7 Ohio St., 155. 1857.

33. — A jury composed of seven of the sixteen persons selected under the provisions of said act, and of five talesmen, is not a struck jury within the meaning of said act, and is subject to peremptory challenge as to any of the panel. *Ib.*

34. Vicinage. The "vicinage" from which a jury is to be summoned means the county and not the neighborhood or town. *Convers v. Grand Rapids and Indiana R. R. Co.*, 18 Mich., 459. 1869.

35. Waiver. If a party voluntarily abstain from claiming the right of trial by jury in a given case, it may be judicially held that it is waived. *Madison and Indianapolis R. R. Co. v. Whiteneck*, 8 Ind., 217. 1856.

36. — Hence the statute (2 R. S., 115), enacting that such act shall be regarded as a waiver, is valid. *Ib.*

JUSTICE OF THE PEACE.

See CONTINUANCE; JUDGMENT.

1. Appeal. In a cause which has been appealed from a justice of the peace, the appellee, who has failed to enter his appearance, cannot be forced to trial at the first term of the court. *Chrimer v. St. Louis, Kansas City and Northern R. R. Co.*, 54 Mo., 152. 1873.

2. — On an appeal from a justice, the circuit court can allow the constable's return to be amended; for the circuit court can do whatever the justice can. *Transier v. St. Louis, Kansas City and Northern R. R. Co.*, 54 Mo., 189, 1873; *Hoelscher v. Same*, *ib.*, 212.

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3.—Where a transcript from a justice's court stated that plaintiff filed an account in the case, and judgment on the appeal trial in the circuit court found that plaintiff had sustained damages as alleged in his complaint, and the objection that plaintiff failed to file his account was raised for the first time in this court, the objection comes too late. *Fisher v. Pacific R. R. Co.*, 46 Mo., 304. 1870.

4. Jurisdiction. A justice of the peace has no common law jurisdiction in civil cases; his powers in that regard are statutory. *Toledo, Wabash and Western R. R. Co. v. McNulty*, 34 Ind., 531. 1870.

5.—The court of a justice of the peace is one of special limited jurisdiction, which acts by virtue of statutory power, and whose acts, to be valid, must be authorized by statute. *Ohio and Mississippi R. R. Co. v. Hanna*, 16 Ind., 391. 1861.

6.—Justices of the peace have jurisdiction of actions brought against railroad corporations under § 12 of the general railroad act (R. C., 1855, p. 414). *Mooney v. Hannibal and St. Joseph R. R. Co.*, 28 Mo., 570. 1859.

7.—Under the existing laws of this state, justices of the peace now have jurisdiction over contracts of affreightment made by railroad companies to the extent of ninety dollars. *Williams v. North Missouri R. R. Co.*, 50 Mo., 433. 1872.

8.—A justice of the peace in Indiana has no jurisdiction of a cause where the sum demanded is over one hundred dollars. *Evansville and Crawfordsville R. R. Co. v. Kargus*, 10 Ind., 182. 1858.

9. Summons. The mode of service of summons upon corporations, in actions brought against them before a justice of the peace, as prescribed in Act of March 14, 1853, is not applicable to suits against railway companies. *North v. Cleveland and Mahoning R. R. Co.*, 10 Ohio St., 548. 1860.

10.—The statute does not authorize a justice of the peace to issue a summons, in a civil case, running more than thirty days before the return, and hence such a writ is void, and no notice to the defendant. *Ohio and Mississippi R. R. Co. v. Hanna*, 16 Ind., 391. 1861.

KILLING EMPLOYÉS.

See INJURIES TO EMPLOYÉS.

KILLING PASSENGERS.

See INJURIES TO PASSENGERS.

KILLING STOCK.

See INJURIES TO STOCK.

LADIES' CAR.

See INJURIES TO PASSENGERS.

1. Colored people. The mere fact that, under the rules and regulations of the company, a certain car in its passenger train has been designated for the exclusive use of ladies and gentlemen accompanied by ladies, will not justify the exclusion of a colored woman from the privileges of such car, upon no other ground than that of her color. *Chicago and Northwestern R. R. Co. v. Williams*, 55 Ill., 185. 1870.

2.—A rule setting apart a car for the exclusive use of ladies, and gentlemen accompanied by ladies, is a reasonable rule, and it may be enforced. *Ib.*

LAKES.

1. Champlain. The proprietors of land lying upon Lake Champlain, unless it is otherwise expressed in the grants, own to low water mark, subject to a servitude to the public, for the purposes of navigation, up to high water mark. *Champlain and St. Lawrence R. R. Co. v. Valentine*, 19 Barbour (N. Y.), 484. 1853.

2.—The proprietor of land on the bank of a river, where the tide flows, owns to high water mark; but above tide water, he takes *usque ad filum aquæ*; except, perhaps, when the stream is a navigable boundary. This rule, however, is not applicable to our North American lakes. *Ib.*

3.—Owners of land bordering on the waters of Lake Champlain have no title to the

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soil beyond low water mark, nor right appurtenant, but only a statutory right, to build wharves and storehouses into the lake, in front of their land. Therefore, if land be made by a stranger by filling in earth in front of their land, from low water mark into the lake, and wharves and docks be built thereon, they cannot maintain ejectment therefor. *Austin v. Rutland R. R. Co.*, 45 Vt., 215. 1872.

4. **Decretions.** The court will not decide what are the rights of lake shore proprietors whose fronts are swept away by currents, nor to what extent they still own the lands covered by water, except in case of one who proves that he owned the land before the decree took place. *Bates v. Illinois Central R. R. Co.*, 1 Black, 204. 1861.

LAND GRANTS.

See MANDAMUS; RECEIVER.

1. **Central Pacific R. R. Co.** The grant of right of way to the Central Pacific R. R. Co. by act of congress of July 1, 1862, was a grant of a present right, and all acquisitions of lands made subsequent to that act were subject to the exercise of this right. *Central Pacific R. R. Co. v. Dyer*, 1 Sawyer (9 U. S. Cir. Ct.), 641. 1871.

2. — The provision in the grant to the Central Pacific R. R. Co., requiring that a plat of the route should be filed in the Department of the Interior within two years, does not affect the right of way; it only furnishes the means by which the secretary can withdraw from sale the lands embraced in the grant. *Ib.*

3. **Certificate.** The descriptive list of lands, certified by the Commissioner of the General Land office, is presumptive evidence that such lands have been granted by act of congress. *Hannibal and St. Joseph R. R. Co. v. Moore*, 37 Mo., 338. 1866.

4. **Construction of grants.** No privileges pass by a grant to a corporation except what are given in clear and explicit terms. *Rice v. Minnesota and Northwestern R. R. Co.*, 1 Black, 358. 1861.

5. — Land grants are strictly construed against the grantees. *Dubuque and Pacific R. R. Co. v. Litchfield*, 23 Howard, 66. 1859.

6. — Where the act of congress making the grant declares that no title shall vest nor patent issue until twenty miles of the road are finished, these words cannot be disregarded, unless clearly repugnant to the rest of the act. *Rice v. Minnesota and Northwestern R. R. Co.*, 1 Black, 358. 1861.

7. — The word *grant* is not a technical word like *enfeoff*, and it may be used in a restricted sense. *Ib.*

8. — Legislative grants must be construed as a whole; but if the words are ambiguous, the true rule is to construe them most strongly against the grantee. *Ib.*

9. **Contract.** An agreement to procure a grant of lands to A. is executed by procuring such grant to the person appointed by A. to receive it. *Smith v. Chicago and Northwestern R. R. Co.*, 18 Wis., 17. 1864.

10. **Des Moines River grant.** The land grant to the territory of Iowa, for the improvement of the Des Moines River, only conveyed the lands between the mouth of the stream and Raccoon fork. *Dubuque and Pacific R. R. Co. v. Litchfield*, 23 Howard, 66. 1859.

11. — The Dubuque and Pacific R. R. Co. were held to be entitled to the lands included in their grant above Raccoon fork. *Ib.*

12. — The proviso in the act of congress of May 15, 1856 (11 Stat. at Large, 9), making a grant of lands to the state of Iowa, in alternate sections, to aid in the construction of certain railroads in said state, by which proviso it was provided "that any and all lands heretofore reserved to the United States, by an act of congress or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or any other object whatsoever, be, and the same are hereby reserved to the United States from the operation of this act," — operated in connection with certain subsequent legislation, to reserve for the purpose of aid in the improvement in the navigation of the Des Moines River, an equal moiety, in alternate sections, of the public lands on and within five miles of the said river between the "Raccoon Fork" and the northern boundary of the state. *Wolcott v. Des Moines Company*, 5 Wallace, 681. 1866.

13. — The case of *Wolcott v. Des Moines Co.*, 5 Wallace, 681, reaffirmed. *Cedar Rapids R. R. Co. v. Des Moines Nav. Co.*, 17 Wallace

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(U. S.), 144, 1872; *Homestead Co. v. Des Moines Valley R. R. Co.*, ib., 153, 1872.

14. **Illinois Central R. R. Co.** Land which is a part of the alternate sections granted to the state for the construction of the Illinois Central railroad, is not subject to preëmption. *Walkerv. Hedrick*, 18 Ill., 570. 1857.

15. **Location of.** Under act of congress of June 10, 1852, giving lands to the state of Missouri for railroad purposes, and the act of that state of Sept. 20, 1852, accepting and making provision in regard to them, the location of the lands was not fixed until the company caused a map of the road to be recorded in the office of the recorder of deeds in the county where the land was situated. *Baker v. Gee*, 1 Wallace, 333. 1863.

16. **Mandamus.** The governor of Iowa will not be compelled by *mandamus* to issue any certificate to the Cedar Rapids and Missouri R. R. Co., which will enable that corporation to acquire any title to any of the lands embraced in the grant of lands to the state, for railroad purposes, by act of congress of May 5, 1856, prior to a compliance by said company with the conditions expressed in §§ 6 and 7 of ch. 37, Laws of 1860. *State ex rel. v. Kirkwood*, 14 Ia., 162. 1862.

17. **Minnesota.** It was competent for the legislature of Minnesota to transfer its interest in the lands granted under act of congress of June 29, 1854, and the defendant acquired all the rights of the territory under the act of the territorial legislature of March 4, 1854. These rights cannot be taken from defendant by subsequent act of congress. *United States v. Minnesota and Northwestern R. R. Co.*, 1 Minn., 127, 1854; see *Minnesota and Northwestern R. R. Co. v. Rice*, ib., 358. 1857.

18. **Missouri.** No title passes to the railway companies under the act of congress of June 10, 1852, and statute of Missouri of Dec. 25, 1852, until the plats of the location of the railroads are filed in the office of the secretary of state, and in the offices of the recorders of deeds of the counties in which the lands are situated. *Pacific R. R. Co. v. McCombs*, 39 Mo., 329, 1866; *Hannibal and St. Joseph R. R. Co. v. Smith*, 41 ib., 310, 1867.

19. — In case of suit in ejectment by the Hannibal and St. Joseph R. R. Co., under the act of congress of June 10, 1852, and the Missouri statute of September 20, 1852, (R. B.

Laws, p. 117), where no question was made as to the location of the road, nor was it questioned that the land sued for was included within the grant by congress, nor was it urged that the land had been sold by the United States, or that any right of preëmption had attached to it, nor was it disputed that plaintiff's proof made out a *prima facie* case — the mere nonrecording in a given county of the map of lands taken by the railroad company in that county, as directed by the act of September 20, would not be fatal to plaintiff's recovery. *Hannibal and St. Joseph R. R. Co. v. Moore*, 45 Mo., 443. 1870.

20. **Pre-emption.** Where congress gives lands to a state for railroad purposes and for "no other," and the state granting the great bulk of them to such purposes, allows settlements by pre-emption, where improvements and occupancy had been made on the lands prior to the date of the grant by congress, and since continued; a purchaser from the railroad company of a part which the state had thus opened to pre-emption cannot object to the act of the state in having thus appropriated the part; the railroad company, having by formal acceptance of the bulk of the land under the same act which opened a fractional part to pre-emption, itself waived the right to do so. The United States not objecting, nobody can object. *Baker v. Gee*, 1 Wallace, 333. 1863.

21. **Repeal of act.** An act of congress granting land to a territory for railroad purposes, by which a beneficial interest is acquired by the territory, is irrepealable. *Rice v. Minnesota and Northwestern R. R. Co.*, 1 Black, 358. 1861.

22. — If the legislature of the territory incorporate a company to build such railroad, congress cannot afterwards divest the company of its title to the lands included in the grant. *Id.*

23. — And where it appears that the act of incorporation was passed *before* the grant was made, and that *after* that grant, the act of incorporation was reënacted, the reënactment gives to the railway company such title as the territory could confer. But no title would pass if the grant was revoked before the reënactment of the charter. *Id.*

24. — Legislative grants are not warranties, and pass no title save what was held by the grantor at the time. *Id.*

Reservations—Texas.

25. — A grant of land to a territory, to be held for the purpose of making or aiding to make, a public improvement of general interest, and restricting the use to that one purpose, does not pass to the territory a beneficial interest in *presenti*. *Ib.*

26. — When the act making the grant provided that it should not enure to the benefit of any company *heretofore constituted and organized*, it is clear that the *future* legislation of the territory only could dispose of the lands. *Ib.*

27. **Reservations.** By a resolution approved March 22, 1864, the legislature directed the sale of certain timber and lumber upon state lands, for the benefit of a certain college. The sale was made by the land agent without strictly observing the law in relation thereto. In 1868, the state conveyed the lands to plaintiffs "subject to the reservations of the act of March 24, 1864," one of which reservations included all timber and lumber, and lands granted and *voted* by the present or any preceding legislature. In an action against the defendant to recover the stumpage of the timber in question, which was cut by him, *held*, that the timber was "voted" by the resolution of March 22, 1864, within the meaning of that term as used in the act of March 24, 1864, and was therefore excepted from the operation of the deed to the plaintiffs. That the reservation was absolute, and not dependent upon a valid sale by the land agent. *European and North Am. R. R. Co. v. Dunn*, 60 Me., 453. 1872.

28. **Swamp lands.** In selecting the swamp lands of Fremont and Mills counties, there was no irregularity or departure from the instructions of the interior department. *Fremont and Mills Counties v. Burlington and Mo. River R. R. Co.*, 22 Ia., 91. 1867.

29. — The effect of the act of congress of March 3, 1857, was to vest in the state the title to such swamp or overflowed lands as had been listed and reported at that time, whether the lands were swamp lands or not. *Ib.*

30. — The title of the swamp and overflowed lands in Mills and Fremont counties, (granted to the state, by act of congress of September 28, 1850), remaining vacant and unappropriated, that had been selected and reported to the general land office, was, by the act of congress of March 3, 1857, immediately vested in the state. *Ib.*

31. — The act of congress of May 15, 1856, granting lands in aid of railways, having reserved from its operation all lands that had been before appropriated for any other purpose, or which should have been granted when the lines of said roads should have been definitely fixed, did not disturb the title to the swamp lands in said counties, that had been confirmed to the state prior to the time when the final location of the line of the Burlington and Mo. River R. R. was definitely determined. *Ib.*

32. — The act of the commissioner of the general land office, certifying these lands to the said railroad company, being in contravention of vested rights, was void. *Ib.*

33. — Where such officer, by his act, violates vested rights, his acts can be attacked collaterally. *Ib.*

34. — The proviso in the act of May 15, 1856, granting lands to the state of Iowa, for the aid of railroads, which excludes from the grant "all lands heretofore reserved by any act of congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any purpose whatever," excludes the lands granted to that state, among others, by the act of September 28, 1850, known as "the swamp land grant." *Railroad Co. v. Fremont County*, 9 Wallace, 89. 1869.

35. — In a suit to recover such lands by a railroad company, it is competent to prove by witnesses, who know the lands sued for, that they were swamp and overflowed within the meaning of the swamp land grant. *Railroad Co. v. Smith*, *ib.*, 95. 1869.

36. **Taxation.** Where the title to land, within an Indian reserve, remains either in the Indians or in the United States, or in both, the land is not taxable. *Douglas County v. Union Pacific R. R. Co.*, 5 Kans., 615. 1870.

37. — Where a railway conditionally purchases such lands, subject to certain conditions, and no patents have been issued, and time appears to be an essential element in the contract, no title passes to the company until the contract is fulfilled, and the lands are not taxable. *Ib.*

38. **Texas.** The acts of the legislature granting lands to certain railroad companies in the state of Texas — construed. *Held*, that the constitution of 1869 did not affect grants of land,

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previously made. *Houston and Great Western R. R. Co. v. Commissioner of Land Office*, 36 Tex., 382. 1871.

39. **Union Pacific R. R.** The land grant of the Union Pacific R. R. Co. excepts lands to which homestead claims had attached at the time the line of the road was definitely fixed—but such homestead rights must have been *bona fide*. *Union Pacific R. R. Co. v. Watts*, 2 Dillon (U. S. C. C.), 310. 1872.

40. **United States laws.** The laws of the United States, and not of the state, must govern the primary disposal of government land. *Douglas County v. Union Pacific R. R. Co.*, 5 Kans., 615. 1870.

LANDLORD AND TENANT.

See EMINENT DOMAIN.

1. **Eviction.** The erection of a fence by a landlord in front of premises used and occupied by a tenant, in such manner that the latter can only gain access to the premises by going over land of a third person, will not amount, as matter of law, to an eviction, where the tenant still continues to use and occupy the premises; but such act of the landlord will affect the amount of the rents of such premises. *Boston and Worcester R. R. Co. v. Ripley*, 13 Allen (Mass.), 421. 1866.

2. **Presumption of title.** Seizing of a rent for twenty-one years affords a legal presumption of title to it. It is for the tenant to show that it was not received under a claim of right. *McElroy v. Railroad Co.*, 7 Penn. St., 536. 1848.

3. **Termination by notice.** To put an end to a tenancy from year to year, there must be three months' notice to quit, ending at the expiration of the year. *Godard v. South Carolina R. R. Co.*, 2 Richardson's Law (So. Car.), 346. 1845.

4. **Trespass.** If a railway company, in violation of a contract with the landlord, enter upon land held by a tenant, and commit a trespass upon the tenant's possession, by destroying his vegetables, etc., said company is liable, in an action on the case, to the tenant for the damages sustained by him. Otherwise, if there is no contract with the company, by which the tenant is protected in his possession of the premises. *Louisville and Nashville R. R. Co. v. Faulkner*, 2 Head (Tenn.), 65. 1858.

LAND WARRANTS.

1. **Maryland.** Rules of practice in the land office of Maryland examined. *Railroad Co. v. Hoye*, 2 Bland's Ch. (Md.), 258. 1830.

LARCENY.

See INJURIES TO PASSENGERS.

1. **Tickets.** If a servant of a railway corporation having custody of passenger tickets that had once been sold and taken up, fraudulently abstracts them and sells them for his own use, it will be larceny of such tickets. *State ex rel. Eaton v. Farmer*, 46 N. H., 200. 1865.

LATERAL RAILROADS.

See CERTIORARI.

1. **Appeal.** Under the lateral railroad act, as amended April 20, 1858, the question of the necessity of the proposed road is, upon appeal, a question exclusively for the court, the appellate jury can only try the question of damages. *Brown v. Peterson*, 40 Penn. St., 373, 1861; *Boyd v. Negley*, ib., 377.

2. — Under the lateral railway act, an appeal does not lie to the supreme court from a decree of the common pleas overruling exceptions to a report of viewers. *Hall's Appeal*, 56 Penn. St., 238. 1867.

3. — Exceptions were filed to the report of the viewers for a lateral railroad, and an appeal to the common pleas taken; the exceptions were overruled whilst the appeal was pending, there was no final judgment, and a certiorari from the supreme court was premature. *Ib.*

4. — Where the court has passed upon all the issues of law and fact on the record, all, including the exceptions, can come upon a writ of error, the jurisdiction of the supreme court extending to them. *Ib.*

5. — A decision of the common pleas on exceptions, pending an appeal, is to be regarded as interlocutory. *Ib.*

6. **Branch roads.** The power of the Penn-

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sylvania R. R. Co. to make branch or lateral roads by the terms of its charter, is as large as the powers granted for the construction of the main line of its road, and authorizes the construction of a branch line through Pittsburgh to connect with the Steubenville R. R., in South Pittsburgh. *Mayor, etc., of Pittsburgh v. Pennsylvania R. R. Co.*, 48 Penn. St., 355. 1864.

7. Constitutional law. The lateral railroad act is constitutional. *Harvey v. Lloyd*, 3 Penn. St., 331, 1846; *Schanberger v. Mullhollan*, 8 ib., 134, 1848.

8. — The lateral railroad acts are constitutional. *Hays v. Risher*, 32 Penn. St., 169. 1858.

9. Construction of statute. The act of March 29, 1840, is a supplement to the act of May 5, 1832, is in *pari materia* with it, and should be so construed, and neither act authorizes the connection of a lateral road, except with a public improvement. *Keeling v. Griffin*, 56 Penn. St., 305. 1867.

10. — The lateral railway act of May 5, 1832, is intended to give to the petitioner the right to open, construct and use a railway through the land of another. The fee remains in the owner of the land. Coal having been severed from the freehold in constructing a lateral railway, it became the property of the owner of the freehold, and trover lay against the owner of the railway for selling it. *Lyon v. Gormley*, 53 Penn. St., 261. 1866.

11. Length. The rule of strict construction will be applied to railroad charters; but where the legislature has given a company power to build lateral roads, without fixing any limits to their length, the court will not, as a general rule, fix any limit. *Newhall v. Galena and Chicago Union R. R. Co.*, 14 Ill., 273. 1853.

12. Location. The line of a lateral railway was marked and surveyed on the ground, differing somewhat from the location described in the petition, but the damages were assessed for it as located. *Held*, that this was the true and authorized line. *Boyd v. Negley*, 53 Penn. St., 387. 1866.

13. — The difference was the omission, by mistake, of one section. This was amendable at any stage of the proceedings, and the supreme court would treat it as amended. *Ib.*

14. — It is not necessary that the petition should describe the grade. *Ib.*

15. — When the petitioner adopts a grade before damages are assessed, and marks the grade along the route, it would be inequitable to permit him to change it after assessment, and adopt one more injurious to the land owner. *Ib.*

16. Proceedings. In proceedings to open a railway from mines to the public works, a petition, signed by the lessee and agent of the owners of the mines on their behalf, is sufficient. *Harvey v. Lloyd*, 3 Penn. St., 331. 1846.

17. — A notice of the filing, signed by an attorney, is sufficient. *Ib.*

18. — It is for the jury to say whether the road is necessary and useful. *Ib.*

19. Right of way. Where a right is conferred to build lateral roads, the presumption follows that the company has the same authority to obtain the right of way for such roads as is conferred for the main line. *Newhall v. Galena and Chicago Union R. R. Co.*, 14 Ill., 273. 1853.

20. — In proceedings under the lateral railroad acts, it is not essential, though proper, that all the owners of land, over which the proposed railroad is to pass, should be named in the petition; and if a mistake be made as to the real owner, the court may direct the damages assessed by the viewers to be paid over to the proper party on proof of the facts. *Boyd v. Negley*, 40 Penn. St., 377. 1861.

21. — Where one was named as a reputed joint owner in connection with the real owners, when she was not a joint owner, but only had an annuity issuing out of the land; and her name was stricken out of the record, by leave of court, after the report of the viewers and before the final assessment of damages, it is not a fatal defect in the petition or proceedings. *Ib.*

22. — It is not necessary that the grades of the road should appear in the petition or plat. *Ib.*

23. — It is no objection that the petition represented that the owner desired to construct his road with a single or double track, as might be found most suitable for carrying his own and the coal of other parties; such petition is not only authorized, but the owner may be required to carry coal for other parties. *Ib.*

24. — The fact that the petitioner already has a right of way by another route, is a proper fact to show upon the trial of the

Assignment—Consolidation.

question of the necessity of the road, but it has nothing to do with the question of damages. *Ib.*

25. — It is no error for the court to permit an amendment pending an appeal, so as to include other coal lands purchased since the commencement of the proceedings, as the amendment could not change or affect the matters in controversy between the parties. *Ib.*

26. — Before an appeal is sent to an appellate jury for trial, the court should approve or disapprove of the findings of the viewers as to the necessity of the road. *Ib.*

27. — **damages.** Under the lateral railroad law of May 25, 1832, the viewers, and in case of appeal, the court and jury, are to decide whether the proposed road is useful for public or private purposes, and to assess the damages to the intervening owner; but they have nothing to do with the location of the road; that is to be done by the petitioner. *Hays v. Risher*, 32 Penn. St., 169. 1858.

28. — The court is bound to appoint viewers, if the petitioner bring his case within the act. *Ib.*

29. — A party cannot file exceptions to the report of the viewers and at the same time report from their report. *Ib.*

30. — On the trial of the appeal, evidence cannot be introduced to show what was usually paid for similar privileges; the party is only entitled to compensation for the injury actually sustained. *Ib.*

31. — The view for a lateral railroad is granted, and the damages assessed, on the plan proposed in the promoter's petition; he cannot adopt any other. *Lance's Appeal*, 55 Penn. St., 16. 1867.

32. **Wharf.** In a proceeding to obtain the use of a landing or wharf for a lateral railroad, under the act of April 24, 1843, an appeal lies from the action of the viewers to the court to which their report is to be made, there to be tried by a jury. On appeal in such cases, the amount of compensation is the only question for trial. *Horner and Robert's Lateral Railroad*, 37 Penn. St., 333. 1860.

LEAKAGE.

See CARRIAGE OF MERCHANDISE.

LEASE.

See ARBITRATION; ELEVATORS; EMINENT DOMAIN; FIRES; INJURIES TO DOMESTIC ANIMALS; INJUNCTION.

1. **Assignment.** The P. & E. R. R. Co. leased to the C. R. R. Co. a portion of its road, with the proviso that in "case of an assignment for the benefit of creditors by the C. Co., a judicial sale or transfer of the road shall at any time take place," the lease should terminate without any act of the P. & E. Co.; the C. Co. leased to another company the "whole of its road, etc." with the "appurtenances of every nature whatsoever." *Held*, that the lease of the P. & E. R. R. Co.'s road passed; that this lease was not an assignment for the benefit of creditors, judicial sale, or transfer, and was not forbidden by the agreement with the P. & E. Co. *Philadelphia and Erie R.R. Co. v. Catawissa R.R. Co.*, 53 Penn. St., 20. 1866.

2. — The act of April 23, 1861, applies to *appurtenances* as well as to the road itself, and made the lease to the Catawissa Co. assignable without the consent of the lessor. *Ib.*

3. **Buildings.** Where the lessee, with the permission of his landlord, erects a building on the leased premises, it does not become a part of the realty, but continues to be a personal chattel. *Goodman v. Hannibal and St. Joseph R. R. Co.*, 45 Mo., 33. 1869.

4. — Where the landlord, before the expiration of the term, enjoins the tenant from removing the chattels and fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction, within which to demand and remove the same. *Ib.*

5. **Consolidation.** The act of March 17, 1870, authorizing the united railroad and canal companies of New Jersey "to consolidate their respective capital stocks, or to consolidate with any other railroad or canal company or companies in New Jersey or otherwise with which they are or may be identified in interest, or whose work shall form with their own, continuous or connected lines, or to make such other arrangements for connection or consolidation of business with any such company or companies by agreement, contract, lease, or otherwise, as to the directors of said united companies may seem expedient;" gives authority to the united companies to lease to a corporation of another state. *Black*

Construction of Contract — Liability of Lessor.

v. Delaware and Raritan Canal Co., 7 C. E. Green's Ch. (N. J.), 130. 1871.

6. Construction of contract. Under a grant from the legislature of New Hampshire to the Eastern Railroad Company in that state, to lease the right to use its railroad "to such person or corporation, and upon such terms as it may deem proper," a lease of the right to use said road was executed to the Eastern R. R. Co., a corporation chartered in Massachusetts, which lease contained certain stipulations in relation to the payments of rents and the performance of other things therein specified to be done by both parties: *held*, that although originally the parties to the lease might have fixed upon any terms and conditions they pleased, yet having fixed and agreed upon certain terms and conditions by the assent of all the stockholders, the directors of both roads are bound, as are the majority of the stockholders in both, to conduct and administer said roads accordingly, and their liability to the stockholders of each road is just the same as though they had been united by act of the legislature upon the same terms and conditions as those contained in the lease. *March v. Eastern R. R. Co.*, 43 N. H., 515. 1862.

7. — When two railways are united under a lease specifying the duties and liabilities of each, neither is restricted or limited in any particular not included in their contract with each other; each may obtain new legislative grants, and avail itself of additional powers in any way it may find advantageous to itself, provided, these new operations are kept so distinct as not to interfere with the due operation of their agreement with each other. *Ib.*

8. — Such lease between the companies must be construed with reference to the objects proposed by the existing charters of each at the time the lease or contract was made, and its construction or operation cannot be affected or changed by any change of the plans, purposes or objects of the corporation without or beyond the existing scope of their chartered powers at the time of the making of such lease or contract. *Ib.*

9. Conveyance. Land cannot pass by a conveyance as appurtenant to land. A lease from the Buffalo, N. Y. and Erie R. R. Co. to the N. Y. and Erie R. R. Co. — construed. *New York Central R. R. Co. v. Buffalo, N. Y. and Erie R. R. Co.*, 49 Barbour (N. Y.), 501. 1867.

10. Correspondence. The effect of a correspondence with reference to the lease of a railroad considered — and held insufficient to constitute a contract. *Brown v. New York Central R. R. Co.*, 44 N. Y., 79. 1870.

11. Eminent domain. A lease by one railroad company of its railroad for a hundred years to another, does not vest in the lessee any power to exercise the right of eminent domain, but this power remains in the lessor, and the legislature may deal with the lessor exclusively in amending its charter. *Mayor, etc., of Worcester v. Norwich and Worcester R. R. Co.*, 109 Mass., 103. 1871.

12. — Every lease implies a covenant for quiet enjoyment. But it extends only to possession and its breach arises only from eviction by means of title. *Schuylkill and Dauphin R. R. Co. v. Schmoele*, 57 Penn. St., 271. 1868.

13. — A lease does not protect from entry and ouster by a tortfeasor. *Ib.*

14. — Even the entry of the state under her right of eminent domain incurs no breach of the covenant for quiet enjoyment. *Ib.*

15. Eviction. Where the use of a railway, together with a rolling mill, furnace, etc., was leased to the defendant; such use being necessary to the full enjoyment of the premises; and rent was to be paid for such railroad, as an appurtenance to the other demised premises; and after the defendant had taken possession thereof, the lessor tore up the rails of the railroad, it was *held*, that this amounted to an eviction of the tenant, which barred an action for the recovery of the possession of the premises on the ground of nonpayment of the rent. *Peck v. Hiler*, 24 Barbour (N. Y.), 178, 1837; See *Same v. Same*, 14 Howard's Pr. (N. Y.), 155, 1856.

16. Liability of lessee. A railway company, running and operating a road under a lease from another company, cannot be held liable, either at common law or by virtue of the statute, for torts committed by the lessor, prior to the execution of the lease. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Kain*, 35 Ind., 291. 1871.

17. — The liability of a lessee for the continuance of the contracts of the lessor — considered. *Scott v. Grand Trunk R. R. Co.*, 51 N. Y., 655. 1873.

18. Liability of lessor. The company owning a railroad will be liable for the acts of its

Mortgaged Premises — Pleadings.

lessees who run the road. *Nelson v. Vermont and Canada R. R. Co.*, 26 Vt., 717, 1854; *Ohio and Mississippi R. R. Co. v. Dunbar*, 20 Ill., 623, 1858.

19. *Macon and Western R. R. Co.* The Central R. R. Co. had the legal right to lease the Macon and Western R. R. Co. *Central R. R. Co. v. Mayor and Council of Macon*, 43 Ga., 605. 1871.

20. *Mortgaged premises.* A railroad company executed a mortgage of real estate to trustees, containing a provision authorizing the trustees, in case of failure to pay the principal or interest, or any part thereof, for ninety days from demand made after any of the bonds should become due, to enter, at the request of the bondholder, and take possession of and use the premises, and apply the proceeds to the *pro rata* payment of the unpaid bonds; or, under circumstances therein expressed, to cause the premises, or so much thereof as might be necessary, to be sold at public auction. The mortgage also contained the following provision: "And it is further mutually agreed that until breach of condition of the aforesaid mortgage, the party of the first part, etc., shall remain in undisturbed possession, etc., and nothing herein contained shall be so construed as to prevent said corporation from improving said real estate, or making leases of such parts thereof as it may desire and have opportunity to make." *Held*, that under this provision, the validity of leases executed by the mortgagor subsequently to the execution of the mortgage, and its authority to execute leases, terminated upon breach of the condition of the mortgage; and that the trustees could not, by an oral assent, confirm leases so as to give them validity thereafter. *Haven v. Adams*, 4 Allen (Mass.), 80. 1862.

21. *Municipal corporation.* If the charter of a city requires any sale or lease of the real estate of such city to be made at public auction to the highest bidder, an ordinance of the council of the city making a lease of any portion of its realty to a railway company, upon the payment of a rent reserved, is void, and passes no title to the corporation. *San Francisco and Oakland R. R. Co. v. Oakland*, 43 Cal., 502. 1872.

22. *Newport and Fall River R. R. Co.* The right of the Newport and Fall River R. R. Co. to lease its road is not impaired by ch.

156 of St. 1861. *Durfee v. Old Colony and Fall River R. R. Co.*, 5 Allen (Mass.), 230. 1862.

23. *Particular case.* A lease from Hicksville, etc., R. R. Co. to Long Island R. R. Co., construed. *Hicksville and Cold Spring Branch R. R. Co. v. Long Island R. R. Co.*, 48 Barbour (N. Y.), 355. 1867.

24. — One railway company leased its road to another, which agreed to equip it, and to give favorable accommodation to its business, and to run regular trains, and also extra trains when required, for which last the lessees should be allowed "the actual cost of running the same;" and it was agreed that the lessees should collect the revenues of the road leased, and, before paying them to the lessors, take out a certain sum semiannually for the running of the trains, and a certain proportion of the balance, for the use of the lessee's own road by such trains. *Held*, that the "actual cost" of the extra trains included only money actually paid out, and not a proportion of the expense of the lessee's road, or of the wear and tear of its track. *Held, also*, that the lessee was bound to transport, without extra charge, wood and coal intended for and used upon that part of a brick yard at the junction of the two roads, which bordered on the road leased, and which were drawn over the lessee's road, and over a side track built by agreement between the two corporations and in part within the location of that road. *Lexington and West Cambridge R. R. Co. v. Fitchburg R. R. Co.*, 9 Gray (Mass.), 226. 1857.

25. — Where a railway company leased its road and all its lands, upon or across which the road or any part thereof, or its machine shops, warehouses, freight or passenger depots or buildings are constructed, such lease was *held* to include all lands acquired for use in operating the road, and without which the use of the road or any part thereof will be less convenient and valuable. *New York Central R. R. Co., In matter of*, 49 N. Y., 414. 1872.

26. *Pleadings.* In an action founded on an act of the legislature, entitled "An act to lease certain lands of the state to the Newark and New York R. R. Co., and to enlarge the powers of said company," an averment that the defendant accepted the said act, necessarily implies that it accepted and agreed to the provisions of the lease embodied in the act. *State*

Power to Lease — Repairs.

v. Newark and New Jersey R. R. Co., 5 Vroom (N. J.), 301. 1870.

27. Power to lease. Where the power to take a lease of a railroad, built under the general railroad law, is derived solely from this law, the rights and liabilities under the lease are governed by it, and not by the charter of the company which becomes lessee. *McMillan v. Michigan Southern and Northern Indiana R. R. Co.*, 16 Mich., 79, 1867; *Heffron v. Same*, ib.; *King v. Same*, ib.

28. Profits. Evidence as to the cost of operating most railroads, in the absence of any proof to show the rates of fare per mile on those roads, is no guide to ascertain the net profits of a particular road. *West Jersey R. R. Co. v. Thomas*, 8 C. E. Green's Ch. (N. J.), 431. 1873.

29. Public policy. The contract of lease and amendment thereto between the Vermont Central R. R. Co. and Vermont and Canada R. R. Co., was not unlawful in the sense of being in violation of some public law, or contrary to public policy. Those corporations and their stockholders having assented to the validity of said contracts, it is not competent for a bondholder, under the first mortgage of the Vermont Central R. R. Co., which mortgage was given in express recognition of, and subject to, those contracts, to object to their validity on account of the want of capacity of the corporations to make them. *Vermont and Canada R. R. Co. v. Vermont Central R. R. Co.*, 34 Vt., 1. 1861.

30. — It is not enough, in order for the bondholders to avoid the effect of a contract, to show that as between themselves and the Vermont Central R. R. Co., it would be prejudicial to give a certain effect to the contract, but they must also show that it would be inequitable on the part of the Vermont Central R. R. Co., as against them, to have such effect given to it. *Ib.*

31. Rates of toll. The Pennsylvania R. R. Co. leased the road of the Philadelphia and Erie R. R. Co. with all its rights, powers, privileges, etc.; the lessee using the lessor's road was not subject to the charges fixed by its own charter as to toll, but to the regulations of the charter of the lessor. *Pennsylvania R. R. Co. v. Sly*, 65 Penn. St., 205. 1870.

32. — The lessee succeeds to all the rights subject to all the limitations imposed on the lessor. *Ib.*

33. — The lessee is the assignee for a term or period of the lessor; his bailiff to hold possession for him. *Ib.*

34. Record. The lease of a railway, reserving rent, in trust for the benefit of the creditors of the lessors, is an assignment, and must be recorded within thirty days in the proper county. Act March 24, 1818. *Lucas v. Sunbury and Erie R. R. Co.*, 32 Penn. St., 458. 1859.

35. Renewal. It was stipulated in a lease that at the expiration of the term of three years from the 1st of July, 1837, or of any subsequent term of three years, the lessor, if dissatisfied with the amount of rent agreed to be paid, might claim an increase; and if the claim was not adjusted, that he might make application to "the chancellor of the state of New York, for the time being," for the appointment of three appraisers to fix the amount of the rent. One of the terms of three years ended on the first of June, 1855. *Held*, that the parties intended, by the term "chancellor," in the lease, to mean the court of chancery, and not the mere personal incumbent of the office of chancellor. And the court of chancery having been abolished by the constitution of 1846, and the supreme court having succeeded to all its powers and duties, that the latter court was the proper tribunal to which to apply for the appointment of appraisers. *New York Central R. R. Co. v. Saratoga and Schenectady R. R. Co.*, 39 Barbour (N. Y.), 289. 1861.

36. Repairs. It is the duty of the court, in construing a written contract, to harmonize it, if possible, so as to give effect to every part of it. *Hydeville Co. v. Eagle R. R. and Slate Co.*, 44 Vt., 395. 1872.

37. — The plaintiff leased to the defendant certain premises by written lease, under seal, and therein agreed to make certain repairs upon the premises within one week from the date thereof. *Held*, that the defendant was not bound to take possession of the premises and pay rent, unless the plaintiff made the stipulated repairs within a week from the execution of the lease; and the defendant could maintain an action against the plaintiff, after the expiration of a week, for his failure to make the repairs. *Ib.*

38. — About six months after the lease was executed, the plaintiff having failed to make the stipulated repairs, the defendant, before he went into possession of the premises, in accept-

Act of Legislature — State Railway Stock.

ance of a proposition made by the plaintiff, indorsed upon the lease the following agreement and signed the same: "This may certify that in consideration of a discount of \$50, I agree to put the said houses in repair, and deliver them up at the expiration of this lease in like good repair, and pay to the Hydeville Co. \$200, instead of the provisions of said lease." *Held*, that this was an agreement to pay \$200 for the remainder of the time the lease had to run, and not merely to discount \$50 from the rent reserved in the lease. *Id.*

39. Seal. If a committee of three directors has discretionary power to execute and deliver a lease of the corporate property, two of the members may seal it with the corporate seal, where the third is absent, but has approved its terms and concurred with the others in directing its engrossment for execution. *So held*, one of the members executing being president of the corporation and custodian of its seal. *Union Bridge Co. v. Troy and Lansingburgh R. R. Co.*, 7 Lansing (N. Y.), 240. 1872.

40. Signals. The Rev. Sts., ch. 39, § 78, requiring every railroad corporation to carry a bell on every engine passing upon "its road," etc., applies to a railroad corporation which has taken a lease of a railroad owned by another corporation, and is running its own engines upon it under such lease. *Linfeld v. Old Colony R. R. Co.*, 10 Cushing (Mass.), 562. 1852.

41. Ultra vires. A contract of lease made by a railroad company for the purpose of extending its road beyond the *terminus* fixed by its charter, is *ultra vires*, and void as against public policy, and should be set aside by the courts on the application of one of the parties. *Union Bridge Co. v. Troy and Lansingburgh R. R. Co.*, 7 Lansing (N. Y.), 240. 1872.

42. Value of lease. The true method of calculating the value of an unexpired lease is by annuity tables; by multiplying the clear annual value of the lease by the value of one dollar per annum for the unexpired term, at the rate of lawful interest. *West Jersey R. R. Co. v. Thomas*, 8 C. E. Green's Ch. (N. J.), 431. 1873.

road state bonds, issued under the act to expedite the construction of the Pacific Railroad and the Hannibal and St. Joseph Railroad, approved February 22, 1851, being payable on their face in gold and silver, can be met only by payment of the sum called for in gold and silver coin, and not by payment of the amount in legal tender currency. The legal tender act cannot affect this obligation. But where the legislature has determined to pay the bonds in legal tender currency, the supreme court has no power to interfere; and *mandamus* to compel the fund commissioners to pay said bonds in gold and silver coin will not lie. *State ex rel. v. Hays*, 50 Mo., 34, 1872; *Governor, Opinion in response to*, 49 ib., 216, 1872.

2. Constitutional law. The act of congress known as the legal tender act is constitutional, and is valid as to debts contracted both before and after its passage. *Richmond v. Dubuque and Sioux City R. R. Co.*, 33 Ia., 422. 1871.

3. Decree. There is no principle upon which the payment of gold bonds and coupons may be decreed to be made in currency to an amount equal to the currency value of the gold on the day when the bonds fall due, but the payment must be decreed in coin itself. *Johnson v. Norwich and Worcester R. R. Co.*, 37 Conn., 433. 1870.

4. Goods lost. In a suit for the value of certain cotton lost by the defendant it was error to render judgment for gold coin. The judgment should have been for dollars and cents only. *Central R. R. Co. v. George*, 32 Tex., 568. 1870.

5. Ground rent. The principal of ground rent is not a debt within the meaning of the legal tender act. *Philadelphia and Reading R. R. Co. v. Morrison*, 5 Philadelphia Rep. (Penn.), 515. 1864.

6. Passenger fares. A railroad company is bound to accept United States legal tender notes at the value expressed on their face in payment of fare upon its railroad. *Lewis v. New York Central R. R. Co.*, 49 Barbour (N. Y.), 330. 1867.

7. State railway stock. The dividends due the state on its stock in the Baltimore and Ohio R. R. Co., are not payable in gold, under the legal tender act. *Baltimore and Ohio R. R. Co. v. The State*, 36 Md., 519. 1872.

LEGAL TENDER ACT.

See CONTRACTS; RATES.

1. Act of legislature. The Pacific rail-

Miscellaneous.

LESSEES.

See INJURIES TO DOMESTIC ANIMALS; LEASE.

LIABILITY LIMITED BY CONTRACT.

See CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS.

LIBEL.

1. **Libel by corporation.** A railway corporation is responsible for the acts of its agents, either *ex contractu* or *in delicto*, in the course of its business and of their employment. It is therefore responsible in an action for the publication of a libel. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Quigley*, 21 Howard, 202. 1858.

2. — It is within the course of the business of the president and directors to report to the stockholders the result of their investigation into the conduct of their agents. *Id.*

3. — But the publication of such report must be made under the responsibilities that attach to individuals under like circumstances. *Id.*

4. — Such report is privileged, but cannot be published in a book for general distribution. *Id.*

5. — The company could not be held responsible for a publication that took place after the suit commenced. *Id.*

6. — An instruction allowing the jury to give exemplary damages was erroneous, there being no evidence of malice or wantonness. *Id.*

LICENSE.

See EMINENT DOMAIN.

1. **Adverse possession.** Unless there is evidence of a license, there must be an uninterrupted use of a railroad switch for twenty-one years to entitle the company to claim a license. *Heyl v. Railroad Co.*, 6 Philadelphia Rep. (Penn.), 42. 1865.

LIEN.

See GARNISHMENT; INJUNCTION; JUDGMENT; MECHANICS LIEN; VENDOR AND VENDEE.

1. **Bank bill holders.** Section 11 of the charter of the Monroe R. R. and Banking Co. gives to bill holders a paramount lien for the payment of their bills upon that part of the road only which was built by the company. *Collins v. Central Bank of Georgia*, 1 Ga., 435, 1846; but see *Woodward v. Same*, 4 ib., 323, 1848.

2. **Factors.** Where the consignor continues to be the owner of the goods consigned, no special property can exist in the factor, nor can any lien general or special attach, unless he have possession, either actual or constructive, of the goods. If the goods are in *transitu*, or if the factor has only a right of possession, no lien attaches. *Woodruff v. Nashville and Chattanooga R. R. Co.*, 2 Head, (Tenn.), 87. 1858.

3. **Freight charges.** An implied agreement between a railway company and an owner of merchandise transported by such company, as a common carrier upon its road for a *per diem* compensation for the use of its cars, during any delay by such owner in removing such merchandise after its arrival, does not give the company a lien upon the merchandise for such compensation during the time it may remain upon its cars in a public highway. *Crommelin v. N. Y. and Harlem R. R. Co.*, 10 Bosworth (N. Y.), 77. 1862.

4. — Several cargoes of coal, delivered by their owner upon the wharf of a railroad company, were successively carried over such railroad, and at the place of destination unladed, and deposited by the owner's servants in bins on the land of the corporation, adjoining the owner's land, and portions were carried away and delivered to purchasers by the owner, from time to time, until he became insolvent. *Held*, that the corporation had a lien upon the coal which remained, for the wharfage and freight of all the cargoes. *Lane v. Old Colony R. R. Co.*, 14 Gray, (Mass.), 143. 1859.

5. — **damages.** A common carrier has no lien upon goods carried by him for damages arising from the neglect of the consignee to take the goods away within a reasonable time after notice to him of their arrival. *Crom-*

Absence from State — Carriage of Goods.

melin v. New York and Harlem R. R. Co., 4 Keyes, (N. Y.), 90. 1868.

6. — Such damage constitutes a claim in the nature of demurrage. There is a breach of contract simply for which the party must seek his redress in the ordinary manner; he cannot enforce it by a detention of the goods. *Id.*

7. Goods in transit. The fact that a consignee has accepted bills drawn upon him by the consignor, based upon the understanding that the goods should be shipped to him to be sold to meet the bills, does not give the consignee a lien upon the goods while *in transitu*, they not having come into his possession, either constructively, by bill of lading, or by actual delivery. *Lewis v. Galena and Chicago Union R. R. Co.*, 40 Ill., 281. 1866.

8. Vessels. In an action against the owners for the value of certain services rendered to a steamer, the defendants may show, under the general issue, that the steamer was chartered to a third person. *Pontchartrain R. R. Co. v. Heirne*, 2 La. An., 129. 1847.

9. — The owners in such case are not liable where the person rendering the services has knowledge of the facts. *Id.*

10. — The charter of the P. R. R. Co., giving a privilege on vessels or other property liable for warehousing, wharfage and transportation imposes no personal liability on the owners of the vessel in this case. *Id.*

LIMITATIONS.

See EMINENT DOMAIN; FERRIES; INDICTMENT; INFUNCTION; MORTGAGE; SUBSCRIPTIONS BY INDIVIDUALS; WATERCOURSES.

1. Absence from state. The absence of the officers of a corporation from the state does not bring the corporation within the exception of § 22 of the statute of limitations; the absence of the officers is not the absence of the corporation. *Sherman v. Buffalo Bayo, Brazos and Colorado R. R. Co.*, 21 Tex., 349. 1858.

2. Adverse possession — title. A title acquired by twenty-one years adverse possession, under the statute of limitations, is an absolute one, and is not barred by a subsequent neglect to keep up the possession, as against

a bona fide purchaser, without notice, of the adverse paper title. *Schall v. Williams Valley R. R. Co.*, 35 Penn. St., 191. 1860.

3. Assault and battery. In an action against a railway company for an assault and battery committed by one of its employes upon the plaintiff, *held*, that the action having been brought more than two years after the cause of action arose, was barred by the statute of limitations. *Held*, further, that it did not become a different action by being brought against the master. *Priest v. Hudson River R. R. Co.*, 2 Sweeney (N. Y.), 595. 1870.

4. Bills and notes. The admission of the execution of a note, accompanied by the assertion that it had been paid, is not such an acknowledgement as will interrupt prescription. *New Orleans and Carrollton R. R. Co. v. Harper*, 11 La. An., 212. 1856.

5. Burden of proof. Where the defendant pleaded the statute of limitations, and the plaintiff, by way of replication, alleged that the defendant had been beyond the limits of the state for a portion of the time, it was *held*, that the affirmation of the issue was upon the plaintiff, and he was entitled to the opening and closing. *Thornton v. West Feliciana R. R. Co.*, 29 Miss., 143. 1855.

6. Canals. Where the grantee of a right to open a canal permitted thirty years to elapse without availing himself of the right, it was *held*, that the right was extinguished by lapse of time. *Marigny v. Pontchartrain R. R. Co.*, 15 La. An., 427. 1860.

7. Carriage of Goods. An action founded upon a contract, was brought against a carrier for the value of goods delivered to him for transportation, but which he neglected to forward, and which were destroyed in his hands. *Held*, that such action was not barred by the statute of limitations until six years after their destruction. *Finn v. Western R. R. Co.*, 102 Mass., 283. 1869.

8. — contract. A written contract entered into by a railway company for the transportation and delivery of goods, is within the purview of the statute limiting actions on such contracts to sixteen years. *Illinois Central R. Co. v. Johnson*, 34 Ill., 389. 1864.

9. — The limitation of one year, prescribed by article 3499 of the Civil Code of Louisiana, does not apply where the plaintiffs were ship brokers only and not ship owners, and where

Constitutional Law — Foreign Corporation.

the contract was not one of affreightment. *Railroad Co. v. Lindsay*, 4 Wallace, 650. 1866.

10. Constitutional law. An action brought against a stockholder of the Lexington Railroad and Coal Mining and Transportation Company (See Wagn. Stat., 291, § 13), more than a year after the debt was contracted, was barred by the limitation of the act touching Manufacturing and Business Companies (Wagn. Stat., 336, § 13). The one year limitation of time for commencing suit was not so short as to justify the supreme court in declaring it unreasonable, and the law for that reason invalid. The act was wholly prospective, and therefore constitutional. *Adamson v. Davis*, 47 Mo., 268. 1871.

11. — Section 7 of an act to amend the charter of the Louisville & Frankfort R. R. Co., approved February 23, 1856, which provided that actions for injuries to stock and other property on said road by the company or its agents, "must be brought within six months after such injury," is constitutional. *O'Bannon v. Louisville, Cincinnati and Lexington R. R. Co.*, 8 Bush (Ky.), 348. 1871.

12. Corporation. A corporation may plead the statute of limitations. *New Orleans and Carrollton R. R. Co. v. Harper*, 11 La. An., 212. 1856.

13. Coupons. The same statute of limitations applies to a coupon that applies to the bond. *Lexington v. Butler*, 14 Wallace, 282. 1871. See post, page 529.

14. Damages. A claim for damages *ex delicto* is barred in one year. C. C. 3501. *Harris v. New Orleans, Opelousas and Georgia R. R. Co.*, 16 La. An., 140, 1861; *Mestier v. Same*, ib., 354.

15. — The statute of limitations may be pleaded in bar of the special statutory remedy provided for the recovery of damages caused in the construction of a railroad. *Forster v. Cumberland Valley R. R. Co.*, 23 Penn. St., 371. 1854.

16. — Statutes of limitations are applied rather according to the substance of the claim than to the form of the proceeding, and may be relied on in all courts, even though their letter may refer only to the proceedings in courts of common law form. *Id.*

17. — A railway company was chartered by an act in 1833, and acted under that and subsequent acts, the last being in 1853, the first act providing for a mode of assessing damages

and allowing an appeal. A claimant for damages is not barred by the limitation against suits for penalties in § 14 of the Railroad Law of 1849. The assessment of damages is not a penalty. *Delaware, Lackawanna and Western R. R. Co. v. Burson*, 61 Penn. St., 369. 1869.

18. — The act of limitations of 1713 does not apply to the assessment of railroad damages. *Id.*

19. — The fifteen days limitation specified in the act of 1853-'4, defining the liability of railroad companies for damages to property only applies to demands under \$30 in amount. *Jones v. Central R. R. Co.*, 18 Ga., 247. 1855.

20. Death. A suit to recover, under § 784 of the code, for the death of a person caused by the wrongful act or omission of another must be commenced within two years from such death. *Hanna v. Jeffersonville R. R. Co.*, 32 Ind., 113. 1869.

21. Dividends. The statute of limitations will not, in this state, run against the dividends of a stockholder, until after demand and refusal, or notice to the shareholder that his right to the dividends is denied. Whether it would in any event be a bar under act of 1847 is doubted. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Cowell*, 28 Penn. St., 329. 1857.

22. Executors. The legislature may pass an act of limitations which shall apply to existing causes of action, but some reasonable time should be allowed, within which suits may be brought; but if the act is silent as to any such intention, it cannot be construed to apply to cases where such construction would cut off all remedy. *West Feliciana R. R. Co. v. Stockett*, 13 Smedes and Marshall (Miss.), 395. 1850.

23. — The act of 1844, limiting the time of bringing actions against executors, etc., is therefore prospective. *Id.*

24. Foreign corporation. A foreign corporation cannot avail itself of the statute of limitations as a defense to an action in the courts of New York. *Mallory v. Tioga R. R. Co.*, 3 Abbott's Ct. of Ap. Dec. (N. Y.), 139, 1867; *Olcott v. Tioga R. R. Co.*, 20 N. Y., 210, 1859; reversing *Same v. Same*, 26 Barbour (N. Y.), 147, 1857; see *Same v. Same*, 40 ib., 179, 1862; *Thompson v. Tioga R. R. Co.*, 36 ib., 79, 1861; *Blossburg and Corning R. R. Co. v. Same*, 5 Blatchford (U. S. C. C.), 387, 1867.

Injuries to Domestic Animals—Subscriptions to Stock.

25. — This rule is not changed by the fact that such corporation has, before the commencement of the action for the time specified in the statute, continuously operated and carried on a railroad in that state, having a large amount of property for all that time within the state, and having a managing agent resident therein. *Rathbun v. Northern Central R. R. Co.*, 50 N. Y., 656. 1872.

26. — The statute of limitations of Kansas does not run in favor of a foreign corporation having no existence under the laws of the state. *North Missouri R. R. Co. v. Akers*, 4 Kansas, 453. 1868.

27. — The statute of limitations does not commence running against a foreign corporation until it has attachable property in this state, although, previous to that time there may be directors and stockholders of such corporation residing in the state. *Hall v. Vermont and Massachusetts R. R. Co.*, 28 Vt., 401. 1856.

28. Injuries to domestic animals. The recovery authorized by statute without proof of negligence, for injuries done to animals by railroads, where the roads are not fenced, is not a "penalty given by statute," within the meaning of the first subdivision of § 211 of the code. The action is for an injury done to property, and the limitation of the action is regulated by the third clause of § 210. *Jeffersonville R. R. Co., v. Gabbart*, 25 Ind., 431. 1865.

29. — Under ch. 169, Laws of 1862, § 6, making railway companies liable for double the value of stock killed, upon their failure to pay the owner therefor, after thirty days' notice, the action is deemed to have accrued at, and the statute of limitations begins to run from, the date of the injury, rather than from the service of such notice. *Koons v. Chicago and Northwestern R. R. Co.*, 23 Ia., 493. 1867.

30. — Such statute is not a penal statute, nor are the double damages a statute penalty, within the meaning of the statute of limitations, and the action is not barred in two years. *Id.*

31. Injury to passengers. Where the death of a passenger, a resident of another state, was occasioned by the negligence of a railway company in Connecticut, and action therefor was limited by statute to be "commenced within one year after the cause of

action shall have arisen," and the action was not commenced within one year after the death, but was commenced within one year after the appointment of an administrator in this state, *held*, that the action was not barred by the statute. *Andrews v. Hartford and New Haven R. R. Co.*, 34 Conn., 57. 1867.

32. Judgment of county commissioners. To a judgment of county commissioners, fixing the damages for real estate taken for the location of a railroad, the statute of limitations is a bar after six years, the court of said commissioners not being a court of record. *Moore v. Kennebec and Portland R. R. Co.*, 58 Me, 279. 1870.

33. Mistake. To enable a complaining party to avoid the effect of the statute of limitations on the ground of failure to discover the mistake, which is made the grounds of recovery, he must show an exercise of a proper degree of vigilance in the pursuit of his right. *Lexington and Ohio R. R. Co., v. Bridges*, 7 B. Monroe, (Ky.), 556. 1847.

34. Private way. A road across one's own land is not a "private way" within the meaning of the Gen. Sts., ch. 63, § 28, requiring application to be made within a year for damages for the obstruction of a private way by a railroad corporation. *Presbrey v. Old Colony and Newport R. R. Co.*, 103 Mass., 1. 1869.

35. — In making an assessment, under the Gen. Sts., ch. 63, § 21, of the damages occasioned to land by the location of a railroad across it, they are to be assessed on the basis that the landowner has no right to cross the railroad, unless the railroad corporation has secured him such a right under §§ 40, 64-66. *Id.*

36. Receipt. A receipt given by a railway company, for freight to be transported, is not a bill of exchange, and the limitation of five years does not apply to it. It is not a bill of lading and the limitation of one year does not apply, C. C., 3501, 3505. *Flash, Hartwell & Co. v. New Orleans, Jackson and Great Northern R. R. Co.*, 23 La. An., 353. 1871.

37. Subscriptions to stock. Where A. subscribed for railway stock, and when sued upon his subscription, he plead the statute of limitations, which was sustained as to a part of the subscription, it was *held*, that A. could not afterwards compel the railway company to issue to him the whole amount of the stock

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subscribed for. *Johnson v. Albany and Susquehanna R. R. Co.*, 54 N. Y., 416. 1873.

38. — The lapse of six years is a bar to an action by a railroad company, for a subscription to its capital stock, if no call has been made within that period. *Pittsburgh and Connellsville R. R. Co. v. Graham*, 36 Penn. St., 77. 1859.

39. — Such subscription is an ordinary contract of purchase and sale. The subscriber does not become an integral part of the corporation, so as to be affected with an implied assent to its acts. *Id.*

40. — The silence of the subscriber, after six years have expired, and his standing by while large expenditures are being made, will not estop him from pleading the statute; it is a bar in equity, as well as at law. *Id.*

41. — Although the statute of limitations does not begin to run against a subscription until after calls are made for installments, yet, where no calls are made for installments for more than six years from the date of the subscription, the law will presume an abandonment of the enterprise, and, from analogy to the statute, bar recovery. *Pittsburgh and Connellsville R. R. Co. v. Byers*, 32 Penn. St., 22, 1858; *McCully v. Pittsburgh and Connellsville R. R. Co.*, *ib.*, 25.

42. — **conditional.** Subscriptions to the stock of a railway company were made on the 28th of April, 1853, conditional upon the adoption by the company of a certain route. This route was adopted by the company on the 31st of March, 1857. No calls were made for the payment of subscriptions until the 25th of June following. In an action brought by the company to recover the amount of the calls upon the stock subscribed for, it was *held*, that the statute of limitation did not begin to run until the several calls were due. *Taggart v. Western Maryland R. R. Co.*, 24 Md., 563. 1866.

43. — Where a stockholder gives a mortgage to secure his subscription to the company, and his liability depends upon a future contingency, the statute of limitations commences to run from the happening of the contingency. *Clinton and Port Hudson R. R. Co. v. Eason*, 14 La. An., 828. 1859.

44. — A subscription conditioned for the prosecution of the construction of a railroad will be barred, unless the condition be per-

formed, and a call made within six years. *Pittsburg and Connellsville R. R. Co. v. Graham*, 2 Grant's Cases (Penn.), 259. 1859.

45. — **creditor's bill.** Under the Ohio statute, actions on subscriptions for stock in a railway company may be commenced at any time within fifteen years, dating from the times fixed in the calls for payment; and where no circumstances interpose to render it inequitable, a creditor's bill may be maintained to subject the amount due to the payment of his claim within that period. *Warner v. Callender*, 20 Ohio St., 190. 1870.

46. **Surface water — change of.** The diversion of surface water from the land of another, by excavations on one's own land, and the backing of water by means of dams, etc., are injuries for which an action will lie at common law, and hence the limitations of two years, under the internal improvement act of 1836, will not apply. See *Trustees, etc. v. Spears*, 16 Ind., 441; *New Albany and Salem R. R. Co. v. Higman*, 17 Ind., 594, 1861.

47. **Trust.** Where in a case of the misapplication of a trust fund, the parties have a remedy at law, concurrent with their remedy in equity, the statute of limitations will apply. *Lexington and Ohio R. R. Co. v. Bridges*, 7 B. Monroe (Ky.), 556. 1847.

48. — The trust confided to the trustees of a corporation is not a continuing trust, and terminates with their term of office, and this is the rule even though they be actually reappointed. The statute of limitations therefore applies to such trust. *Id.*

LIS PENDENS.

1. **Interval between suits.** The doctrine of *lis pendens* has no application to a case where there are three distinct and independent suits, with an interval of one year between the first and second, and two years between the second and third. *Lee County v. Rogers*, 7 Wallace, 181. 1868.

LIVE STOCK.

See CARRIAGE OF LIVE STOCK; INJURIES TO DOMESTIC ANIMALS.

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LOBBYING.

1. **Lobby members.** No action will lie on a contract for procuring legislation by means of what is termed "lobby members." *Marshall v. Baltimore and Ohio R. R. Co.*, Taney's Dec., 204. 1852.

2. — Money may be properly used and improperly, to influence legislation. It is used properly for the distribution of circulars or pamphlets, or otherwise for the collection or distribution of information, openly and publicly, among members. It is used improperly in bribing or working up a personal influence upon members, and conciliating them by suppers, presents, or any of that machinery used by lobbyists to secure a member's vote, without reference to his judgment. *Kansas Pacific R. R. Co. v. McCoy*, 8 Kan., 538. 1871.

LOCAL FREIGHTS.

See CARRIAGE OF MERCHANDISE.

1. **Statute.** Millers in Philadelphia bought grain west of Pennsylvania, not the product of her soil, shipped it to Pittsburgh and thence by railroad to Philadelphia. *Held*, that this was not "local freight" within the meaning of the "commutation act." *Rowland v. Pennsylvania R. R. Co.*, 52 Penn. St., 250. 1866.

LOCATION.

See EMINENT DOMAIN.

1. **Branch lines.** A railway company was authorized to construct a railway, making S. and F. points on the main line. It proceeded to put under construction a line from S. to P., which lies thirty-eight degrees north of a direct line from S. to F., and which, if brought down to that line, would not be half way between S. and F. The court considered that this was manifestly the main line, and could not be called a branch. *Works v. Junction R. R. Co.*, 5 McLean, 425. 1853.

2. **Change of location.** Where a railway company has received from private individu-

als donations of lands, subscription of stock, and payments in money, in consideration that it should locate its road at a particular place, and allow private side track and warehouse privileges in connection therewith, the company will not be permitted to effectuate a change in fact, though not in name, of the line of its road away from such place, by getting up a new corporation and constructing a new road parallel with its old one, under a different charter, and permitting its old line to go to decay, without compensating the parties with whom it has contracted as aforesaid. *Chapman v. Mad River and Lake Erie R. R. Co.*, 6 Ohio St., 119. 1856.

3. — A railway company in the city of New Orleans, which has been authorized by the city to change the track of its railroad, cannot be enjoined from so doing by an individual property holder situated on the line of the road, on the ground that such change would likely prove detrimental to the public health, and would therefore work an irreparable injury to him. *Hoyle v. New Orleans City R. R. Co.*, 23 La. An., 535. 1871.

4. — A right to change location, "either for the difficulty of construction, or of procuring a right of way at a reasonable cost, or whenever a better and cheaper route can be had," does not authorize a company to relocate, because a particular town, on the selected route, will not contribute to the route. *Works v. Junction R. R. Co.*, 5 McLean, 425. 1853.

5. — The 11th and 12th sections of the act incorporating the Little Miami R. R. Co., do not confer upon the company the right to relocate its road, after completing it upon the first location, and to condemn other property for its uses. *Moorhead v. Little Miami R. R. Co.*, 17 Ohio, 341, 1848; *Atkinson v. Marietta and Cincinnati R. R. Co.*, 15 Ohio St., 21, 1864.

6. — Railway companies may make experimental surveys at pleasure, before finally locating their route. *Neal v. Pittsburgh and Connellsville R. R. Co.*, 2 Grant's Cases (Penn.), 137. 1856.

7. — But they cannot have experimental suits at law, as a means of chaffering with land owners for the cheapest route. *Id.*

8. — The power of taking any man's land by such company is exhausted by a location. It cannot be indulged with another choice. *Id.*

9. **Charter.** Where, by the terms of the

Commissioners — Extension.

charter, much is left to the discretion of the officers of a company in respect to the location and route of the road, their selection should not be disturbed, unless they have clearly erred. *Hentz v. Long Island R. R. Co.*, 13 Barbour (N. Y.), 646. 1852.

10. — All railroad charters that do not directly express the contrary, must be taken to allow the exercise of such a discretion in the location of the route as is incident to an ordinary practical survey, but not deviating substantially from the course and direction indicated by the charter. *Southern Minnesota R. R. Co. v. Stoddard*, 6 Minn., 150. 1861.

11. Commissioners. No person is authorized to apply to a justice of the supreme court, under § 22 of the general railroad act, of 1850, for the appointment of commissioners to examine the proposed route of a railroad, and affirm or alter the same, except one whose lands the company desires to take for its use, and after proceedings have been commenced for that purpose by the company. *People ex rel. v. Tubbs*, 59 Barbour (N. Y.), 401. 1871.

12. — The commissioners thus appointed are to examine the proposed route, and hear the parties before deciding; and the decision must be confined to the rights of the parties heard, and consistent with the rights of the public. *Ib.*

13. — Any person feeling aggrieved may, within a certain time after written notice of the route, apply to a justice of the supreme court, for the appointment of commissioners; who, on a hearing of the parties, are to affirm or alter the route. *Norton v. Wallkill Valley R. R. Co.*, 61 Barbour (N. Y.), 476. 1871.

14. — The determination is to be made by the commissioners; one of whom must be a civil engineer. *Ib.*

15. — Where, in a proceeding under the general railroad act of 1850, as amended by the act of 1870, on the petition of a land owner for the appointment of commissioners to change the location of the route of a railroad as surveyed by the company, it appears that he has not given notice of the application for the appointment of commissioners, to an individual whose land will be affected thereby, such proceeding is wholly void. *Norton v. Wallkill Valley R. R. Co.*, 63 Barbour (N. Y.), 77. 1872.

16. — Although § 22 of the general railroad

act does not, in terms, declare that the commissioners shall have jurisdiction of the entire subject of the location of the route through the county in which the land of the person applying for their appointment is situated, still, that is the true intent and construction of the act. *Long Island R. R. Co., In the matter of*, 45 N. Y., 364. 1871.

17. — Where commissioners are appointed under the provisions of § 22 of the general railroad law, their power over the proposed route is not restricted to that part of it which lies within the bounds of the land of the party procuring their appointment, but they may make any alteration of the proposed route within the county which may be necessary; but they have no power to so change a portion of the proposed route as to leave it disconnected at either end with the other portions. *People ex rel. Erie and Genesee Valley R. R. Co. v. Tubbs* 49 N. Y., 356. 1872.

18. Connections. A road 24 miles long was authorized "from a point on the Pennsylvania Railroad, at or near Parkesburg." *Held*, that a connection one mile and a half east of Parkesburg was not a transgression of the act *per se*. *Parkes' Appeal*, 64 Penn. St., 137. 1870.

19. — The only question is, has the company exceeded a discretion on the subject apparent on the face of the act of incorporation? *Ib.*

20. Dwelling house. Where according to the smallest estimate of the width required for the railroad, on the proposed route, it will take a portion of the land of an individual, and according to the largest estimate, it will take his dwelling house; it cannot be said that such owner is not "affected by the proposed alteration," merely because the center line of the proposed railroad does not cross his land. *Norton v. Wallkill Valley R. R. Co.*, 63 Barbour (N. Y.), 77. 1872.

21. Extension. Where a company is authorized to extend its road to a point named, beyond its original terminus, such authority will not justify the building of such extension from some point upon the original line other than the terminus. *Works v. Junction R. R. Co.*, 5 McLean, 425. 1853.

22. — Where a company is authorized to build branch roads "in the several counties through which it passes," it will not thereby be permitted to build a branch road com-

Filing—Terminus.

mencing in one county and terminating in another. *Ib.*

23. — The charter of a railway company required the road from N. to S. to be located as far north as a certain point, and in the location, a curve was made in order to reach that point, and the road was thence continued towards S. by an acute angle; *held*, that the subsequent continuation of the railroad for about a mile and one-half northerly from the point of the angle to the village of M., was unauthorized. *Brigham v. Agricultural Branch R. R. Co.*, 1 Allen (Mass.), 316. 1861.

24. Filing. Where the time of filing the location with the county commissioners was fixed by statute to be February 8th, and it was deposited with their clerk on February 6th, it was seasonable, although a term of the commissioners' court did not occur until the following April. *Eaton v. European and North American R. R. Co.*, 59 Me., 520. 1871.

25. — And where one year was given by statute for the alteration and amendment of the location, and the amended location was filed in the last day of the year, it was held that the filing was seasonable, although there was no session of the commissioners' court for several months after the filing. *Ib.*

26. Form of plan of location. A location filed by a railroad company with the county commissioners, by which alone the true location upon the ground cannot be fixed and ascertained, is nevertheless sufficient, if the location can be determined by the plan filed therewith. *Grand Junction R. R. Co. v. Com'rs of Middlesex*, 14 Gray (Mass.), 553. 1860.

27. Injunction. Equity will not restrain the directors of a railroad company unless it is shown that they wantonly or capriciously disregard the rights of others. *Anspach v. Mahanoy and Broad Mountain R. R. Co.*, 5 Philadelphia Rep. (Penn.), 491. 1864.

28. *Midland R. R. Co.* By St. 1850, ch. 268, the *Midland R. R. Co.* was authorized to locate and construct a railroad "commencing at some convenient point on the Norfolk County Railroad; thence through the southerly part of Dedham; thence through or near the westerly part of the towns of Canton and Milton." *Held*, that a location, commencing at a point on the Norfolk County Railroad in South Dedham, and not departing from that road at once, but running northerly upon it

for more than two miles, and then approaching within two hundred rods of the north-westerly corner of Canton, and running near the westerly boundary of Milton, was authorized by the statute. *Boston and Providence R. R. Co. v. Midland R. R. Co.*, 1 Gray (Mass.), 340. 1854.

29. Navigable streams. An unrestricted grant authorizing the building of a railroad from one designated point to another carries with it the authority to cross a navigable stream, if the railroad cannot reasonably be constructed without doing so. *Fall River Iron Works Co. v. Old Colony and Fall River R. R. Co.*, 5 Allen (Mass.), 221. 1862.

30. Objections to location. No person has the right to object to the location of a railway, on the ground of damage to his property, unless his title or possession extends back to the time when the land was taken by the company. *Hentz v. Long Island R. R. Co.*, 13 Barbour (N. Y.), 646. 1852.

31. Review. A company was authorized to locate its road by the most direct and cheapest route; after the location and construction had become complete, the exercise of the discretion of the company in the location could not be reviewed. *Cleveland and Pittsburgh R. R. Co. v. Speer*, 56 Penn. St. 325. 1867.

32. — If the act of location had been voidable, none but the Commonwealth could call the company to account. *Ib.*

33. Rights of railway companies. A railway company, in determining upon its route, acts arbitrarily, and is not required to consult any one. *Norton v. Wallkill Valley R. R. Co.*, 61 Barbour (N. Y.), 476. 1871.

34. — No one is entitled to any notice, on the subject, until the route has been actually designated. *Ib.*

35. — Under a charter which fixes one terminus of a railroad at or near a certain point, a large discretion is conferred upon the railroad company in locating its road, the exercise of which will not be revised by this court unless it has clearly exceeded its just limits or acted in bad faith. *Fall River Iron Works Co. v. Old Colony and Fall River R. R. Co.*, 5 Allen, (Mass.), 221. 1862.

36. Terminus. The articles of association of the Brooklyn and Newtown R. R. Co., construed with reference to the terminus of the

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road. *Mason v. Brooklyn and Newtown R. R. Co.*, 35 Barbour (N. Y.), 373. 1861.

LOSS OF BAGGAGE.

See BAGGAGE.

LOSS OF GOODS.

See CARRIAGE OF MERCHANDISE.

LOST GOODS.

1. **Rights of finder.** A person finding money in a railroad car is entitled to the custody and possession of the same as against the railroad company or its officers; if the finder places it in their custody for the purpose of finding the true owner, they hold it only as the bailee of the finder, and cannot dispute his title thereto. *New York and Harlem R. R. Co. v. Haws*, 3 Jones & Spencer, (N. Y.), 372. 1873.

LUNATICS.

See EMINENT DOMAIN; INJURIES TO PASSENGERS.

MACHINERY.

See CARRIAGE OF MERCHANDISE; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS.

MAIL CATCHER.

See INJURIES TO EMPLOYEES.

MALICIOUS MISCHIEF.

1. **An indictment for "unlawfully, willfully, maliciously and mischievously driving the**

horses attached to a freight car, on the Fourth Avenue railroad, against another railroad car, then and there being, and then and there injuring the last mentioned car, he so intending, etc.," does not allege or include the common law offense of malicious mischief. The defendant can be considered as guilty of nothing beyond a *hurtful trespass*. *Williams v. People*, 24 Howard's Pr. (N. Y.), 350. 1862.

MALICIOUS PROSECUTION.

1. **Pleadings.** An action of trespass for false imprisonment will lie against a corporation, but an action on the case for a malicious prosecution will not. *Owsley v. Montgomery and West Pt. R. R. Co.*, 37 Ala. N. S., 560. 1861.

2.—The sufficiency of pleadings determined in a particular case. *Id.*

3.—An action may be maintained for malicious prosecution against a corporation aggregate. *Vance v. Erie R. R. Co.*, 3 Vroom (N. J.), 334. 1867.

MANDAMUS.

See BRIDGES; ELEVATORS.

1. **Adequate law remedy.** A writ of *mandamus* will not be issued where there is a plain and adequate remedy at law. *State of Kansas ex rel. v. McCrillus et al.*, 4 Kans., 250. 1868.

2. **Amendment of writ.** A motion to amend and enlarge a peremptory writ of *mandamus* to conform to a judgment upon which it is based, should point out specifically the defects in the writ and the discrepancy between it and such judgment. *State ex rel. v. County Judge of Johnson County*, 12 Ia., 237. 1861.

3.—The rule is, that a peremptory writ or *mandamus* must conform strictly to the alternative. *Id.*

4.—Where the record does not set out the alternative writ, the supreme court will presume that it was followed in the peremptory writ. *Id.*

Contempt—Judgments.

5. **Contempt.** When a *mandamus* is awarded, directed to a board of officers composed of several members, commanding the performance of an official act, by them as a board, and they do not obey it, but one writ of attachment should go against them for this contempt. *Durant v. Supervisors of Washington County*, 1 Woolworth (U. S. C. C.), 377. 1869.

6.—If more than one writ is issued, and each is entered as a separate case, they will be consolidated. *Ib.*

7. **Continuance.** The writ will not lie to compel a judge of the circuit court to set aside an order of continuance of a garnishment for further answer pending in that court, unless, perhaps, the power to continue the cause has been corruptly used. *South and North Alabama R. R. Co. ex parte*, 44 Ala. N. S., 654. 1870.

8. **Courts of general sessions** have no power to issue writs of *mandamus*, that power being by the constitution, vested in the courts of common pleas. *McIver v. The State*, 2 So. Car. (N. S.), 1. 1870.

9. **Demurrer.** A demurrer to a petition for *mandamus*, based on the ground that the petition does not state facts sufficient to constitute a cause of action, is too indefinite. *McGregor and Sioux City R. R. Co. v. Birdsall*, 30 Ia., 255. 1870.

10. **Federal courts.** The chapter on the "action by *mandamus*," of the Revision of 1860 of the Laws of Iowa, changes the character of the writ to an action for the enforcing of any right to which it may be applicable; but this chapter has not been adopted by the federal courts. *Rusch v. Supervisors of Des Moines County*, 1 Woolworth (U. S. C. C.), 313. 1868.

11.—The act of congress of March 3, 1873, confers original jurisdiction on the proper circuit court of the United States of cases of *mandamus* to compel the Union Pacific R. R. Co. to operate its road according to law. *United States ex rel. v. Union Pacific R. R. Co.*, 2 Dillon (U. S. C. C.), 527. 1873.

12. **Governor of a state.** Under an application for a *mandamus* to the governor, requiring him to issue the bonds of the state to a railroad company under a law alleged by him to have been passed by the general assembly over his veto without the observance of the forms prescribed by the constitution, a majority of the court concurred in sustaining juris-

diction of the application, and passing upon the validity of the law, reserving the question of power to *mandamus* the governor for the final hearing upon the return to a conditional writ. *Pacific R. R. Co. v. The Governor*, 23 Mo., 353. 1856.

13. **Highway.** Supervisors of a township may apply for a writ of *mandamus* commanding a railroad company to make a road for public accommodation, required by its charter. *Whitemarsh Tp. v. Philadelphia, Germantown, etc., R. R. Co.*, 8 Watts & Sergeant (Penn.), 365. 1845.

14. **Injunction.** The court will not, by *mandamus*, compel a party to do what by a subsisting decree of injunction he is prohibited from doing, although the party seeking the remedy by *mandamus* is not a party to the decree of injunction. *Ohio and Indiana R. R. Co. v. Com'rs of Wyandot County*, 7 Ohio St., 278. 1857.

15. **Judgments.** After a return of an execution on a judgment in the circuit court against a municipal corporation for interest on railroad bonds, issued under a state law in force prior to the issue of the bonds, and which made the levy of a tax obligatory on the county, a *mandamus* from the circuit court will lie against the county officers to levy a tax, even although prior to the application for the *mandamus*, a state court have perpetually enjoined the same officers from making such levy; the *mandamus*, when so issued, being regarded as a writ necessary to the jurisdiction of the circuit court which had previously attached, and to enforce its judgment; and the state court therefore not being regarded as in prior possession of the case. *Riggs v. Johnson County*, 6 Wallace, 166, 1867; *Weber v. Lee County*, ib., 210; *United States v. Council of Keokuk*, ib., 514; *Mayor v. Lord*, 9 Wallace, 409, 1869; *Supervisors v. Durant*, ib., 736.

16.—The limit of taxation one per cent. in the charter does not apply to taxes levied to pay such judgments. *Butz v. City of Muscatine*, 8 Wallace, 575. 1869.

17.—A bill in equity is not the proper remedy. *Walkley v. City of Muscatine*, 6 Wallace, 481. 1867.

18.—Where a creditor has a judgment at law against a city on city bonds, the city cannot, in defense to the application for the writ, set up that the bonds were not authorized by a

Land Grants — Record Entry.

requisite popular vote. *Mayor v. Lord*, 9 Wallace, 409. 1869.

19. — On application by a creditor for *mandamus* against county officers to levy a tax to pay a judgment, the defendants cannot impeach the judgment by setting up that interest was improperly given in it. The judgment cannot be impeached collaterally. *Supervisors v. United States ex rel.*, 4 Wallace, 435. 1866.

20. — The Illinois statute, providing that when a judgment is rendered against a county, the supervisors shall draw a warrant therefor, "which shall be paid as other debts," cannot be taken advantage of on error, in case of an application for a *mandamus* to levy a tax to pay a judgment, where such warrant was applied for and refused, and where there were no funds in the county treasury wherewith to pay the judgments. *Ib.*

21. Land grants. *Mandamus* against the commissioner of the land office is the proper remedy to enforce the issuance of certificates for lands to which a railway company has become entitled under the laws of Texas. *Houston and Great Northern R. R. Co. v. Commissioner of Land Office*, 36 Tex., 332. 1871.

22. Ministerial duty. Where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to perform that act, he may be compelled to respond in damages for his neglect. His mistaken idea of duty will not excuse him. *Amy v. The Supervisors*, 11 Wallace, 136, 1870; *Raleigh and Augusta R. R. Co. v. Jenkins*, 68 N. C., 502, 1873.

23. Municipal corporations. A *mandamus*, directed to the mayor and aldermen of a city, is rightly enough directed, if it appears that they together constitute the city government, even although the charter provides that the city shall sue or be sued in its corporate name. *Mayor v. Lord*, 9 Wallace, 409. 1869.

24. — A *mandamus* will not lie to compel the county commissioners, or the mayor and aldermen of the city of Boston, to revise their decision upon the merits of the claim of an owner of land for damages sustained by the construction of a railroad. *Smith v. Mayor, etc., of Boston*, 1 Gray (Mass.), 72. 1854.

25. — A writ of *mandamus* will be issued to compel a state treasurer to return to a municipality bonds illegally voted in aid of a railway. *Bay City v. State Treasurer*, 23 Mich., 499. 1871.

26. — But such writ will issue without costs, where there is nothing to indicate that the treasurer is not acting in good faith. *Ib.*

27. — *Mandamus* is the proper remedy in such cases. It would violate public policy to allow a sheriff or constable, under color of legal process, to intermeddle with public files. *La Grange v. Same*, 24 ib., 468. 1872.

28. Notice. After notice of intention to make application for a writ of *mandamus*, ten days' service of the writ is sufficient. *People ex rel. v. Warsaw and Rockford R. R. Co.*, 19 Ill., 405. 1858.

29. Pending of equity suit. The writ of *mandamus* cannot properly be granted to a party who has previously, for the same cause of complaint, instituted proceedings in equity, under which full, complete and specific relief may be afforded him. *Hardcastle v. Maryland and Delaware R. R. Co.*, 32 Md., 32. 1869.

30. Practice. Practice in proceedings for a *mandamus* considered. *People ex rel. v. Ohio Grove Township*, 51 Ill., 191. 1869.

31. — On motion to discharge a rule to show cause why a peremptory *mandamus* should not issue, the court cannot look into any facts outside of the record annexed to the application for such rule. *State ex rel. v. Board of Supervisors of Sheboygan County*, 20 Wis., 104. 1865.

32. — *Mandamus* cases, at a term subsequent to the commencement of proceedings, are calendar cases, to which the rules requiring notice of argument and printing of briefs apply. *Detroit and Howell R. R. Co. v. Salem*, 19 Mich., 11. 1869.

33. Quo warranto. The pendency of proceedings in *quo warranto* against the persons claiming to be a corporation, to try their right to exercise corporate powers, is no defense to an action for a writ of mandate brought by the corporation to compel a county to subscribe to its capital stock. *Oroville and Virginia R. R. Co. v. Plumas Co.*, 37 Cal., 354. 1869.

34. Record entry. An amendment by allowing *nunc pro tunc*, an entry, omitted at the proper time, by inadvertence, in the journal of the clerk, of the issue of a writ of peremptory *mandamus*; and an amendment of the marshal to his return, so as to show that he had exhibited the original writ to the party served, allowed as matters of common practice. *Supervisors v. Durant*, 9 Wallace, 736. 1869.

Return of Writ — Taxes.

35. Return of writ. A return to a *mandamus*, directing the defendant to levy a tax to pay a certain judgment, stated that a tax of one per cent. had been levied to pay the judgment and other claims. The return was held insufficient; the whole act of levy should have been set out in the return. *Benbow v. Iowa City*, 7 Wallace, 313. 1868.

36. St. Louis and Iron Mountain R. R. *Mandamus* will not lie to enforce the payment of money realized from the sale of the Iron Mt., etc., R. R. Co. by the state, the money having already been applied to the payment of interest on the state bonds. The statutes in relation to said railroad construed. *St. Louis and Iron Mountain R. R. Co. v. Clark*, 53 Mo., 214. 1873.

37. School fund loan. A petition by a railroad company against the treasurer to compel him to discharge warrants issued to it by the board of school commissioners for a loan out of the school fund (if maintainable), should show that the company was one of those entitled by law to apply for such loan. *Houston Tap etc. R. R. Co. v. Randolph*, 24 Tex., 317. 1859.

38. — The treasurer cannot, by a writ of *mandamus*, be compelled to pay out money from the treasury. *Ib.*

39. Subscription to stock by counties. *Mandamus* lies to compel a board of supervisors to issue bonds where they refuse to comply with the law requiring their issue. *California Northern R. R. Co. v. Butte Co.*, 18 Cal., 671. 1861.

40. — Where, under the act requiring the issue of bonds in aid of a railroad, it was provided, that no proceedings should be taken against the board until ten days after an "estimate of expenditures" has been presented by the company, and that during that time, any taxpayer has a right to institute proceedings to review the action of the board, it was held that a proceeding begun before the ten days had elapsed should be dismissed. *Ib.*

41. — A board of supervisors may be compelled by *mandamus* to subscribe for stock in a railway when they refuse to comply with the terms of a law requiring such subscription. *Napa Valley R. R. Co. v. Napa Co.*, 30 Cal., 435. 1866.

42. Supreme court. A *mandamus* cannot be issued by the supreme court. *Internation-*

al R. R. Co. v. The Comptroller, 36 Tex., 641. 1871.

43. — The supreme court may issue a *mandamus* upon an original application having no connection with any suit in an inferior court, or with any writ of error or appeal pending in the supreme court. *Townsend v. McIver*, 2 So. Car. (N. S.), 25. 1870.

44. The supreme court, at its session in either of its districts, may issue writs of *mandamus* to any part of the state. *Pennsylvania R. R. Co. v. Canal Commissioners*, 21 Penn. St., 9. 1852.

45. Taxes. The relator, being the owner of a judgment against a county of which the respondents were the officers, filed an information for a *mandamus*, in May, 1859, and at the June term of the district court of the same year, an alternative writ was issued, but no return was made to it. At the same term, a peremptory writ was ordered commanding the respondents to levy and collect a tax on the assessment of 1859 for the payment of the judgment. This writ was issued and returned in March, 1860, and was served on Feb. 24, 1860, on which day the respondents levied the tax required. In June, 1860, the treasurer made a further return that he had held the books ready to receive the taxes and they had not been paid, and that he could do nothing till January 15, 1861, when the tax would be delinquent. Held, that the tax should have been collected the same as if it had been levied in 1859, and that it became delinquent January 15, 1860. *State ex rel. v. County Judge of Johnson County*, 12 Ia., 237. 1861.

46. — The respondent cannot escape the performance of a duty because of the failure to do a precedent act, which if performed would have insured the performance of the whole duty, as commanded by the writ, at the time required by law. *Ib.*

47. To compel corporation to operate its chartered route. The Hartford and New Haven R. R. Co. was chartered to construct and operate a railway from Hartford to the navigable waters of New Haven harbor. A steamboat company was subsequently chartered to run in connection with it to New York, and the railroad and line of steamboats constituted a route that was of great convenience to the public. After the construction of the road and after its use in connection with

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the steamboat line for several years, the railway company constructed a track diverging from the original track at a point a mile and a half from its terminus at tide water, and running to the station of the New York and New Haven R. R. Co., in the city of New Haven, and discontinued the running of passenger trains to the original terminus at tide water. This change incommoded many travelers who wished to pass by the steamboat route. *Held*, that a *mandamus* ought to be issued to compel the railway company to run passenger trains to the original terminus. *State v. Hartford and New Haven R. R. Co.*, 29 Conn., 588. 1861.

48. — The railway company had discontinued the running of passenger trains over that part of the road, under a contract with the New York and New Haven R. R. Co., by which the latter was to prevent the extension of a certain railroad chartered by the legislature which would interfere with the Hartford and New Haven road, and the New York and New Haven Co. was to secure an advantage over the line of steamboats in competing for public travel. *Held*, that this contract was void, as against public policy. *Ib.*

49. **To enforce the construction of a railway.** A *mandamus* was refused where it was asked in order to compel the defendant to build its railroad to the village of La Crescent. *State ex rel. v. Southern Minnesota R. R. Co.*, 18 Minn., 40. 1871.

50. **Transfer of stock.** A railway company may be compelled by *mandamus* to transfer stock, where the stock has been sold. And it is no defense that the application for the writ is made by both the buyer and the seller. *Townsend v. McIver*, 2 So. Car. (N. S.), 25. 1870.

51. — A demand for the transfer, made by letter, is sufficient, where the officers of the company refuse to permit the transfer to be made. *Ib.*

52. — A notice to the company by other parties having a beneficial interest in the stock, that the right to make a transfer is questioned, will not justify the company in refusing to permit the transfer, after a sufficient time has elapsed to enable the parties giving the notice to institute legal proceedings to contest the right to make the transfer. *Ib.*

53. — And where the stock sought to be transferred is owned by a corporation whose

directors, being vested with the necessary power to that end, authorize the president to sell it, a contract of sale by him shows a sufficient legal and equitable title in the purchaser to entitle him to the writ of *mandamus* to compel the officers to transfer the stock to him. *Ib.*

54. — The public has such an interest in the management of a railway corporation to justify the issuance of a writ of *mandamus* to compel the transfer of stock. *Ib.*

MANDATE.

1. **Construction.** A mandate of the supreme court is to be construed reasonably, and not so as to work manifest injustice. *Milwaukee and Minnesota R. R. Co. v. Soutter*, 2 Wallace, 410. 1864.

MANUFACTURING COMPANIES.

1. **Directors.** One who is a stockholder and director of a manufacturing company, and overseer of part of its business, has not thereby authority to bind it to a contract to aid in the extension of a railroad. *New Haven and Northampton R. R. Co. v. Hayden*, 107 Mass., 525. 1871.

MARINE RAILWAY.

1. **Fixtures.** A marine railway, consisting of iron and wooden rails and sleepers, endless chain, gear, wheels and ship cradle, and constructed in the usual manner, is a fixture, and will pass by a levy upon the realty. *Strickland v. Parker*, 54 Me., 263. 1866.

MARKS.

1. **Shipping marks.** The knowledge of the arbitrary mark of a consignee, possessed by a former officer of the company, is not the knowledge of the company, in the absence of

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any usage, custom or course of business. And it seems that notice to the agent that certain marks indicate certain ownership, will not affect the company in any subsequent transaction, unless the agent actually remembers the previous notice. *Great Western R. R. Co. v. Wheeler*, 20 Mich., 419. 1870.

MARITIME LIEN.

See BRIDGES.

MARRIAGE.

1. **Evidence.** Marriage in Pennsylvania is a civil contract, and is provable in all civil actions by cohabitation, reputation, acknowledgement of the parties, reception of the family and any other circumstances from which it may be inferred. *Lehigh Valley R. R. Co. v. Hall*, 61 Penn. St., 361. 1869.

MASTER AND SERVANT.

See EMPLOYES; FIRES; INJURIES TO EMPLOYES; INJURIES TO PASSENGERS.

1. **Damages.** Employers are answerable for the damage occasioned by their servants, in the exercise of the functions in which they are employed. Civil Code, 2299. *Choppin v. New Orleans and Carrollton R. R. Co.*, 17 La. An., 19, 1865.

2. — Corporations are liable for damages occasioned by employes of their stewards. *Thompson v. New Orleans and Carrollton R. R. Co.*, 10 La. An., 403. 1855.

3. **Torts.** A master is liable in a civil action for the tortious act of his servant, committed in the course of the latter's employment, and it makes no difference that the act was done willfully and without the knowledge of the master, or even in disobedience to his orders. *Redding v. South Carolina R. R. Co.*, 3 So. Car., N. S., 1, 1871; but see *Winterson v. Eighth Avenue R. R. Co.*, 2 Hilton, (N. Y.), 389. 1859.

MASTER IN CHANCERY.

1. **The fees of a master in chancery allowed under the facts of a particular case.** *Erie R. R. Co. v. Heath*, 10 Blatchford, (U. S. C. C.), 214. 1872.

MECHANIC'S LIEN.

See CONSTRUCTION OF RAILWAYS.

1. **Assignment.** The lien given to a laborer by statute is personal and cannot be assigned. The statute giving such lien—construed. *Dano v. Mississippi, Ouachita and Red River R. R. Co.*, 27 Ark., 564. 1872.

2. **Bridges.** The law of mechanics' liens does not apply to railway bridges or tracks; such bridge is not a "building" within the meaning of the statute. *La Crosse and Milwaukee R. R. Co. v. Vanderpool*, 11 Wis., 119. 1860.

3. **Coal cars** are not subject of mechanics' liens under the act of 1845, ch. 176; the word "machine" used in that act applies only to fixed or stationary machinery, and does not extend to movable machines. *New England Car Spring Co. v. Baltimore and Ohio R. R. Co.*, 11 Md., 81. 1857.

4. **Entire road must be included in lien.** The doctrine, that a railroad is an entire thing, cannot be applied so as to cut off a mechanic's lien upon a depot building. The property to which such lien attaches does not become a part of the entirety for that purpose, until the lien is discharged. *Hill v. La Crosse and Milwaukee R. R. Co.*, 11 Wis., 214. 1860.

5. — Contractors for the construction of depot building contracted for materials of a person who furnished them, and then filed his lien against the building and brought suit thereon; but before he obtained judgment the contractors obtained judgment by mechanics' lien on the same building, for an amount including the subcontractor's judgment. *Held*, that these two judgments were not incompatible; the several judgments should remain, and the court should provide for the proper distribution of the funds arising from the sale of the property. *Id.*

6. — A lien for work or materials cannot be acquired on a portion of a railway, but

Laborers — Underletting.

must be filed on the entire road. The contractor who grades a section only of the road, cannot file a lien on that section alone. *Cox v. Western Pacific R. R. Co.*, 44 Cal., 18. 1872.

7. Laborers. A laborer employed in the construction of a railroad by a subcontractor is entitled to the benefit of the act of Feb. 24, 1853. *Peters v. St. Louis and Iron Mountain R. R. Co.*, 24 Mo., 586. 1857.

8. — It is not necessary that the thirty days' labor, for which a railroad company may be held liable under said act, should be performed upon thirty consecutive days. *Ib.*

9. — Demands against a railway company under said act were assigned to an assignee, in order that he might collect them either by suit in his own name or otherwise; for his services he was to receive twenty-five per cent. of the amount collected, and the remainder he was to pay over to the assignors; he was to pay all costs and charges that might accrue in the collection of the claims or in their attempted collection. *Held*, that the assignee might sue for such claims in his own name. *Ib.*

10. — Where work and labor are performed upon, or materials furnished for, the construction of bridges and culverts upon the line of a public railroad authorized by an act of the legislature, no lien upon said bridges and culverts is conferred upon the material man or laborer by the act of Feb. 24, 1853. *Dunn v. North Missouri R. R. Co.*, 24 Mo., 493. 1857.

11. — Said act applies to railway companies in existence at the time of its passage as well as those subsequently incorporated. *Peters v. St. Louis and Iron Mountain R. R. Co.*, 23 Mo., 107. 1856.

12. Materials. A party furnishing material under a contract with the president of a railway company is an original contractor, and as such, entitled to a mechanic's lien. *Hearne v. Ohllicotho and Brunswick R. R. Co.*, 53 Mo., 324. 1873.

13. Mines. A railway constructed in the slope of a mine, by a lessee, is not an improvement or fixture to which a mechanic's lien will attach under the act of 1858. *Esterley's Appeal*, 54 Penn. St., 192. 1867.

14. Record. Where a party claims a privilege for materials furnished which exceeds \$500 in amount, to maintain his privilege, he

must show that his claim was duly recorded. Civil Code, Art. 3239. *State v. Mexican Gulf R. R. Co.*, 5 La. An., 333. 1850.

15. Street railways. A stable built by a street railway company is liable to a mechanic's lien. *McIlwain v. Hestonville and Mantua R. R. Co.*, 5 Philadelphia Rep. (Penn.), 13. 1862.

16. Subcontractors. Where a claim for a lien is filed by a subcontractor or a person who has furnished materials for a building, it is a proper practice to make the contractor, as well as the owner of the building, a defendant in the suit, so that the court may adjust all the equities between the parties. *Carney v. La Crosse and Milwaukee R. R. Co.*, 15 Wis., 503. 1862.

17. — But if the contractor is a necessary party in such case, his omission must be objected to by demurrer on answer; otherwise the objection is waived. *Ib.*

18. — A party who since the enactment of the mechanic's lien law, applicable solely to the county of Onondaga (Laws of 1864, ch. 366), and the act amending the same (Laws of 1866, ch. 788), furnishes materials, and performs labor, upon a building, in that county, for a subcontractor, comes within the clear object and intent of those acts. *Lumbard v. Syracuse, Binghamton and New York R. R. Co.*, 64 Barbour (N. Y.), 609. 1873.

19. Successive lien. Neither a contractor nor subcontractor can, from time to time, as the work progresses, file successive liens for work done on an entire contract. In such case, but one lien can be acquired. *Cox v. Western Pacific R. R. Co.*, 44 Cal., 18. 1872.

20. Underletting. While the act of 1852, securing to mechanics a lien on land and buildings, was in force, the defendant entered into a contract, which, among other things, provided for the erection of a passenger depot at the terminus of the defendant's road, and also provided that the contractor should not underlet any of the work except with the written assent of the defendant's engineer, upon the written application of the contractor therefor; afterward the contractor entered into certain subcontracts, in pursuance of which the subcontractor erected the building specified in the original contract, filed a lien for the balance due him for work upon such depot and assigned his claim to the plaintiffs. On a bill in equity to enforce such lien, it ap-

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peared that the engineer of the defendant drew the specifications for such passenger depot, delivered them to the subcontractor, superintended the building and gave directions to the subcontractor during the progress of the work. The defendant, by its directors, voted to advance to the contractor, to be paid to the subcontractor, certain amounts of money, and also paid him \$2,200, on an order from the original contractor for \$—— and requested the subcontractor to cause such station house to be insured, and to assign the policy of insurance to it. But such votes did not purport to assent to such subcontract, and there was no written assent of the defendant thereto, by its engineer or otherwise, nor was there any application to it for such assent. *Held*, that the lien claimed by the plaintiff was invalid, and that the bill ought to be dismissed. *Benedict v. Danbury and Norwalk R. R. Co.*, 24 Conn., 320. 1856.

MEDICAL SERVICES.

See INJURIES TO EMPLOYEES.

1. **Agency.** A physician attended, for several days, as his patient, a man who had been injured by an accident upon a railroad, and whilst this attendance was going on, the railroad company, by its agent, requested him to continue his attendance and the company would pay him for his services; *held*, that this did not amount to an original undertaking or promise, on the part of the company to pay for future services, unless the jury should believe they were rendered upon the credit of the company, and not upon that of the patient. *Northern Central R. R. Co. v. Prentiss*, 11 Md., 119. 1857.

2. **Contract.** Where a physician attends upon persons injured by a railway collision the liability of the railway company for such services must depend upon the contract. *Ellis v. Central Pacific R. R. Co.*, 5 Nev., 255. 1869.

3. **Employees.** When an employé has been disabled while in the service of a railroad company, and in the discharge of his hazardous duties, it is a sufficient consideration to support a promise to pay for the nursing and

medical attendance necessary to his cure. *Toledo, Wabash and Western R. R. Co. v. Rodrigues*, 47 Ill., 188. 1868.

4. — The general superintendent may, in the exercise of his powers as such, bind the company for the payment of such liabilities. *Id.*

5. — Station agents and conductors are not authorized, by virtue of their official positions, to employ a physician at the expense of the railroad to attend to one of its brakemen injured by its cars. *Tucker v. St. Louis, Kansas City and Northern R. R. Co.*, 54 Mo., 177. 1873.

MERCHANDISE.

See BAGGAGE; CARRIAGE OF MERCHANDISE.

MILLS.

See EMINENT DOMAIN; INJUNCTION; WATERCOURSES.

1. **A contract** for the conveyance for the right of way for a railroad, over lands upon which was an embankment forming a part of a mill dam, etc. — construed, and the respective rights of the parties determined. *Valentine v. Central R. R. Co.*, 5 Dutcher (N. J.), 60, 1860; *Central R. R. Co. v. Valentine*, *ib.*, 561, 1862.

2. **Injunction.** A bill for an injunction against a railway company to prevent it from cutting a certain channel that would injure complainant's water power and work an irreparable injury was dismissed, there being no allegation that the corporation was insolvent. *Chesapeake and Ohio R. R. Co. v. Bobbett*, 5 W. Va., 138. 1872.

MINES.

See EMINENT DOMAIN; MECHANIC'S LIEN.

MISJOINDER.

See PARTIES TO ACTIONS.

Power to Execute Mortgages.

MISNOMER.

1. **Appeal.** An objection to the misnomer of defendant cannot for the first time be made on appeal to the court of appeals. *Keech v. Baltimore and Washington R. R. Co.*, 17 Md., 32. 1860.

MISTAKE.

See RECORD.

MONEY.

See BAGGAGE; CARRIAGE OF MERCHANDISE.

MONOPOLIES.

See CHARTER; EMINENT DOMAIN; ELEVATORS; EXPRESS COMPANIES; GRANTS; RATES.

1. **Bill in equity to prevent.** In a suit in equity by citizens of New Hampshire against railroad corporations under the act of July 5, 1867, to prevent railroad monopolies, it is not necessary to allege or prove that the plaintiffs have any special interests or grievance to redress, beyond those which every citizen is supposed to have. *Currier v. Concord R. R. Co.*, 48 N. H., 321. 1869.

2. — In such a bill, the respondents are not bound to discover in their answers any matters that will expose them to penalties, and any provisions in the law of July 5, 1867, which require such discovery are in conflict with the constitution. *Ib.*

3. **Camden and Amboy R. R. Co.** The acts of the Camden and Atlantic and Raritan and Delaware Bay R. R. Companies, in carrying freight and passengers between the cities of New York and Philadelphia, were in violation of the chartered privileges of the Camden and Amboy R. R. Co., and an injunction was issued to restrain such acts in future. But it was held, that the grant to the Camden and Amboy R. R. Co. did not affect the rights of the former companies to do a local business

as carriers. *Delaware, etc., R. R. Co., v. Camden and Atlantic R. R. Co.*, 1 C. E. Green's Ch. (N. J.), 321, 1863; see also *Same v. Same*, 1 McCarter's Ch. (N. J.), 445, 1862; *Same v. Same*, 2 ib., 13, 1862.

MORTGAGE.

See CONSOLIDATION; CONSTITUTIONAL LAW; CONVEYANCE; COSTS; EMINENT DOMAIN; EQUITY OF REDEMPTION; EXECUTIONS; INCOME BONDS; INJUNCTIONS; MANDAMUS; PLEDGE; REDEMPTION; SET-OFF; SPECIFIC PERFORMANCE; WRIT OF ERROR.

- I. POWER TO EXECUTE MORTGAGES.
- II. FORM AND CONSTRUCTION.
- III. FUTURE ACQUISITIONS OF PROPERTY.
- IV. CHATTELS.
- V. ASSIGNMENT AND NEGOTIABILITY OF BONDS AND MORTGAGES.
- VI. COUPONS AND INTEREST.
- VII. RECORDS, NOTES AND PRIORITY.
- VIII. GUARANTY.
- IX. COLLATERAL SECURITY.
- X. FORECLOSURE.
- XI. SALES.
- XII. REDEMPTIONS.
- XIII. TRUSTEES.
- XIV. RECEIVER.
- XV. INJUNCTION.
- XVI. LEASE.
- XVII. GENERAL MATTERS.

I. POWER TO EXECUTE MORTGAGES.

1. **Androscoggin R. R. Co.** The statutes of 1860, ch. 450 and 475, authorizing the extension of the Androscoggin Railway, recognizes the extension and old road as separate and distinct roads for certain purposes. *Bath, City of, v. Miller*, 51 Me., 341. 1863.

2. — Under said statutes, the whole road cannot be mortgaged as a unit. *Ib.*

3. — Property purchased by the earnings of the whole road, after its completion, is not included in either of the mortgages authorized by the statutes. *Ib.*

4. **Bonds.** The bonds of a railway company are not rendered void in consequence of being secured by a mortgage, which the company may have had no authority to execute.

Power to Execute Mortgages.

Philadelphia and Sunbury R. R. Co. v. Lewis, 33 Penn. St., 33. 1859.

5. — The statutes of New York give every railway company the power to borrow money for completing, furnishing and operating its road; to issue bonds for any amount so borrowed, and to mortgage its property and franchises to secure such bonds, or for any debt contracted for the purposes aforementioned. *Thompson v. Erie R. R. Co.*, 42 Howard's Pr. (N. Y.), 68. 1871.

6. — Where such a corporation has issued a mortgage in trust "to consolidate its funded debt, obtain the money and material necessary for perfecting its line of railway, enlarging its capacities, and extending the facilities thereof," it has the power to issue its bonds for the amount and for the purposes expressed in the mortgage. *Ib.*

7. — A railroad company having by statute authority to borrow money may issue its bonds as evidence of such indebtedness. *Miller v. New York and Erie R. R. Co.*, 18 Howard's Pr. (N. Y.), 374, 1859; *Same v. Same*, 8 Abbott's Pr. (N. Y.), 431, 1859.

8. Charter. The power of a railway company to borrow money and mortgage its property is not limited by the usual clause contained in the charter of such a company, that shares shall not be assessed over \$100, and if more money is necessary it shall be raised by creating new shares. *Richards v. Merrimack and Connecticut River R. R. Co.*, 44 N. H., 127. 1862.

9. — Although by a provision in its charter a corporation is empowered to mortgage its effects, for a particular purpose, this will not be construed as abridging its general power to execute a mortgage for the security of creditors. *Allen v. Montgomery R. R. Co.*, 11 Ala., N. S., 437, 1847; *Mobile and Cedar Point R. R. Co. v. Talman*, 15 ib., 472, 1849.

10. Cincinnati, Logansport and Chicago R. R. Co. Proceedings were commenced to foreclose a mortgage executed by a railway company to a trustee, to secure the payment of certain bonds. The mortgage was conditioned that after default in the payment of the principal, or of any interest on the bonds, the trustee might lease the lands; or at his option, he might, and upon request of the holders of one-half of the bonds he should cause the lands to be sold at public auction. The char-

ter of the company contained no express grant of authority to acquire, hold, mortgage or dispose of real estate, and the lands included in this mortgage were not such as were needed or used in the operation of the road. The bonds were issued after the law of January 20, 1852 (1 R. S., § 2, p. 427), authorizing railway companies to receive lands in payment of subscriptions of stock, went into effect. *Held*, that a demand of the interest due upon the bonds by the holder thereof, at the place where they were payable, was sufficient, without any demand by the trustee. *Held*, also, that the power to mortgage, conferred by the act of 1851 (Local Laws, 1851, p. 43), had reference only to such lands and property as the company could lawfully acquire, and could not therefore have included such as were not necessary to the purposes of the road. *Held*, also, that a mortgage creating a lien in a manner, for a time, amount and purpose, not inconsistent with such statute, may be valid, as the power to mortgage is not inconsistent with the duty to sell. *Held*, also, that as the sale of the lands by the trustee without judicial proceedings, as provided for in the mortgage, is forbidden by statute, it was his duty to pursue the remedy provided by law for the foreclosure of mortgages. *Taber v. Cincinnati, Logansport and Chicago R. R. Co.*, 15 Ind., 459. 1860.

11. — A railway is not an immovable, when the soil on which it is laid belongs to another; and it is not in consequence susceptible of being mortgaged, unless authorized by a special act of the legislature. *State v. Mexican Gulf R. R. Co.*, 3 Robinson (La.), 513, 1843; *Commonwealth v. Smith*, 10 Allen (Mass.), 448, 1865.

12. — Corporations have the power by common law to issue bonds. But since St. 1854, ch. 286, railroad corporations in Massachusetts have no power to issue bonds for the payment of money, except for the purposes and in the mode therein authorized; and all bonds issued otherwise are void, and a mortgage to secure such bonds is also void. *Commonwealth v. Smith*, 10 Allen (Mass.), 448. 1865.

13. — Although a railroad company which has executed such mortgage does not seek to repudiate it, one who has taken a valid second mortgage which contains no covenants of warranty, but is not made expressly subject to the

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former mortgage, may take advantage of their invalidity. *Ib.*

14. **Delivery.** An act authorized a company, having power under the general railroad law of 1849, to execute a mortgage on its lands, franchises, etc. A mortgage executed to a trustee under the authority of the directors alone was valid. *Gettysburg R. R. Co. — McCurdy's Appeal*, 65 Penn. St., 290. 1870.

15. — The mortgage was duly executed, acknowledged and recorded, and the corporation treated it as existing; this was sufficient evidence of its delivery, although never in the manual possession of the trustee. *Ib.*

16. **Grand Junction R. R. Co.** Under special statutes of Massachusetts showing by reasonable implication the intention on the part of the legislature to authorize such a conveyance, a mortgage executed in 1852 by the Grand Junction R. R. Co. to the Eastern R. R. Co., of a portion of the railroad and franchise of the former corporation, to secure bonds to be issued by it and guaranteed by the latter corporation, was held to be valid. *East Boston Freight R. R. Co. v. Eastern R. R. Co.*, 13 Allen (Mass.), 422. 1866.

17. **Kentucky railways.** A mortgage, executed by a railway company to secure money borrowed for the construction of its road, is not opposed to the public policy of Kentucky. This is indicated by the general course of legislation there upon the subject. *Bardstown and Louisville R. R. Co. v. Metcalfe*, 4 Metcalfe (Ky.), 199. 1862.

18. — A railway company, authorized by its charter to borrow money necessary to complete the road, but not expressly authorized to make a mortgage upon its property or franchises to secure the bonds issued therefor, has an implied power to do so; though it cannot mortgage its corporate existence or any prerogative franchise conferred upon it. But the right to build and use a railroad is not a prerogative franchise. A purchaser under its mortgage would take the road, subject to the terms of the charter designed to protect the public, and would be bound thereby as fully as the corporation. *Ib.*

19. — An authority to mortgage a railroad and its property must design a transfer of the right to operate the road. *Ib.*

20. **New Orleans, etc., R. R. Co.** The authority conferred upon the N. O. & N. R. R.

Co., under act of 1837, to execute a mortgage to the state to secure a loan, does not apply to property acquired after the date of the mortgage. *State v. New Orleans and Nashville R. R. Co.*, 4 Robinson (La.), 231. 1843.

21. **Ratification.** A mortgage authorized the trustees, in case of default, to take possession and manage and control the mortgaged railway, and to apply the net proceeds to the payment of the mortgage. It was held, that the mortgage, having been ratified by statute, was valid. That this court had jurisdiction to decree a specific performance of the stipulation in the mortgage authorizing the trustees to take possession of the mortgaged property. *Shepley v. Atlantic and St. Lawrence R. R. Co. and Grand Trunk R. R. Co.*, 55 Me., 395. 1868.

22. — An act of the legislature authorizing the trustees under a railroad mortgage to sell the road, is a ratification of the mortgage, so far as the state and public are concerned. *Richards v. Merrimack and Connecticut River R. R. Co.*, 44 N. H., 127. 1862.

II. FORM AND CONSTRUCTION.

23. **Bonds.** Where a mortgage is given by a railway company to secure the payment of its bonds, a bond issued by the company, and a certificate indorsed thereon, stating that such bond is included in the mortgage, are all to be construed together, as parts and parcels of the same security. *Benjamin v. Elmira, Jefferson and Canandaigua R. R. Co.*, 49 Barbour (N. Y.), 441. 1867.

24. — Under a conveyance to M., to secure certain bonds and a certain contract, it was held, that the conveyance was a mortgage and not a deed of trust. That the bonds had priority over the contract. That one bondholder could maintain a bill in equity to enforce payment of the bonds, in his own name, but for the benefit of all the bondholders. *Mason v. York and Cumberland R. R. Co.*, 52 Me., 82, 1861. *Carroll v. Same*, ib.

25. **Charter.** A company was authorized to hold so much land, not above five acres in any one place, and improvements necessary for water stations, etc. The company purchased land which was not used for the road, and mortgaged all its property and franchises, with the right to maintain possession "according to the effect and meaning" of the acts

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of incorporation. The land purchased was not included in the mortgage. *Youngman v. Elmira and Williamsport R. R. Co.*, 65 Penn. St., 278. 1870.

26. Construction, etc. The mortgage of a "railroad with all its rights and privileges," is authorized by a resolution of its board of directors, which authorized a mortgage of "the road and its property, etc." As there was nothing to which the phrase "etc." could have been designated to apply, except the franchises, it must be regarded as having been used to embrace them. *Bardstown and Louisville R. R. Co. v. Metcalfe*, 4 Metcalfe (Ky.), 199. 1862.

27. Lands not used for railway purposes. A railroad company executed a mortgage to secure the payment of money borrowed to aid in its construction, by which it granted its railroad, with superstructure, track and all other appurtenances made or to be made, all rights in the land on which the road was constructed, all rights of way to be acquired, depots, engine houses, shops, and the parcels of ground on which the same should be constructed, all lands used for depot purposes and appurtenances, all embankments, bridges, fences and structures thereon, and all other appurtenances belonging thereto, and all franchises, privileges and rights of the company to and concerning the same. *Held*, that this mortgage did not, as against a subsequent mortgagee, create any lien on 285 acres of woodland afterwards acquired by the company, and situated seven miles from the road, although such land was purchased and used for the purpose of supplying said road with timber and fuel. *Dinsmore v. Racine and Mississippi R. R. Co.*, 12 Wis., 649. 1860.

28. Signature. Where a first mortgage, otherwise regular, was signed by the president of the company with his own name simply, but the mortgage recited his authority to make the same, it was *held*, that the conveyance was not the deed of the corporation; but that said transaction was to be treated as an equitable mortgage, and the trustees named in the subsequent mortgages having actual notice of the first mortgage, the bondholders of the second and third mortgages took their bonds subject to the lien of the first mortgage. *Miller v. Rutland and Washington R. R. Co.*, 36 Vt., 452. 1863.

III. FUTURE ACQUISITION OF PROPERTY.

29. Cincinnati and Marietta R. R. Co. The power of the Cincinnati and Marietta R. Co., under § 13 of the act of February 11, 1848, regulating railway companies, to borrow money on the security of its property and income, includes the authority to mortgage subsequently acquired property, and embraces every species of property, owned by the company, necessary to the operation of the road. *Ludlow v. Hurd*, 1 Disney (Ohio), 552. 1857.

30. Machinery. The first mortgage of the Vermont Central R. R. Co. and its appurtenances contained the following words: "And all other personal property belonging to said company, as the same now is in use by said company, or as the same may be hereafter changed or renewed by said company." *Held*, that these words did not embrace certain machinery for burnetizing ties and timber so as to render them more durable, which machinery was not in existence at the time of the mortgage and took the place of nothing that was therein specified, but was constructed by the company as a new experiment after the execution of the mortgage. *Brainerd v. Peck and Colby*, 34 Vt., 496. 1861.

31. Other liens. A mortgage by a railroad company covering all future acquired property, attaches only to such interest therein as the company acquires, subject to any liens under which it comes into the company's possession. *United States v. New Orleans R. R. Co.*, 12 Wallace, 362. 1870.

32. — If the company give a mortgage for the purchase money of a part of its road, at time of the purchase, such mortgage, whether registered or not, takes precedence of the general mortgage. *Ib.*

33. — This rule does not apply where the property purchased is annexed to a subject already covered by the general mortgage, and becomes a part thereof; as where iron rails are laid down and become a part of the railroad. *Ib.*

34. — Such a mortgage will hold the after-acquired property as against judgment creditors. *Pennock v. Coe*, 23 Howard, 117. 1859.

35. — A mortgage, conveying property that may be purchased after its execution, takes precedence of another mortgage subsequently

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executed, upon such after acquired property. *Morrill v. Noyes*, 56 Me., 458. 1863.

36. — Where possession in such a case is taken by the prior mortgagee, the holder of the second mortgage cannot maintain trover. His proper method to try the title is by a suit for possession. *Ib.*

37. — A railway company having executed such a mortgage, it was *held*, that the plaintiff, who afterwards sold to the company certain land for its roadbed, could not, as against the mortgage, set up a vendor's lien for purchase money; especially after the mortgage had been foreclosed and the road had passed into the hands of innocent purchasers. *Pierce v. Mil. and St. Paul R. R. Co.*, 24 Wis., 551. 1869.

38. — If a corporation, after the execution of a mortgage covering future acquisition of property, become owner of a cargo of railroad iron, subject to the lien of the United States for duties, the mortgage will attach to the iron as soon as it becomes a part of the property of the road, subject to the lien of the government; and if an agreement is made by which certain persons pay the duties and are to have a lien on the iron as security for the money advanced until the same is paid, and the iron has been delivered to the company, the claim of the persons advancing money under the agreement cannot be asserted as against the mortgage unless the trustees had notice of this agreement and gave their assent, express or implied, to the arrangement. *Pierce v. Emery*, 32 N. H., 485. 1856.

39. — Where it was agreed that such rails should be laid upon a certain portion of the track and that they should not become the property of the company until the payment of a specified price, but that until such payment, they should remain the property of plaintiffs; *held*, that plaintiffs were entitled to hold such rails as against subsequent mortgagees of the road who had notice of the plaintiffs' interest when they took their mortgage. *Haven v. Emery*, 33 ib., 66. 1856.

40. — Notice to the trustees under the mortgage would be sufficient to charge the bondholders with notice. *Ib.*

41. **Power to mortgage future acquisitions.** Future property can never be the subject of conventional mortgage. Civ. Code, 3276. *State v. Mexican Gulf R. R. Co.*, 3 Robinson (La.), 513. 1843.

42. A mortgage of real property, to be subsequently acquired, will operate as effectually as a lien thereon as one upon property owned at the time of its execution. *Seymour v. Canadaigua and Niagara Falls R. R. Co.*, 25 Barbour (N. Y.), 284, 1857; see *Same v. Same*, 14 Howard's Pr. (N. Y.), 531. 1857.

43. — A company mortgaged "all its road, property, rights, liberties, privileges, corporate franchises, income, tolls and receipts then held or thereafter to be acquired." *Held*, that the mortgage was a lien on engines, rolling stock, etc., in actual use by the company and required for the transaction of its business, whether owned at the date of the mortgage or afterwards acquired. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Woelpper*, 64 Penn. St., 366. 1870.

44. — One may grant the future accretions of any subject he owns at the time of the grant. *Ib.*

45. — Equity will treat a mortgage of property, real or personal, to be subsequently acquired, as a binding contract. *Ib.*

46. — At common law nothing can be mortgaged that does not belong to the mortgager at the time of the mortgage. But a mortgage executed by a railway company of all its rights, franchises, powers and privileges, with power to the trustees to sell, on breach of condition, all such rights, etc., for the same purposes and to the same extent that the corporation could use the same, will operate as a mortgage of subsequently acquired property. The mortgage being for the entire road, etc., subsequently acquired property becomes a part of the subject of the original mortgage by accession. *Pierce v. Emery*, 32 N. H., 485. 1856.

47. — A railroad company empowered to borrow money, and to execute "such securities, in amount and kind" as it might deem expedient, may execute a mortgage on all future acquired real or personal property. *Pierce v. Milwaukee and St. Paul R. R. Co.*, 24 Wis., 551, 1869; *Pennock v. Coe*, 23 Howard, 117, 1859; *Jessup v. Bridge*, 11 Ia., 572, 1861; *Dunham v. Isett*, 15 ib., 234, 1863.

48. — The C. P. and I. R. R. Co. was authorized to pledge "by mortgage or otherwise, the entire road, fixtures, and equipments, with all the appurtenances, income and resources thereof." *Held*, that the company could not mortgage the franchise to be a corporation,

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but could mortgage the franchise of the corporation to maintain a railway, and could also mortgage its real and personal property to be subsequently acquired. The right to exercise the power of condemning private property is not transferable, and cannot be conveyed in a mortgage. *Coe v. Columbus, Piqua and Ind. R. R. Co.*, 10 Ohio St., 372. 1859.

49. — But the existence of such mortgage on such subsequently acquired personal property will not exempt it from levy by other creditors of the company. *Ib.*; *Coe v. Peacock*, 14 ib., 187, 1863.

50. Repairs. Where a mortgage upon a railway, following the statute, contains apt language to that effect, it will cover future acquisitions of property. *Coopers and Clark v. Wolf*, 15 Ohio St., 523. 1864.

51. — Cast off articles, such as iron, etc., once forming a part of the road, will continue to be embraced in the mortgage, if they are required, under a judicious management of the road. *Ib.*

52. Unfinished road. A railway company mortgaged its "road, built and to be built" — a part was built at date of the mortgage — a contractor finished the road afterwards and held possession under a subsequent agreement that he should finish the road and retain possession until he was paid out of the earnings. *Held*, that the mortgage had precedence as against the claim of the contractor even as to that part built by him. *Dunham v. Cincinnati, Peru, etc., R. R. Co.*, 1 Wallace, 254. 1863.

53. Wood. A deed of trust, executed by a railway company to a trustee, to secure the payment of certain bonds, and giving certain powers to the trustee touching the operation of the road, in the granting clause of which the following words are used: "the road, railways, bridges, locomotives, engines, cars, depots, right of way and land, with all buildings, shops, tools and machinery then in use, owned by them, or which they might thereafter acquire, with the superstructure, rails, and other materials used thereon," must be construed to embrace wood provided for the use of the road from time to time. *Coe v. McBrown*, 22 Ind., 252. 1864.

IV. CHATTELS.

54. Affidavit. A mortgage of the personal property of a railroad company is not invalid,

if sworn to by the agents who executed it, because they did not sign the oath in behalf of the corporation. *Richards v. Merrimack and Connecticut River R. R. Co.*, 44 N. H., 127. 1862.

55. Construction of mortgage. A mortgage of the entire line of a railway, with all its tolls and revenue, covers not only the line of the road, but all the rolling stock and fixtures, whether movable or immovable, essential to the production of tolls and revenue. *State v. Northern Central R. R. Co.*, 18 Md., 193. 1861.

56. Execution. The personal property of a railroad company in the possession of a mortgagee, is not liable to be taken in execution for the general debts of the road. *Palmer v. Forbes*, 23 Ill., 301. 1860.

57. Possession. The mortgage of personal property of a railway company is valid without delivery of possession of the property to the mortgagee, as respects property necessary to maintain the business of the road. *Covey v. Pittsburgh, Fort Wayne and Chicago R. R. Co.*, 3 Phila. Rep. (Penn.), 173. 1858.

58. Redemption. The mortgagee of a chattel may, it seems, purchase at public sale and hold it for his own benefit, and free from any equity of redemption. *Olcott v. Tioga R. R. Co.*, 27 N. Y., 546, 1863; *Same v. Same*, 40 Barbour (N. Y.), 179, 1862.

59. What constitutes personal or real property. The rolling stock of a railroad is personal property, and a mortgage upon such property must be filed and recorded as a chattel mortgage. *Hoyle v. Plattsburgh and Montreal R. R. Co.*, 54 N. Y., 314. 1873.

60. — Actual notice of such mortgage would be sufficient to charge subsequent creditors and lienholders. *Benjamin v. Elmira, etc. R. R. Co.*, 54 N. Y., 675, 1873; *Bement v. Plattsburgh and Montreal R. R. Co.*, 47 Barbour (N. Y.), 104, 1866; *Same v. Same*, 51 ib., 45, 1868.

61. — Rolling stock of a railroad will not pass by a deed or mortgage of the railroad track or way, by metes and bounds, as parts or fixtures thereof, or as constructively annexed thereto. *Ib.*

62. — Such rolling stock will not pass by a mortgage of the railroad track or way, and a foreclosure and sale, unless the terms of the mortgage are such as to include or carry such rolling stock as personal property. *Ib.*

63. — A mortgage of a railroad, and the rolling stock on it, is not, so far as it relates

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to the rolling stock, within the purview or intent of the act of 1833 (Laws of 1833, ch. 279), requiring chattel mortgages to be filed in the town or city where the mortgagor, if a resident of this state, resides, and if not a resident, then in the town or city where the mortgaged property is, at the time of the execution of the mortgage. *Ib.*

64. — The fuel, oil, and property of that description, belonging to a railroad company and intended for daily consumption, is personal property. *Palmer v. Forbes*, 23 Ill., 301. 1860.

65. — The rolling stock and material for repairs of the track, designed to be attached to the realty, is real estate. *Ib.*

66. — As between mortgages and judgment creditors of the mortgagors, the rolling stock of a railroad company — such as locomotive engines, passenger, baggage and freight cars, hand cars, snow plows, etc. — are to be deemed fixtures, and will pass under a mortgage of the track, and the lands occupied by the company. *Farmers' Loan and Trust Co. v. Hendrickson*, 25 Barbour (N. Y.), 484. 1857. Directly the contrary doctrine is held and this case overruled in *Stevens v. Buffalo and New York R. R. Co.*, 31 ib., 590, 1858; *Beardsley v. Ontario Bank*, 31 ib., 619, 1859.

67. — A railway tank house, locomotive and cars, are presumed to be annexed to the realty, and in fact are a part of it, and are not liable to be sold by a constable on an execution from a justice of the peace. *Titus v. Genheimer*, 27 Ill., 462. 1861.

V. ASSIGNMENT AND NEGOTIABILITY OF BONDS AND MORTGAGES.

68. Bonds. The bonds of a railroad company are not, *it seems*, exactly governed by the law merchant. But they will pass by delivery, like bank notes, so as to vest a complete title in the *bona fide* possessor; and they are entitled to all the privileges of commercial paper. *Junction R. R. Co. v. Clineay*, 13 Ind., 161. 1859.

69. — It is no defense to an action on the bonds of a railway company, that the defendant's books do not show that any value had been received for them, and that the bonds had been delivered to the president, who had made no return of the proceeds. The bonds

being in form to pass by delivery, a *bona fide* purchaser had nothing to do with the application of the money paid for them. *Philadelphia and Sunbury R. R. Co. v. Lewis*, 33 Penn. St., 33. 1859.

70. — One who purchases railroad bonds in the open market, supposing them to be valid, and having no notice to the contrary, will be deemed a *bona fide* holder. *Galveston R. R. Co. v. Cowdrey*, 11 Wallace, 459. 1870.

71. — It is no defense to such bonds that the mortgage given to secure the same was executed out of the state. *Ib.*

72. Note and mortgage. In an action on a note and mortgage of land made to a railroad company, and transferred to plaintiff with the company's bond, in a form which constituted an indorsement of the note within the law merchant, parol evidence that the company, in making the transfer, intended it to have a different effect, is inadmissible. *Callanan v. Judd*, 23 Wis., 343. 1868.

73. — An instrument assigning a note and mortgage issued by the president and secretary of a railroad company, purporting to be by order of the board of directors, is *prima facie* evidence of the power of such officers to transfer the note and mortgage. *City Bank of Kenosha v. McClellan*, 21 Wis., 112. 1866.

74. — The transfer of a note and mortgage, attached to a negotiable bond of a railway company, which recites that said note and mortgage are transferred as security for such bond, and are transferable only in connection with it, is an *indorsement* within the meaning of the law merchant. *Murphy v. Dunning*, 30 Wis., 296, 1872; *Crosby v. Roub*, 16 ib., 616; *Banger v. Flint*, 25 ib., 544, 1870.

VI. COUPONS AND INTEREST.

(See subdivision X, *post*, 533.)

75. Assignment. Without some statutory provision, no action can be maintained in the name of the assignee, upon interest coupons, which contain no negotiable words. *Jackson v. York and Cumberland R. R. Co.*, 48 Me., 147. 1858.

76. Contract for debt to mature on failure to pay interest. A corporation issued bonds payable at a distant date with interest coupons payable semi-annually, and agreed that upon three successive defaults in pay-

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ment of interest, the principal should become due. The bonds were secured by a mortgage in which it was provided that the trustees in it should sell the mortgaged property at the request of the holders of \$100,000 in the bonds. *Held*, that this provision in the mortgage was no defense to a suit on the bonds after a breach of their condition. *Philadelphia and Baltimore Central R. R. Co. v. Johnson*, 54 Penn. St., 127. 1867.

77. — The bond was the principal debt, the mortgage the incidental security. *Ib.*

78. — Where the mortgage of a railroad contained a stipulation that the principal should become due in case the interest on the bonds should remain unpaid for four months, and no such provision appeared in the bonds, and the bonds did not refer to the mortgage, it was *held*, that the trustees of the mortgage alone could sue upon such condition, and that the bondholders could not recover the principal of the bonds, although an indorsement referring to such condition had been placed upon the bonds by the trustees and signed by them. *Mallory v. West Shore Hudson River R. R. Co.*, 3 Jones & Spencer (N. Y.), 174. 1873.

79. — A resolution of the board of directors, authorizing the president to mortgage the road, but not indicating any conditions beyond saying that it was to secure bonds "running fifteen years with semi-annual interest," did not authorize him to make any covenants *unusual* in such mortgages, and did not authorize him to insert a stipulation that the principal sum should become due at the option of the holder on default of payment of the interest. *Jesup v. City Bank of Racine*, 14 Wis., 331. 1861.

80. — Such bonds were held valid, except as to the clause inserted without authority. *Ib.*

81. — Such bonds would have been valid as to all their conditions if they had been subsequently ratified by the board. *Ib.*

82. Demand. Where the company has no money at the place at which its coupons are to be presented for payment, interest is payable on the coupons after maturity without presentation. *North Pennsylvania R. R. Co. v. Adams*, 54 Penn. St., 94. 1867.

83. In blank. A coupon, having no payee designated therein, is not a promissory note,

nor negotiable in law. *Wright v. Ohio and Mississippi R. R. Co.*, 1 Disney (Ohio), 465. 1857.

84. — Where a deed of trust provided that the payment of certain bonds and interest should be secured to the holders thereof, and that the holders of the bonds should have the first lien on the road, and the bonds should be payable to bearer, with interest coupons attached in which a payee was not mentioned, it was *held* that the bondholder might enforce his lien on behalf of his own interest in the bonds and interest coupons, or on behalf of any person to whom he had transferred certain of his interest coupons. *Wright v. Ohio and Mississippi R. R. Co.*, 1 Disney (Ohio), 465. 1857.

85. Lien. To acquire, as against all mortgages and incumbrances, a lien by statute on the *corpus* of a railroad, in virtue of credit advanced, it is necessary that the statute express in terms not doubtful the intention to give a lien. *Cincinnati City v. Morgan*, 3 Wallace, 275. 1865.

86. Coupons. The same statute of limitations applies to a coupon that applies to the bond. *Lexington v. Butler*, 14 Wallace, 282. 1871. See *ante*, page 508.

87. Payable at a particular place. The coupons being payable at a particular place, it is necessary to a complete defense to allege that the company was ready at that place to pay, but they had never been presented. *Philadelphia and Baltimore Central R. R. Co. v. Johnson*, 54 Penn. St., 127. 1867.

88. — Where there is no allegation of a readiness to pay, a want of demand is no defense. *Ib.*

89. Pleadings. Bonds being specialties, the remedy for breaches thereof is by an action of debt or covenant broken. *Jackson v. York and Cumberland R. R. Co.*, 48 Maine, 147. 1858.

90. Rates of interest. A railway company, by legislative authority, issued bonds payable at a future time, with interest payable semi-annually, at the rate of seven per cent. The bonds became due and were not paid. *Held*, that the damages to which the holders were entitled for the detention of the principal after it became due, were to be estimated at the contract rate of seven per cent., and

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not at the legal rate of interest, six per cent. *Beckwith v. Hartford, Providence and Fishkill R. R. Co.*, 29 Conn., 268. 1860.

91. Release. Where the liability upon coupons results solely from, and is embraced in, the liability for the bonds of which they were a part when issued, a release of the bonds includes the liability for the coupons. *State v. North La. and Texas R. R. Co.*, 25 La. An., 65. 1873.

92. Severed coupons. The Vt. and Canada R. R. Co., leased its road to the Vt. Cent. R. R. Co., for a certain rent upon certain conditions, securing the payment thereof. The latter company then issued bonds to a large amount, with interest payable semi-annually, upon presentation of the coupons attached to the bonds, and secured the bonds by a mortgage to trustees of its franchises and property. Subsequently, the former company brought a bill in chancery against the latter company, the trustees and some of the bondholders, to secure its lien, claiming possession of both roads for the nonpayment of rent. The trustees were appointed receivers under directions to hold possession and operate both roads, and before final decree of the court, the former company and the great body of the first mortgage bondholders entered into an agreement compromising all matters of controversy. The arrangement was made binding by an act of the legislature, and a petition brought to the court of chancery, and a decree obtained in pursuance of the agreement, by consent of both railroad companies and the bondholders. Among other things, the decree provided that the trustees and receivers should pay for a certain extension of the Vt. and Canada road to an amount not exceeding \$250,000, and as often as \$70,000 should be so expended, said company should issue shares of its stock to said trustees and receivers at par, to be ratably distributed by them among said bondholders, in liquidation of their respective claims as such. After providing for other payments, including said rents, the decree provided for the application of the payment of the net income on the first mortgage bonds. The receivers having given notice that they were ready to pay $3\frac{1}{2}$ per cent. of the first mortgage bonds, which was the first \$70,000, in Vt. and Canada R. R. Co., stock mentioned in the decree, and having refused to pay the same to

the holders of the coupons which had been severed from the bonds by the bondholders and sold, said coupon holders petitioned the chancellor, who made the decree, to direct the receivers to make the payment to them under the decree, or if necessary to so modify the decree as to give them the dividend. *Held*, that the decree does not decide to which class this payment shall be made, but if it did, since no such question was presented to the chancellor, he may modify his decree on this petition. *Sewall v. Brainerd*, 33 Vt., 364. 1865.

93. — That the coupon holders have the right in equity, to have payment made to them in the order in which the coupons fall due, whether negotiable or not separate from the bonds. *Id.*

94. — On a final distribution of the proceeds of the whole of mortgaged property, a *pro rata* distribution would probably be the rule. *Id.*

95. — A coupon, payable to bearer, detached from a bond, and owned by one party, while the bond is owned by another, is still a lien under the mortgage given to secure the bond, and the holder is entitled to a *pro rata* distribution. *Miller v. Rutland and Washington R. R. Co.*, 40 Vt., 399. 1867.

96. — The coupons of railroad bonds are negotiable instruments, and may be sued on by the holders separate from the bonds; and interest from date of demand and refusal of payment may be recovered. *Beaver County v. Armstrong*, 44 Penn. St., 63. 1862.

97. — The owner of matured interest coupons may sue thereon, although he no longer owns the original bond. *City of Kenosha v. Lamson*, 9 Wallace, 477. 1869.

98. — The facts with relation to the bonds may properly be recited by way of inducement in the pleading, but such recital does not make it a suit upon the bond; it is still a suit upon the coupons. *Id.*

99. — A coupon in this form, detached from a mortgage bond of a railroad company, viz.: "Interest Warrant No. 12. On the first day of July, 1856, the X. R. R. Co. will pay to bearer \$30 for interest on its bond No. 342. J. S., Treasurer," is negotiable by delivery and may be enforced against the corporation by any holder in good faith. *Haven v. Grand Junction R. R. Co.*, 109 Mass., 88. 1871.

100. Special contract. B. advanced money

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and took up certain coupons on the faith of an agreement with the directors of the corporation that he should have the benefit of the mortgage. *Held*, that he should be protected, as no superior equity forbids it. *Miller v. Rutland and Washington R. R. Co.*, 40 Vt., 399. 1867.

101. Time of payment of interest. The general authority to issue bonds drawing a certain rate of interest per annum will authorize the agreement to pay interest on such bonds annually or semi-annually. *Coe v. Columbus, Piqua and Indiana R. R. Co.*, 10 Ohio St., 372. 1859.

102. Usury. The reservation of an illegal rate of interest, does not prevent a recovery of the sum actually loaned, with legal interest. *Philadelphia and Sunbury R. R. Co. v. Lewis*, 33 Penn. St., 33. 1859.

VII. RECORDS, NOTICE AND PRIORITY.

103. Attachments. A trust deed of the property of a railway company is paramount to a subsequent attachment, notwithstanding the fact that the company has been permitted to retain and use the property included in the deed. *Woodman v. York and Cumberland R. R. Co.*, 45 Me., 207. 1858.

104. Creditor. The consideration of the debt, for which a creditor recovered judgment, was for moneys advanced in payment of interest for a railway company, and for taxes assessed against it, and for rights of way. *Held*, these facts did not entitle the creditor to an equitable lien as against mortgages of the road. *Coe v. Columbus, Piqua and Indiana R. R. Co.*, 10 Ohio St., 372. 1859.

105. Decree. The issue of priority having been made and decided in a federal court, is conclusive upon the defendants therein in another suit in a state court. *Board of Supervisors of Iowa County v. Mineral Point R. R. Co.*, 24 Wis., 93. 1869.

106. — It seems that in a mortgage foreclosure suit, it is error to determine a claim of title hostile to the mortgagor, though litigated; but whether the judgment is void, quere? *Ib.*

107. — But priority of liens between two mortgages, by the same mortgagor, may be litigated in a foreclosure of one of them. *Ib.*

108. — A decree of foreclosure which ad-

judged that the defendants named, including one who held a mortgage of prior date, but which is distinctly charged in the bill to constitute a subordinate lien, should be barred and foreclosed, etc., *held*, to determine the question of priority thus raised, although it does not expressly state that such defendant's mortgage is subordinate to the one in suit. *Ib.*

109. — The holders of negotiable bonds are bound by a decree of foreclosure of another mortgage, in which the trustee of the mortgage securing their bonds is made a party. *Ib.*

110. Injunction. The trustees in a railway mortgage for the benefit of numerous and widely scattered bondholders secured thereby, have sufficient authority and interest to enable them to bring a bill in equity to enjoin all alleged illegal proceedings which will injure the value of the bonds and cast a cloud upon the security, or a bill to have a controverted priority of lien settled before an irredeemable sale is made under another mortgage, which is claimed to be prior to that made to the trustees. *Murdock v. Woodson, Governor*, 2 Dillon (U. S. C. C.), 188. 1873.

111. Possession. Where a vendor put his vendee into possession, and executed and placed in his hands a deed of conveyance for the land sold, with an understanding between them that the deed should not be considered as *delivered*, or become effectual, until the purchase money should be paid; and the vendee afterwards put the deed upon record, and, without paying the purchase money, mortgaged the land to *bona fide* mortgagees for value, and without notice, *held*, that such vendor is *estopped*, as between him and the mortgagees, from denying the delivery of the deed, or asserting any claim to the land. *Resor v. Ohio and Mississippi R. R. Co.*, 17 Ohio St., 139. 1866.

112. Receiver. Where a receiver was appointed for the benefit of the 3d, 4th and 5th mortgage bondholders of the defendant, and a motion was made on behalf of the 4th mortgage bondholders for an order directing the receiver to pay the interest coming due upon their bonds, out of the receipts of the road, to the exclusion of other indebtedness and against the consent of prior mortgagees, upon the ground that the bonds secured by the 4th mortgage were so drawn that the principal became due and payable if the interest is not

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paid, *held*, that the motion should be denied. *Brown v. New York and Erie R. R. Co.*, 22 Howard's Pr. (N. Y.), 451, 1859.

113. Recitals in mortgage. Where three mortgages were made on a railway, and the second in point of time was defective in only having one witness, but the third stipulated that it was subject to the first and second; *held*, that the second mortgage was prior to the third. *Coe v. Columbus, Piqua and Indiana R. R. Co.*, 10 Ohio St., 372. 1859.

114. — Where a mortgage was, in express terms, made junior to another mortgage, the bonds secured by the prior mortgage being negotiable, the junior mortgagees are estopped from questioning the validity of such bonds in the hands of innocent holders. *Bronson v. La Crosse R. R. Co.*, 2 Wallace, 283. 1863.

115. Record. A mortgage of land in Michigan conveys no title, either legal or equitable, to the mortgagee, but the title remains in the mortgagor until foreclosure and sale, and the mortgage is but a security in the nature of a specific lien for the debt or obligation to which it was collateral. *Ladue v. Detroit and Milwaukee R. R. Co.*, 13 Mich., 380. 1865.

116. — Where a mortgage is made to secure the mortgagee against a liability to be incurred in the future, at the option of the mortgagee, and the mortgagor conveys the land by deed, which is recorded before such liabilities are incurred, such deed is entitled to precedence. *Id.*

117. — The record is only notice to the purchaser to the extent of the liabilities incurred at the time of the purchase. *Id.*

118. — Where an act by which a mortgage is retained is passed in the office of a parish judge, acting *ex officio* as a notary public, in relation to property within his parish, no further registry is necessary to give such mortgage effect against third persons. *New Orleans and Carrollton R. R. Co. v. Crain*, 6 Robinson (La.), 61. 1843.

119. Sale. A railroad company in Texas made four successive mortgages in 1853, 1855, 1857 and 1859. The road and its appendages were sold under judgments in 1860; the purchasers operated the road and realized large receipts thereupon. In 1867, after the making of the first three mortgages, the legislature passed a law subjecting the road and char-

tered rights of all railroad companies to sale for their debts, either under mortgages, deeds of trust or judgments. *Held*: 1. That the law enured to the benefit of the three first mortgages, as well as to the mortgage made and judgment recovered thereafter. 2. The sale did not disturb the priority of the mortgages. 3. The purchasers were not liable for the profits under the circumstances of this case. 4. Although the money raised on the fourth mortgage principally built the road, that fact did not give it priority over the first three. 5. A railroad mortgage as against the company and its privies, although given before the road is built, attaches itself thereto as fast as it is constructed. 6. The principle, applicable to maritime cases, which gives priority of lien to the last creditor furnishing repairs and supplies for the conservation of the ship and voyage, does not apply to railroads. *Galveston R. R. Co. v. Cowdrey*, 11 Wallace, 459. 1870.

VIII. GUARANTY.

120. The Martinsville and Franklin R. R. Co. issued certain railroad bonds, payable to the order of the Madison and Indianapolis R. R. Co., for the purpose of borrowing money to complete the road of the former company. The bonds were delivered to the Madison Co., and were indorsed and guaranteed by that company, and sent to its agent at New York for sale. The agent, in a circular offering the bonds for sale, represented that they were owned by the Madison Co. Suit was brought by the holders of the bonds against the Madison and Indianapolis R. R. Co., upon its guaranty. *Held*, that it is within the corporate powers of the Madison and Indianapolis R. R. Co. to sell and guarantee bonds held by it in the usual course of business. *Held, also*, that as the contract of guaranty upon the bonds was, upon its face, such a contract as the company had power to make, the fact that the guaranty was in this case, made for a purpose not authorized by the charter (as for the accommodation of another road), could not affect the right of a *bona fide* holder, without notice, to recover upon it. *Madison and Indianapolis R. R. Co. v. Norwich Savings Society*, 24 Ind., 457. 1865.

Collateral Security — Foreclosure.

IX. COLLATERAL SECURITY.

121. A holder of bonds as collateral, may press a sale of the mortgage. *Gettysburg R. R. Co. — McCurdy's Appeal*, 65 Penn. St., 290. 1870.

122. Conversion. The pledge of a bond, and as incident thereto of collaterals, is not *per se* a conversion of the collaterals. If the principal bond and the collaterals are redeemed by the obligee of the bond, before maturity, and before suit brought, and are in the hands of the obligee ready to be restored upon the payment of the bond, the obligor has no cause for complaint. *Shelton v. French*, 33 Conn., 489. 1866.

123. Recovery on bonds pledged. Where the bonds of a company are pledged by it as collateral security for its own indebtedness, in a smaller amount than the par value of the bonds, and the pledgee still holds them, he is entitled to recover from the company no more than the amount secured by the pledge. *Jesup v. City Bank of Racine*, 14 Wis., 331. 1861.

X. FORECLOSURE.

(See subdivision VII, *ante*, 531.)

24. Appeal. A bidder at a marshal's sale made on foreclosure of a mortgage, in the district court, may by his bid, though not a party to the original suit, so far be made a party to the proceedings in the court below as to entitle him to appeal. *Blossom v. Milwaukee and Chicago R. R. Co.*, 1 Wallace, 655. 1863.

125. — An appeal lies from a decree of foreclosure. *Bronson v. Railroad Co.*, 2 Black, 524. 1862.

126. — Such right of the mortgagee to appeal cannot be suspended by cross bills between other parties, contesting matters with which the mortgagee has no concern. *Ib.*

127. — Where the mortgagees had commenced a foreclosure suit, and at the same time had obtained an order for a receiver, and an appeal was taken from the order appointing a receiver, and after the appeal, the plaintiffs discontinued the suit at their costs, and notified the defendants that the order appointing a receiver might be rescinded, and offered to pay all costs. *Held*, that even if the circuit court still retained jurisdiction of this cause so that

it might make such orders as were necessary to protect the rights of all the parties, still the plaintiffs could claim no further benefit from such suit, but must go out of court on such terms as the court might impose. *Spaulding v. Milwaukee and Horicon R. R. Co.*, 12 Wis., 607. 1860.

128. — That the appeal to the supreme court would fall upon the discontinuance in the circuit court, and an injunctive order would not be issued by the former court restraining certain persons from operating the road, who had obtained possession by virtue of certain proceedings in the federal courts. *Ib.*

129. Conflicting rights of bondholders. The rights of bondholders, as between themselves, where one claims to have advanced bonds to the other to assist in making a purchase of the property, will not be determined on a motion made by one of said bondholders. *Euston v. Pendleton Street R. R. Co.*, 2 Cincinnati Sup. Ct. Rep., 64. 1870.

130. Coupons. A bond issued by a railway company for the payment of \$1,000 at a future time, acknowledged an indebtedness in that amount for money borrowed, naming certain trustees, payable to bearer, with semi-annual interest thereon, payable at the office of the company on delivery of certain interest warrants annexed. An interest warrant annexed was as follows: "Interest warrant, for \$30, being half yearly interest on bond No. 30, of the N. L. W. & P. R. R. Co., payable on the 1st of February, 1856. J. D., Treasurer." A holder of the bond and warrant, having presented the latter when due at the time and place of payment, brought an action of debt on a general indebitatus count for the recovery of the interest represented by the warrant. *Held*, I. That the warrant did not import a promise, but was a mere acknowledgment of indebtedness for interest on the bond itself, and therefore could not be made the ground of an action. II. That if the plaintiff relied upon the bond itself, on which alone his right to the interest was founded, he should have declared specially upon it. III. That the omission to do so was not a mere defect of form, of which advantage could be taken only by special demurrer, but was a fatal variance, inasmuch as the declaration, as it stood, imported only a parol promise. *Crosby v. New London, Willimantic and Palmer R. R. Co.*, 26 Conn., 121. 1857.

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131. Decree. One of the defendants in a foreclosure decree, who had a residuary interest in the mortgage foreclosed after the complainant's demand should be satisfied, filed a bill, the object of which was to have the benefit of that decree, and also to foreclose the mortgage against the defendants, who were not, but should have been, parties to the first suit. *Held*, not objectionable; such bill is an original bill as to those who were not parties to the first bill, and a supplemental bill as to those who were. *Griggs v. Detroit and Milwaukee R. R. Co.*, 10 Mich., 117. 1862.

132. — It is no objection to such decree that it is in the ordinary form of foreclosure decrees — it appearing that payments have become due on the mortgage since the decree in the original suit, as well as on complainant's debts which the mortgage was assigned to secure. *Ib.*

133. Distribution. In distributing the proceeds of a sale of a railroad, the master is limited to distributing the fund to the parties entitled under the decree; he cannot go behind the decree. *McElrath v. Pittsburgh and Steubenville R. R. Co.*, 68 Penn. St., 37. 1871.

134. — In the distribution, it was competent for one to claim that he owned bonds entitled to a dividend, which were presented and claimed by another. *Ib.*

135. Exchange of bonds for stock. Where there had been a foreclosure and sale under a mortgage, the exceptions of bondholders who had exchanged their bonds for stock in a new association, were refused to be entertained. *Crawshaw v. Soutter et al.*, 6 Wallace, 739. 1867.

136. — And a bondholder who has not surrendered his bonds could not complain if the decree required the full payment of his bonds. *Ib.*

137. Federal courts. Where during the pendency of an action in this court, the trustee acting with certain bondholders, but without notice to or permission from this court, filed a bill in the state court to foreclose the same mortgages, and making no reference to the case in this court, upon which a receiver was appointed, foreclosure was ordered, and sale made by the sheriff, who under order of the court delivered the road to the purchasers; such an interference on the part of the state court with property at the time within the jurisdiction of this court was unauthorized.

Bill v. New Albany, etc., R. R. Co., 2 Bissell (U. S. C. C.), 390. 1870.

138. Fraud. A sale of a railroad under a foreclosure expedited by an arrangement between the mortgagees and the stockholders was held fraudulent as against other creditors, although the road was mortgaged above its value, and did not on an open sale bring enough to pay even the mortgage debts. *Railroad Co. v. Howard*, 7 Wallace, 392. 1868.

139. Installments. Whenever a debt is payable in installments, the failure to pay any one of them, will authorize a foreclosure and sale. *Goodman v. Cincinnati and Chicago R. R. Co.*, 2 Disney (Ohio), 176. 1858.

140. — Where a decree of foreclosure and sale for a sum due authorized the complainants, on petition, to have an order of sale in case of default as to any future installment, successive orders of sale upon such summary proceeding were held regular. *Fleming v. Soutter*, 6 Wallace, 747. 1867.

141. Interest. A mortgage provided that in case of sale or other proceedings to coerce payment of interest or principal, all the bonds secured by the mortgage and interest accrued thereon should be a lien in common therewith; and the interest accrued thereon should be equally due and payable, and entitled to a *pro rata* dividend of the proceeds of the sale; with this proviso, "in no case shall the principal of any bond be considered due until twenty years from the date thereof" — it was held error, after a sale, under the mortgage, within twenty years, to give precedence to the overdue interest warrants. The above clause was held only to exclude the bondholder from bringing an action for the principal before it became due by its terms. *Dunham v. Cincinnati, Peru, etc., R. R. Co.*, 1 Wallace, 254. 1863.

142. Interest unpaid. In an action brought to foreclose a mortgage upon a railway and its franchises, which authorized a sale upon failure to pay either the interest or principal, to pay the amount claimed and due, but contained no provision that the principal should become due upon failure to pay interest, and the principal is not due, the bondholders have a right to a sale for the interest due. If the property was divisible, a sale should be ordered of so much as might satisfy the amount due. If not susceptible of division, it must be sold or leased as an entirety.

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Bardstown and Louisville R. R. Co. v. Metcalfe, 4 Metcalfe (Ky.), 199. 1862.

143. — In such a case, where the property is worth much more than the debt and interest, it should be leased by public auction for the shortest term that will bring the amount due, and the accruing interest and principal as the same shall become due. If no one will take it for a term of years, then to be sold absolutely; the company to elect whether the property should be first offered for a term of years. *Ib.*

144. **Judgment.** If an absolute judgment of foreclosure of a mortgage given to trustees has been rendered, and the mortgagees thereupon bring a suit in equity for the purpose of having their title declared valid, and of obtaining authority to sell the premises for the benefit of the *cestuis que trust*, the mortgagors and their privies in estate cannot be heard to object that the mortgage was not properly sealed, or that on a true construction of its terms, an absolute judgment of foreclosure should not have been entered. *Haven v. Grand Junction R. R. Co.*, 12 Allen (Mass.), 337. 1866.

145. — **at law on bond.** A bondholder of a class, covered by a mortgage to secure the class of bonds issued, in case of insolvency of the obligors cannot, by getting a judgment at law, be permitted to sell a portion of the property devoted to the common security, as this would disturb the equitable distribution among the bondholders. *Pennock v. Coe*, 23 Howard, 117. 1859.

146. **Judgment lien.** Judgment liens against a corporation in Wisconsin, subsequent to the date of a mortgage by such corporation, are discharged by a foreclosure of the mortgage. *Bronson v. La Crosse R. R. Co.*, 2 Wallace, 283. 1864.

147. **Junior incumbrancers.** Persons made parties to a foreclosure suit as junior incumbrancers by judgment or mortgage, whose rights were already acquired, and existed at the commencement of the suit, are bound to set up their claims in that action. *Benjamin v. Elmira, Jefferson and Canandaigua R. R. Co.*, 49 Barbour (N. Y.), 441. 1867.

148. — If individuals are made parties defendants to a foreclosure suit as subsequent incumbrancers, that is sufficient, whatever may be the nature of their liens. It makes no difference if the plaintiff has made them par-

ties as judgment creditors, when they hold a chattel mortgage upon the property. *Ib.*

149. — A subsequent incumbrancer cannot contest the propriety of a judgment against the mortgagor who did not appeal, without showing that he was, or probably might be, aggrieved if it was allowed to stand. *Jesup v. City Bank of Racine*, 14 Wis., 331. 1861.

150. **Nonresident corporation.** A railroad company constructed part of its road through another state, and mortgaged all its rights, etc., in the whole road; the trustee in the mortgage being within the jurisdiction of the court, can be authorized and compelled to sell whatever interest of the company will pass under the terms of the mortgage. *McElrath v. Pittsburgh and Steubenville R. R. Co.*, 55 Penn. St., 189. 1867.

151. **Notice and sale.** The K. and P. R. R. Co., on the 15th of Oct., 1852, mortgaged its road, etc., to trustees for the benefit of the holders of a certain class of bonds, said bonds drawing interest payable semi-annually. The company having made default in the payment of interest, the trustees, upon due application of the holders of the bonds to an amount exceeding one-third of the amount of the mortgage, in accordance with the public laws of 1857, ch. 57, gave the public notice, and caused the same to be published and a copy of the printed notice recorded at the time and place, and in the manner prescribed in said statute, for the purpose of obtaining a foreclosure of the mortgage for the breach of its condition. In a bill to redeem, *held*, by a majority of the court that the mortgage was legally foreclosed. *Kennebec and Portland R. R. Co. v. Portland and Kennebec R. R. Co.*, 59 Me., 9. 1871.

152. **Parties — abatement.** A railway company, in pursuance of votes of its stockholders and directors, conveyed all its property and franchises to three trustees, their survivors and successors, in fee, by deed conditioned to be void upon payment of certain bonds of the corporation, and stipulating that the trustees and their successors might, upon any breach of condition, if they should see proper, take possession and apply the net proceeds to the purposes of the trust; or, upon nonpayment of interest or principal of the bonds for six months, and the written request of two-thirds in amount of the bondholders, sell the premises at auction, and apply the proceeds to

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the payment of the bonds; and that any vacancy occurring in the board of trustees should be immediately filled by the remaining trustees by appointment from among the bondholders. *Held*, that none of the bondholders need be made parties to a bill in equity brought by the trustees for a foreclosure of the mortgage. *Shaw v. Norfolk County R. R. Co.*, 5 Gray (Mass.), 162. 1855.

153. — *Held*, also, that such suit did not abate by the death of one of the trustees, but must be postponed until the vacancy was filled. *Id.*

154. — **bondholders.** A trustee, to whom a mortgage is made by a railway company for the benefit of bondholders, and who has no interest except as trustee, is not authorized by § 37 of the civil code to bring an action in his own name for its foreclosure; but where the mortgage makes it his duty to sue, he may do so, without making the bondholders parties, upon showing that they are numerous, and that it is impracticable to bring them before the court within a reasonable time. *Bardstown and Louisville R. R. Co. v. Metcalfe*, 4 Metcalfe (Ky.), 199. 1862.

155. — **decree.** A decree is not void as between the parties before the court, by reason of the absence of a "necessary party." *Board of Supervisors of Iowa County v. Mineral Point R. R. Co.*, 24 Wis., 93. 1869.

156. — **defect of.** A majority of the stockholders and creditors of a railway company which had several mortgages on its road, agreed to sell it for a price offered, and to divide the proceeds among all the stockholders and creditors in a way settled on by those agreeing to the plan. Other stockholders and creditors refusing to agree, in order to avoid their opposition, a sale was effected through the action of the majority, by an amicable foreclosure of mortgage, the trustees in one of the mortgages being complainants, and those in other mortgages, with the corporation whose road was intended to be sold, the defendants. The dissatisfied stockholders and bondholders then filed a bill against the purchaser and the railroad company whose road had been sold, but not making any of the trustees or any of the consenting stockholders parties, charging collusion in this sale, and praying that it might be set aside, a resale made, and the money arising from the sale be

applied primarily to their benefit. *Held*, that the bill was fatally defective for want of proper parties. *Ribon v. Railroad Cos.*, 16 Wallace, 446. 1872.

157. — **lis pendens.** Those becoming purchasers *pendente lite*, on a mortgage, are not necessary parties to a bill to foreclose. *Youngman v. Elmira and Williamsport R. R. Co.*, 65 Penn. St., 278. 1870.

158. — **mortgages on distinctly separate property.** Where a railway company, at different times, executes two mortgages on distinct portions of its road, to secure the debts of separate creditors, one mortgagee is not necessarily a party to a suit which the other may bring against the company to foreclose his mortgage. *Bronson v. Railroad Co.*, 2 Black, 524. 1862.

159. — If any portion of the company's property is claimed to be covered by both mortgages, that raises a question that cannot be determined in a foreclosure suit brought by one of them. *Id.*

160. — **stockholders.** Stockholders in a corporation are not necessary parties to the foreclosure of a mortgage, where their interest is fully represented both by the company and a committee chosen and appointed by the stockholders. *Railroad Co. v. Howard*, 7 Wallace, 392. 1868.

161. **Payment of proceeds to bondholders.** Upon foreclosure of a mortgage upon a railway, the holders of bonds should be required to produce them before payment of the proportions to which the holders of the bonds are entitled. An order requiring the bondholders to prove their claims, and state the amount paid for the bonds, is erroneous. *Coe v. Columbus, Piqua and Indiana R. R. Co.*, 10 Ohio St., 372. 1859.

162. **Pleadings.** The sufficiency of pleadings in a particular case — determined. *Mobile and Cedar Pt. R. R. Co. v. Talman*, 15 Ala., 472. 1849.

163. — **joinder.** After the repeal of the act authorizing it, the legal cause of action on a note or bond could not be properly joined with the equitable one to foreclose the mortgage, unless both causes of action affected all the parties, according to the provisions of the Code on that subject. *Jesup v. City Bank of Racine*, 14 Wis., 331. 1861.

164. — **multifarious.** Where two mort-

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gagees, one of whom has a mortgage on a part only, and the other on the whole, of the property named in the bill, join as complainants, the bill is not multifarious. *Mobile and Cedar Pt. R. R. Co. v. Talman*, 15 Ala., N. S., 472. 1849.

165. — name of mortgagee. In an action upon a note and mortgage running to the Kenosha and Rockford R. R. Co. one defense was that at the date of execution no such corporation existed; the act changing the name of the Kenosha and Beloit R. R. Co., to that named in the instruments not having yet been published although it had been passed. *Held*, that the complaint would have been good if it had averred that the instruments were made to the K. & B. Co. in the name of the K. & R. Co.; and the complaint should have been amended even after judgment to meet the proof. *City Bank of Kenosha v. McClellan*, 21 Wis., 112. 1866.

166. Possession. A trustee may waive his rights to take possession of the mortgaged property and file a bill to foreclose instead. *Williamson v. New Albany, etc., R. R. Co.*, 1 Bissell (U. S. C. C.), 198. 1857.

167. — A power of sale in a mortgage, to be exercised in case of breach of any of its conditions, is valid and binding on the parties, and is to be executed according to the terms of the appointment. *Bradley v. Chester Valley R. R. Co.*, 36 Penn. St., 141. 1860.

168. — If the mortgage create a trust and provide that the power of sale is to be executed by the trustee in certain contingencies, he may be controlled, restrained and directed by a court of equity, at the suit of a party standing in the relation of a *cestui que trust*; the rule for his guidance being derived from the instrument itself. *Ib.*

169. — But where there is no trust to be administered as the immediate object of the suit, or the contingency has not happened which was to bring it into exercise, courts of equity have no jurisdiction in this state, over mortgages; mortgagees are left to their common law and statutory remedies. *Ib.*

170. Priority. If two parties holding mortgages upon the same property, file a bill to foreclose, a subsequent assignee of the property has no right to object that the senior mortgagee yields his priority of lien to the

junior mortgagee. *Mobile and Cedar Pt. R. R. Co. v. Talman*, 15 Ala. N. S., 472. 1849.

171. Real and personal property. Under a foreclosure of a mortgage of a railway and all its real and personal property, it was *held* that the real and personal property should each be sold according to the requirements of the statute as to the sales of each kind of property. That the road and franchises should be sold as an indivisible tract, and should all be sold in the county where the action was brought. *Coe v. Columbus, Piqua and Indiana R. R. Co.*, 10 Ohio St., 372. 1859.

172. Receiver. A creditor having levied upon personal property of a railroad company which had been acquired subsequently to certain mortgages, the levy having been made after a suit had been commenced for the foreclosure of the same, and after the appointment of a receiver, it was *held*, that the creditor was not entitled to a preference, although one of the mortgages was defective for the want of a sufficient number of attesting witnesses. *Coe v. Columbus, Piqua and Indiana R. R. Co.*, 10 Ohio St., 372. 1859.

173. — The ground on which courts of equity intervene, either by injunction or by the appointment of a receiver, is the preservation of the property and securities, either or both, which constitute the subject matter of the litigation pending the controversy. *Cheever and Hart v. Rutland and Burlington R. R. Co.*, 39 Vt., 653. 1863. (Co. Ct. of Chancery.)

174. — The court will not, pending litigation, transfer the possession of mortgaged property to the mortgagee, but will at most only appoint a receiver for the purpose of preserving the property, and its rents and profits, from waste and diversion. *Ib.*

175. Review. There were a first and second mortgage on a railway. The trustee under the first filed a bill for foreclosure making the trustee under the second a party. A decree having been made, postponing the second, a bondholder under it alleging error should ask for a review or rehearing. *McElrath v. Pittsburgh and Steubenville R. R. Co.*, 68 Penn. St., 37. 1871.

176. — The bondholder is not as a creditor claiming a right to attack the decree of an opposing creditor for collusion or fraud between the plaintiff and defendant, but is affected by the decree against his own trustee. *Ib.*

Sales.

177. Scire facias. Under the statutes of Illinois, a *scire facias* does not lie to foreclose a mortgage not duly acknowledged. *Kenosha and Rockford R. R. Co. v. Sperry*, 3 Bissell (U. S. C. C.), 309. 1872.

178. Stockholder. Stockholders, who have been permitted to put in answers in the name of the corporation, cannot be regarded as answering for the corporation itself. The court has discretion to permit a stockholder to become a defendant, where he alleges that the directors fraudulently refuse to attend to the interests of the company. *Bronson v. La Crosse R. R. Co.*, 2 Wallace, 283. 1864.

179. The supreme court may, under the Act of April 11, 1862, decree a sale under a corporation mortgage. *Gettysburg R. R. Co. — McCurdy's Appeal*, 65 Penn. St., 290. 1870.

180. — The act is constitutional, falling within the express terms of art. 1, § 6 of the constitution. *Ib.*

181. — The act being passed after the date of the mortgage does not affect the contract, it only pertains to the remedy. *Ib.*

182. — jurisdiction. A railroad company executed a mortgage of all its real property, franchises, etc.; under a decree of the supreme court, the mortgaged property was sold and conveyed by the trustees in the mortgage to W. This was effectual to W. at least as an assignment of the mortgage. From that time, W. and his assignors stood in the shoes of the mortgagee. *Youngman v. Elmira and Williamsport R. R. Co.*, 65 Penn. St., 278. 1870.

183. — If a mortgagee proceed by *scire facias* in a court having no jurisdiction, a purchaser having paid his money under such proceedings would be entitled to be subrogated to the mortgage. *Ib.*

184. — The legislature, after the decree of sale in equity, passed a law to carry the decree into effect. *Held*, that this cured any defect in the jurisdiction of the court. *Ib.*

185. — No one could object to the decree and sale except the mortgagors and stockholders. *Ib.*

XI. SALES.

186. Adjournment. An adjournment of a marshal's sale was made for a short time, to enable the mortgagors to pay off the debt, which they did. Before the adjournment a

bid was made but the property was not sold. *Held*, that the bidder could not insist on having a confirmation of the sale to him; that the marshal had discretion to make the adjournment. *Blossom v. Milwaukee and Chicago R. R. Co.*, 3 Wallace, 197. 1865.

187. Appeal. A motion to set aside a sale made under a judgment cannot be made after the term, so as to make the motion perform the office of an appeal. *Hartshorn v. Milwaukee and St. Paul R. R. Co.*, 23 Wis., 692. 1868.

188. Appurtenant property. Town lots held by a railway company do not pass by a sheriff's sale, upon a mortgage of the road, "with its corporate privileges and appurtenances," unless directly appurtenant to the railroad and indispensably necessary to the enjoyment of its franchises. *Shamokin Valley R. R. Co. v. Livermore*, 47 Penn. St., 465. 1864.

189. — Where the question of such appurtenancy arose as to certain lots, held by a railway company ostensibly for a basin to connect with river navigation, and the jury were instructed, that if the lots were not appurtenant to the road and essential and indispensably necessary to the enjoyment of its franchises, and as such included in the mortgage, the plaintiffs, claiming adversely to the mortgage, were entitled to recover, referring the question of appurtenancy and necessity to the jury as matters of fact; the instruction was not error. *Ib.*

190. Commissioner. An act confirming or setting aside a sale of a commissioner in chancery, involving, as it often does, the exercise of a very delicate discretion and judgment, cannot be regarded as a mere control of the ministerial duties of an officer in the execution of final process. *Milwaukee R. R. Co. v. Soutter et al.*, 5 Wallace, 660. 1866.

191. — Such an act belonged to the circuit court and not to the district court. The case of *Bronson v. La Crosse R. R. Co.*, 1 Wallace, 405, approved. *Ib.*

192. Confirmation of invalid sale. A marshal's sale is not valid where made under the marshal's wrong interpretation of an order which the court did not in fact make. Such sale is not valid even after being confirmed by the court, the court's attention not having been directed to such mistake. *Minnesota Co. v. St. Paul Co.*, 2 Wallace, 609. 1864.

Redemption.

193. Franchise. The charter of the Marietta and Cincinnati R. R. Co., did not authorize it to mortgage or sell its corporate franchise to be a corporation; and a judicial sale upon mortgages executed by it, would not invest the purchasers with any corporate capacity whatever. *Atkinson v. Marietta and Cincinnati R. R. Co.*, 15 Ohio St., 21. 1864.

194. — A "special act" of the general assembly undertaking to give such an effect to the sale, and authorizing the purchasers to reorganize, create a new stock, and elect another board of directors, is, in substance and legal effect, an attempt to create a corporation and confer corporate powers by a special act; and is in conflict with the first and second sections of the thirteenth article of the constitution of the state. *Ib.*

195. Fraud. The legislature has no power to confirm a fraudulent sale of the mortgaged property of a corporation. *White Mountains R. R. Co. v. White Mountains N. H. R. R. Co.*, 50 N. H., 50. 1870.

196. — Where the notice of the sale of a railroad under a mortgage to secure bonds, set forth that the sum of \$2,000,000 principal and \$70,000 interest was due thereon, when, in fact, less than \$200,000 was outstanding in hands of *bona fide* holders, the remainder being in the hands of the directors, or under their control, such notice was held fraudulent and the sale void. *James et al. v. Railroad Co.*, 6 Wallace, 752. 1867.

197. Power of sale. A power inserted in a mortgage authorizing the mortgagee upon default of payment, to take possession of the railroad and other property connected therewith, and use and sell the same, must be exerted upon all the property mortgaged; and does not authorize the mortgagee to detach portions thereof, either from the possession of the company, or an officer succeeding to its rights, by a valid levy thereon. *Coe v. Peacock*, 14 Ohio St., 187. 1863.

198. Reorganization after sale. An act of assembly provided that if the railroad of the P., F. W. & C. Railroad Company should be sold under mortgages, etc., the purchaser should become a corporation. The property, etc., of the railroad company were sold; the purchasers, who were bondholders under the mortgage, were organized as the P., F. W. & C. Railway Company. *Held*, that they were

not liable, under the facts in the case, for the obligations of the Railroad Company. *Stewart's Appeal*, 72 Penn. St., 291. 1872.

199. — Where the property and franchises of a railroad company have been sold under a mortgage, and a new company organized in pursuance of ch. 121, laws of 1856, the new company is not liable for the debts of the old. *Smith v. Chicago and N. W. R. R. Co.*, 18 Wis., 17. 1864.

200. — There might be a valid agreement between a railroad company, the mortgagees in trust of its road and the bondholders, that after a sale under the mortgage, the company should be so reorganized that the stockholders and unsecured creditors of the old company should become stockholders in the new; and such agreement would to that extent modify the effect of the mortgage sale. *Ib.*

201. Surplus. Where the immovable property of a railway company is sold at the instance and suit of the owner of a mortgage bond, the interest coupons of which are due, the purchaser at sheriff's sale must apply the surplus to the payment *pro rata* of all the matured interest coupons of other bonds of the same grade as the one on which the seizure and sale was made which are presented and demanded; if he refuses, it is the duty of the sheriff to re-offer the property for sale the same day. *Branner v. Hardy*, 18 La. An., 537. *Gordon v. Vicksburg, Shreveport and Texas R. Co.*, *ib.*, 550. 1866.

202. — Where the debt is not all due, the sale must be for the whole debt, on such terms of credit as are granted by the original mortgage. *Ib.*

XII. REDEMPTION.

203. Road in two states. When a railway company, owning a road lying in two states, under charters from each of those states, mortgages the whole road, and its right to redeem in one state is sold on execution, the purchaser of the equity is entitled to redeem the whole road from the mortgage. *Wood v. Goodwin*, 49 Me., 260. 1861.

204. — The owner of the equity may pay the mortgagee the amount then due on the mortgage, the mortgagee being in possession, and thus prevent foreclosure, but he cannot obtain possession without securing the balance of the debt not yet due. *Ib.*

Trustees.

205. Special act. The vested right of a mortgagor to redeem, under the general law, cannot be destroyed or impaired by a special statute enacted that the mortgage has been foreclosed, or that it shall be foreclosed in case the debt be not paid within one year from the passage of the act. *Ashuelot R. R. Co. v. Elliot*, 52 N. H., 387. 1873.

XIII. TRUSTEES.

206. Compensation of trustees. If a mortgage of real estate, executed by a railroad company to trustees to secure the payment of certain bonds therein described, provides that in default of payment, the trustees may enter into and take possession of the premises, etc., and apply the earnings of the road to the payment of the principal and interest of said bonds, and that the trustees "shall be entitled to receive proper compensation for every labor or service performed in the discharge of said trust, in case they shall be compelled to take possession of said premises, or any part thereof, or to manage the same," the trustees, having taken possession for breach of condition, may, on a bill to redeem, be allowed any sum which is reasonable for their own services, and expenditures authorized by the mortgage, but not for counsel fees in suits between them and the mortgagors, or for insurance procured by them without the request of the mortgagors. *Boston and Worcester R. R. Co. v. Haven*, 8 Allen (Mass.), 359. 1864.

207. Constitutional law. The act of 1857, No. 16, so far as it provides for the appointment of trustees annually, in case a railroad is in the hands of trustees under a mortgage, is held to impair the obligations contained in the second mortgage of the Rutland and Burlington R. R. Co., in which deed the trusts are specified and the manner of perpetuating the same, and in this respect is repugnant to that provision in the constitution of the United States, which prohibits the legislature of a state from passing any law impairing the obligation of a contract. *Fletcher v. Rutland and Burlington R. R. Co.*, 39 Vt., 633. 1858. (Co. Ct. of chancery.)

208. Death of trustees. Where the trustees of a railway mortgage are dead, an action may be brought on the mortgage in the name of

one or more of the bondholders. *Galveston R. R. Co. v. Cowdrey*, 11 Wallace, 459. 1870.

209. — So likewise if there be several successive mortgages, the trustees of which are dead. *Ib.*

210. Operation of railway by trustees. The trustees of a mortgage, having taken possession of a railway, and having undertaken to operate the same are liable as common carriers. *Barter and Co. v. Wheeler*, 49 N. H., 9. 1869.

211. Qualifications of trustees. The title of the trustee in a mortgage given by a railway company to secure its bonds is not invalidated by the fact that he is an officer of the corporation. *Ellis v. Boston, Hartford and Erie R. R. Co.*, 107 Mass., 1. 1871.

212. Removal of trustee. A trustee under two railway mortgages, will not be removed from his trusteeship upon the application of a majority in interest of the bondholders under the first of such mortgages, on the ground that he declines to employ counsel for the foreclosure of the first mortgage, selected by such majority, and declines to elect to act as trustee only under one of the mortgages, and to resign his trusteeship under the other. *So held*, in a case where it was not clear, but that the action of the trustee was the result of sound judgment, and not against the interest of any bondholders. *Beadleston v. Knapp*, 13 Abbott's Pr., N. S. (N. Y.), 335. 1872.

213. Sale. The trustee cannot at a foreclosure sale become a purchaser of the trust property. *Racine and Mississippi R. R. Co. v. Farmers' Loan and Trust Co.*, 49 Ill., 331. 1868.

214. Vacancies. Where vacancies in the board of trustees, under a mortgage, are to be filled from the bondholders, the election of persons who have procured bonds for the purpose of qualifying themselves, will not be invalidated, if no fraud is intended. *Richards v. Merrimack and Connecticut River R. R. Co.*, 44 N. H., 127. 1862.

215. — A trustee does not cease to be chargeable, as such, because he has parted with the bonds required as a qualification. *Ib.*

216. — R. S. of 1857, ch. 51, § 51, and the nine following sections, and ch. 30, Acts of 1858, relative to "trustees of railroads," only apply to cases where the trust, the trustees, and the *cestui que trust* are all created by the

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same deed, and not to a case where a mortgage is made to an individual to secure him and his assignees who may subsequently become holders of bonds to be issued by him. *In re Bondholders of York and Cumberland R. R. Co.*, 50 Me., 553. 1861.

217.—And in case of such a mortgage, the bondholders cannot elect trustees in place of the original mortgagee. *Ib.*

218.—The A. and W. R. R. Co. made a deed on its property to secure certain bonds; and it provides that if the trustee should become incapable of acting, any court of record of A. county, upon the application of three-fifths of the holders of the bonds, upon notice to the president or any director of the company, may appoint another trustee. The trustees, president and directors went into the enemies' lines and remained there during the war. An order of the court of A. county, substituting another person as trustee, without notice, was without law, and null and void, and a sale by such substituted trustee, is utterly void. *Washington, Alexandria, etc., R. R. Co. v. Alexandria, etc., R. R. Co.*, 19 Grattan (Va.), 592. 1870.

XIV. RECEIVER.

(See subdivision X, *ante* 533.)

219. **Appointment.** The appointment of a receiver, in the foreclosure of a mortgage upon a railroad, is not a matter of course, but is in the discretion of the court. *Williamson v. New Albany, etc., R. R. Co.*, 1 Bissell (U. S. C. C.), 198. 1857.

220.—A railway ninety-five miles long, being a link in an important route, whose gross annual earnings are \$800,000, in good condition, is ample security for mortgage debts thereon, amounting to \$2,200,000; and a receiver of such road, appointed at the suit of a party on whose debt \$300,000 is offered to be paid, and who has a decree which provides for sale in case of a default of payment, as therein provided, will be discharged. *Howard v. La Crosse and Milwaukee R. R. Co.*, 1 Woolworth (U. S. C. C.), 49. 1864.

221. **Land in custody of receiver.** A company owning land and having power to mortgage gave a mortgage of all its estate and property, real and personal; the mortgage covered land whether it was necessary to the

enjoyment of its franchises or not. *Robinson v. Atlantic and Great Western R. R. Co.*, 66 Penn. St., 160. 1870.

222.—A receiver having been appointed, the land was in legal custody and could not be levied on. *Ib.*

223.—Whether the land should pass into the hands of a receiver could be determined only by the court that appointed him. *Ib.*

XV. INJUNCTION.

224. **Judgment creditors.** An injunction may be allowed to restrain the removal and sale on execution, of portions of the mortgaged property of a railway company, on the application of the mortgagees, when the whole of the property mortgaged is admitted to be inadequate security for the payment of the mortgage debts. *Lane v. Baughman and Sandusky, Dayton and Cincinnati R. R. Co.*, 17 Ohio St., 642. 1867.

225.—The remedy of the judgment creditor, in such case, is, in equity, to subject the interest of the mortgagor to the payment of his judgment; or, where the nature of his claim is such as to entitle him to have it paid out of the earnings of the company, by proceedings to appropriate so much thereof as may be necessary to the payment of the judgment. *Ib.*

226.—A railway company executed a mortgage for borrowed money upon its road and equipments. The loan was for a long period, but the interest was to be paid semi-annually. The corporation had, by the terms of the mortgage, the possession and use of the road until default in payment of interest. There had been no default, and a creditor recovered judgment and levied an execution upon a part of the equipments of the road. The mortgagee filed a petition to obtain a perpetual injunction, upon the ground that the use and possession of the road were indispensable to enable the corporation to raise money wherewith to pay the interest as it became due. *Held*, that such an averment did not show a sufficient ground for an injunction. *Coe v. Central Ohio R. R. Co.*, 10 Ohio St., 412. 1859.

XVI. LEASE.

227. **Improvements by lessee.** If the mortgagor of real estate leases the same for a

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term of years, and for a certain rent, to a third person, from whom he receives an advancement of money under an agreement that he will expend it in buildings and improvements upon the land, which is accordingly done, the lessee, after judgment has been rendered against him in a writ of entry brought by the mortgagee, cannot be allowed compensation for the buildings and improvements, although he had reason to believe that, under the terms of the mortgage, the mortgagor had a right to execute such a lease, which would be valid as against the mortgage. *Haven v. Boston and Worcester R. R. Co.*, 8 Allen (Mass.), 369. 1864.

228. Right of mortgagor to lease. Until entry by a mortgagee for condition broken, or until foreclosure, the mortgagor is the owner of the mortgaged estate, and may lease the same, or otherwise deal with it as owner. *Kennett v. Plummer*, 28 Mo., 142. 1859.

XVII. GENERAL MATTERS.

229. Attorney fees. Where a mortgage authorizes the payment of the expenses of the mortgagee, the costs and proper counsel fees may be paid out of the funds realized from the sale of the mortgaged property. *Bronson v. LaCrosse R. R. Co.*, 2 Wallace, 283. 1863.

230. Canal boats. A railway company mortgaged its engines, cars, etc., etc., "and all other personal property in any way belonging or appertaining to the railroad of said company." Under this description, canal boats, purchased with the funds of the corporation, and used and run by it in connection with the railroad, but beyond its terminus, are not included. *Parish v. Wheeler*, 22 N. Y., 494. 1860.

231. — Though the corporation exceeded its legal powers in the purchase of such boats, it cannot, nor can one claiming under it, set up such violation of duty to defeat the title of a mortgagee. *Ib.*

232. Compromise. Several of the different classes of the creditors of a corporation entered into a compromise agreement, the object of which was to wipe out all the debts and securities of the corporation, and to substitute therefor a third mortgage. *Held*, that a substantial departure from the terms of this agreement in carrying it out, absolved the signers thereof, and left them to stand upon their origi-

nal rights. *Miller v. Rutland and Washington R. R. Co.*, 40 Vt., 399. 1867.

233. Damages for right of way. Where a railway company executes a mortgage on its road and franchises, and afterwards occupies land for its uses, and damages are assessed, it has no interest in such land on which the mortgage can operate, and a sale under the mortgage would not convey the title nor extinguish the lien for the damages. *Western Pennsylvania R. R. Co. v. Johnston*, 59 Penn. St., 290. 1868.

234. — The land owner's title to damages is paramount to the lien of the mortgage. *Ib.*

235. Depot grounds. A railroad company mortgaged all its road, etc., and all parcels of land on which depots were or should be erected, together with all the franchises of the company. Afterwards, F. and G. purchased certain lands for the use of the company for depot grounds, and took a written contract of sale, and for a deed upon payment of the purchase money, and assigned the contract to the company, which took possession of the land and used it for depot purposes, and paid a part of the purchase money. *Held*, that the land was subject to the mortgage; that the mortgagee, having taken possession of the road to protect his lien, was entitled to a conveyance by the vendor to the railroad company on payment of the balance of the purchase money; that a deed having been deposited as an escrow, the mortgagee was entitled to have it delivered and recorded upon such payment. *Farmers' Loan and Trust Co. v. Fisher*, 17 Wis., 114. 1863.

236. Discount. The act of March 3, 1851, authorized the sale of railway bonds at a discount, and such authority having been given, the C. P. and I. R. R. Co. had the authority to exchange its bonds for iron rails, and such exchange did not invalidate the bonds or mortgage. *Coe v. Columbus, Piqua and Indiana R. R. Co.*, 10 Ohio St., 372. 1859.

237. — A mortgage of \$4,000,000 was given to trustees to secure bonds of like amount. Many of the bonds had been issued at a large discount, and it had been judicially decreed that the holders were entitled to no more than what had actually been given for them so that margin remained of the security. A party who took some of the bonds at 80 per cent., with an agreement that if the company should at any time sell bonds at a less rate, he should have as many bonds as would pay him the discount,

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estimating the bonds already given and those to be given at the lowest rate at which any had been sold, which was 40 per cent. — was *held*, not entitled to have his outstanding equity adjusted on a foreclosure of the mortgage and his demand attached to the mortgage; bonds to the whole extent of \$4,000,000 having been actually issued. *Vose v. Bronson*, 6 Wallace, 452. 1867.

238. Division of roads. A railway company may divide its line and rolling stock into divisions, and mortgage the same by separate divisions. *Minnesota Co. v. St. Paul Co.*, 2 Wallace, 609. 1864.

239. — But, in the absence of any specific apportionment in fact of the rolling stock between the separate divisions, the mortgages thereon took precedence in the order of their dates. *Same v. Same*, 6 ib., 742. 1867.

240. — Where a railway company mortgaged separately, and at different times, the two divisions of which its road consisted, for the purpose of raising money to complete the road, and neither of the mortgages contained any language purporting to convey materials acquired subsequently to its execution, any further than they became appurtenant to the road, or were not used in operating it: *Held*, that there was nothing in the general nature and object of the mortgages to give them a more enlarged meaning. *Farmers' Loan and Trust Co. v. The Commercial Bank of Racine*, 15 Wis., 424. 1862.

241. Escrow. Where a note and mortgage had been delivered to the agent of a railway company as an escrow, to be delivered on the fulfillment of certain parol conditions, and the possession was obtained by the company without the performance of the conditions, and without the consent of the agent or maker; and it appeared that the maker knew that the company had obtained possession of them, and knew that they were in the possession of plaintiff under a claim of ownership, and made no objection until after he had known of plaintiff's possession for two years. *Held*, that the defendant must be regarded as having assented to the delivery of the securities to the company. *Truman v. McCollum*, 20 Wis., 360. 1866.

242. Exchange of bonds. A railroad company having become insolvent, certain of the bondholders and other creditors agreed that

they would purchase the road, etc., and would organize a new company; that the new company should execute a first mortgage on the road to the amount of the then existing first mortgage on the old road to secure bonds of the new company; the bonds under the old mortgage to be exchanged for the new bonds. The subscribers to the agreement agreed to surrender their bonds whenever they should be required so to do, and to receive the new bonds in exchange. The plaintiff, a bondholder, signed this agreement, and received notice to surrender his bonds, but failed to do so until after the purchase of the road and the formation of the new company. *Held*, that not having complied with the terms of the contract, he had no right to claim any benefits under it, or to insist on the delivery of the new bonds. *Carpenter v. Catlin*, 44 Barbour (N. Y.), 75. 1865.

243. Future advances. A mortgage of a railroad to secure bonds to be issued to raise money to pay the debts of the corporation, is not invalid, as given to secure future advances. *Richards v. Merrimack and Connecticut R. R. Co.*, 44 N. H., 127. 1862.

244. — A mortgage made to secure a future loan does not take effect from the date of the registry, but only from the date, and for the amount of the loan. *Meeker v. Com'rs Clinton and Port Hudson R. R. Co.*, 2 La. An., 971. 1847.

245. Income. Where a mortgage does not in terms cover the income or earnings of a road, a subsequent deed of surrender to the trustee of the property named in the mortgage will not operate to convey the earnings of the road accrued prior to the deed of surrender. *Farmers' Loan and Trust Co. v. Carey*, 13 Wis., 110. 1860.

246. — By deed executed in the state of Pennsylvania, the Pittsburgh, Ft. Wayne & Chicago R. R. Co., mortgaged the entire works and effects of the company, including all its tolls, income, rents, issues and profits, and alienable franchises, to secure its entire debt, providing that if the interest or principal of its bonds should not be paid as they became due, then the trustees under said deed were to take possession, work the road, and apply the net income to the payment of the bonds, interest and principal; but that until default in the payment of the interest or principal of

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said bonds, the mortgagors should continue in the management of the granted premises. *Held*, that the mortgagors conveyed only the net income of the railroad, after payment of all expenses, while they remained in no default in paying the interest, and providing a sinking fund. *Parkhurst v. Northern Central R. R. Co.*, 19 Md., 472. 1862.

247. — Where a corporation had given a mortgage or trust deed of all its property, tolls, incomes, franchises, etc., to secure its bonds, its revenues so pledged are not liable to a garnishee process by its judgment creditors. *Galena and Chicago Union R. R. Co. v. Menzies*, 26 Ill., 121. 1861.

248. *Internal revenue.* A proviso in a mortgage, that the interest and debt should be paid "without any deduction, defalcation or abatement to be made of anything for or in respect of any taxes, charges or assessments whatsoever, does not prevent the company from retaining for the government, the five per cent. tax provided for in the 122d section of the Revenue Act of 1864. *Haight v. Railroad Co.*, 6 Wallace, 15. 1867. *Haight v. Pittsburgh, Ft. Wayne and Chicago R. R. Co.*, 1 Abbott (U. S. C. C.), 81. 1867.

249. *Intervention.* The purchaser of a part of a road including stock, machinery, franchises, etc., of the entire road, under a senior mortgage cannot intervene for the purpose of reducing the amount of the decree in a suit brought by a junior mortgagee against the company. *Bronson v. Railroad Co.*, 2 Black, 524. 1862.

250. — Nor will he be permitted to intervene to show that an agreement for the increase of such decree was fraudulent — the amount of the decree does not concern him. *Id.*

251. — General creditors having no lien cannot interfere in the contest. *Id.*

252. *Jurisdiction.* In 1852, the R. and M. R. R. Co., an Indiana corporation, and the E. and H. R. R. Co., an Ohio corporation, consolidated under the name of the E. and H. R. R. Co. The law in neither state surrendered to the other any jurisdiction over the property of said companies, the property being in both states. *Held*, that a mortgage executed in Indiana by the R. and M. R. R. Co., prior to the consolidation, should be foreclosed in Indiana. That the courts of Ohio had no juris-

diction to enforce such mortgage. *Eaton and Hamilton R. R. Co. v. Hunt*, 20 Ind., 457. 1863.

253. — A prior suit commenced in Ohio, and prosecuted to judgment for other bondholders under the same mortgage, by the same trustee, cannot be set up in bar against such foreclosure suit in Indiana. *Id.*

254. *Lost bond.* The loss of a bond is no objection to its being paid, provided an indemnity is furnished against its being enforced in the hands of others. *Miller v. Rutland and Washington R. R. Co.*, 40 Vt., 399. 1867.

255. *Payment.* Where the sheriff holds an execution for the sale of mortgaged property, nothing short of payment into his hands will satisfy the mortgage. *Clinton and Port Hudson R. R. Co. v. Brown*, 21 La. An., 248, 1869; *Haynes v. The Sheriff*, *ib.*

256. *Place of execution.* The place of the delivery of a bond or note, and not the place where it is dated or signed, is the place of its execution. *Butler v. Myer*, 17 Ind., 77. 1861.

257. *Removal of track.* A railway company cannot be permitted to take up a portion of its mortgaged track without the consent of the mortgagees. *Watt v. Passenger R. R. Co.*, 6 Philadelphia Rep. (Penn.), 386, 1867; *Watt v. Hestonville, etc.*, R. R. Co., 1 Brewster's Eq. (Penn.), 418, 1867.

258. *Seal.* An impression of the seal of a railroad company, made upon the paper of the instruments issued by it as bonds, and purporting to be under seal, is a sufficient seal to make the instruments specialties on which debt may be maintained. *Allen v. Sullivan R. R. Co.*, 32 N. H., 446. 1855.

259. *State liens.* The legislature of Missouri was not prohibited from discharging its mortgage lien on the Pacific Railroad, on receiving full value of its security, and of that value the legislature was the judge; so *held*, as to third persons whose rights accrued in good faith. *Murdock v. Woodson*, 2 Dillon (U. S. C. C.), 188. 1873.

260. — The Northern Central R. R. Co. executed a mortgage to the state for an annuity of \$90,000, payable in quarterly installments, with the condition that until default made in the payment of the annuity, or some part thereof, "and until three months subsequent to a default of the company to pay the whole

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amount of said annuity which may fall due in any one year," the company shall enjoy the road, etc. *Held*, that the failure to pay any installment entitled the state to an action, and that it was not necessary that the whole of a year's annuity should have become delinquent. *Northern Central R. R. Co. v. The State*, 17 Md., 8. 1860.

261. — Under the act of March 3, 1857, bonds issued by the state to the several railroad companies receiving them, "constituted a first lien or mortgage upon the road and property" of said companies. *Held*, that the lien of the state under this statutory mortgage extended to lands which had before that time been granted by congress to aid in the construction of the road, and by the state to the railroad company, and that the lien of the state was not confined to the road, and such property immediately connected with the road as was necessary for its operation. *Wilson v. Boyce*, 2 Dillon (U. S. C. C.), 539. 1873.

262. Statute. The statute of December 15, 1852, relating to the sale of bonds of railroad companies, § 3 Curwin, 2093, authorizing the sale of such bonds, at such prices as the directors may choose to take, does not apply to foreign corporations. *McGregor v. Covington and Lexington R. R. Co.*, 1 Disney (Ohio), 509. 1857.

263. Subrogation. A railway, then under a first and second mortgage, was sold on execution and bought in by certain bondholders, whom the second or junior mortgage was given to secure. These purchasers organized themselves into a new corporation and worked the road themselves, and for their own profit. After a certain time, the mortgagees under the first or senior mortgage obtained a decree of foreclosure, and to prevent a sale of the road, the new corporation paid the mortgage debt. Subsequently, on a creditor's bill, the sale made to the creditors under the second mortgage was set aside as fraudulent and void, as against other creditors of the corporation originally owning the road. *Held*, that no bill in equity would lie by the new corporation against the mortgagees under the first mortgage, to be paid back (as paid under a mistake of fact), what had thus been paid to them by the new corporation, or to be subrogated to their decree of foreclosure. *Railroad Co. v. Soutter*, 13 Wallace, 517. 1871.

MUNICIPAL AID AND BONDS.

[The decisions in relation to such aid and bonds are to be found under the titles of Subscriptions by Cities and Towns and Subscriptions by Counties.]

MUNICIPAL CORPORATIONS.

See FEDERAL COURTS; HIGHWAY; INJURIES TO PERSONS ON THE TRACK; SEWERS; SUBSCRIPTION BY CITIES AND TOWNS; SUBSCRIPTIONS BY COUNTIES; WHARVES.

1. By-laws. A record by a town clerk of the proceedings of a town meeting in enacting a by-law, authorized by statute to be enacted by towns at meetings specially called for that purpose, stating that, at a special meeting of the inhabitants of the town, legally warned and held for the purpose of making the by-law in question, it was voted, etc., is *prima facie* evidence that such meeting was specially warned for the purpose of making such by-law. *Isbell v. New York and New Haven R. R. Co.*, 25 Conn., 556. 1857.

2. Charter. The charter of the city of Baltimore construed. *Northern Central R. R. Co. v. Mayor of Baltimore*, 21 Md., 93. 1863.

3. — The acts incorporating cities are made public acts, and will be judicially noticed by the courts. *Janesville v. Milwaukee and Mississippi R. R. Co.*, 7 Wis., 484. 1859.

4. Contract. The properly constituted authorities of a municipal corporation may bind the corporation whenever they have power to act in the premises. *Cincinnati City v. Morgan*, 3 Wallace, 275. 1865.

5. Conveyance of real estate to a railway company. The statute authorizing and empowering the board in which the corporate authority of a city is vested, to convey to a railway company "not to exceed five thousand acres of the land of the city, or such parcels thereof as they may deem advisable, and upon such terms and conditions as they may determine, even if mandatory, so far as the act of conveyance is concerned, vests the board with discretionary power as to the quantity to be conveyed, and the terms of the conveyance. *San Diego v. San Diego and Los Angeles R. R. Co.*, 44 Cal., 106. 1872.

6. — Such board is entrusted with such property in a fiduciary capacity, and its mem-

Highways and Streets — Railway Stock.

bers cannot bargain with reference to it, with a corporation in which they hold stock. *Ib.*

7. **Highways and streets.** Where an injury is received by any person wholly by reason of a defect caused by the alteration of a highway by a railway company or its contractors, the town is liable for the injury. *Veazie v. Penobscot R. R. Co.*, 49 Me., 119. 1860.

8. — The railway company is liable to the town for such damages as it may be compelled to pay for such injury. *Ib.*

9. — Where the company received notice of an action against the town, and was requested by the town to appear and assume the defense, any judgment recovered against the town is conclusive against the company. *Ib.*

10. — Although an action must be brought by a town against a railway company for expenditures required to repair streets obstructed by the company, such limitation does not apply to cases where suits are brought against the town for injuries to individuals. The town has one year from time of the recovery against it in which to sue the railway company. *Ib.*

11. — Though a change in the law regulating the mode in which railways shall cross streets is a remedial act, still it cannot be construed to apply to railways already in process of construction, where the line is located and under contract. *Veazie v. Mayo*, 49 Me., 156. 1861.

12. — A provision, therefore, making such a railway a nuisance where it has not conformed to the statute, and holding the directors personally responsible, does not apply. *Ib.*

13. — The charter of the city of Portland does not authorize the city council to license an individual to use a street exclusively for his own benefit by putting down a railway for the transportation of rocks and gravel. *Green v. City of Portland*, 33 Me., 431. 1851.

14. — In such a case, the city was held not liable for damages to the comfort or business of citizens occasioned by such railway, and its liability was not increased by taking an indemnifying bond from the person building the railway. *Ib.*

15. **Operation of railways.** That clause of the charter of Jersey City, giving to the common council power, by general law, to declare nuisances, and provide for their re-

moval, does not give the right to regulate the running of locomotive engines and cars; the power to regulate the speed and running of locomotive engines and railroad cars is given by a separate section of the charter. *State v. Jersey City*, 5 Dutcher, (N. J.), 170. 1861.

16. The city authorities of New York have the power to prohibit the use of steam, within the city, upon the New York and Harlem Railroad. *New York and New Haven R. R. Co. v. Mayor of New York*, 4 Blatchford (U. S. C. C.), 193. 1858.

17. A statute giving power to the common council of a city, to regulate the running of railway cars within the corporate limits, authorizes the adoption of an ordinance entirely prohibiting the propelling of cars by steam through any part of the city. *Buffalo and Niagara Falls R. R. Co. v. Buffalo*, 5 Hill (N. Y.), 209. 1843.

18. **Pleading.** It is not necessary to aver the capacity of a municipal corporation to sue. *Janesville v. Milwaukee and Mississippi R. R. Co.*, 7 Wis., 484. 1859.

19. **Railway built by a city.** The commonwealth determined to build a railway from C. to the intersection of Broad and Vine streets in P.; with the proviso, that before any part of the railway between the west bank of the S. river and the intersection of said streets should be contracted for, the city should engage to construct and continue the railway to Cedar street; the city constructed the latter road; *held*, that the city had the complete ownership of the road so constructed; the city road was a portion of the line of the state road, but not a portion of the road. *Philadelphia v. Philadelphia and Reading R. R. Co.*, 58 Penn. St., 253. 1868.

20. — The city was only bound to maintain its Broad street road as long as it was needed and used for the purposes of its original construction. *Ib.*

21. — A conveyance of the state road and "appurtenances" was not sufficient to convey any interest in the city road. *Ib.*

22. — Property built by municipal corporations for their corporate use may be removed when the interests of the community demand it. *Ib.*

23. **Railway stock — exchange.** Where a special statute constitutes certain persons commissioners for a municipal corporation,

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and confers on them certain specific powers enumerated therein, a following clause authorizing them "to do whatever else may be necessary to secure and advance the interests of the city in the premises," does not work an enlargement of the powers specifically granted, but the phrase, "in the premises," limits the discretion conferred to the manner of the execution of the special grants of power. Such city authorities cannot exchange railway stock belonging to the city, for stock of some other company without special authority. *Cleveland v. The State Bank of Ohio*, 16 Ohio St., 236. 1865.

MURDER.

1. **Breaking into a ticket office.** Breaking and entering a railroad ticket office in the day time, with an intent to steal therein, but not actually stealing, is, under Rev. Sts., ch. 126, § 13, but a misdemeanor; and an arrest by an officer without a warrant for such an offense previously committed, is illegal; and killing the officer by the person so arrested is not murder, but manslaughter. *Commonwealth v. Cary*, 12 Cushing (Mass.), 246. 1853.

NAVIGATION.

1. **Piles.** Where a railway company employed contractors to build a bridge, and for that purpose to drive piles in a river, and, owing to the abandonment of the contract, the piles were left in the river in such a condition as to injure a vessel when sailing on her course, the railroad company were held responsible for the injury. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Philadelphia and Havre de Grace Steam Towboat Co.*, 23 Howard, 209. 1859.

NEGLECTANCE.

[Most of the decisions upon questions of negligence will be found under other heads. Nearly every title contains some decision in which questions of negligence are considered.]

1. **Agreed statement of facts.** Where the issue in a case presents a question of negligence as the foundation of the plaintiff's right of recovery, and the intervention of a jury being waived, the court has found for the plaintiff, on the issue made, and judgment has been entered thereon, and the cause comes up on a petition in error, founded on an agreed statement of the facts, but omitting a statement, whether there was negligence or not, this court cannot find that fact contrary to the finding of the court below, the question, whether there was negligence or not, being not a question of law merely, but a question of fact, to be found from the testimony. *Cleveland and Toledo R. R. Co. v. Johnson and Kellogg*, 10 Ohio St., 591. 1857.

2. **By whom the question of negligence is to be determined.** The question of negligence is a mixed one of law and fact, and it is the duty of the court to instruct the jury, whether the facts, which the testimony tends to prove, will, if found true, constitute that negligence which will defeat the action. *Trow v. Vermont Central R. R. Co.*, 24 Vt., 487, 1852; *Filer v. New York Central R. R. Co.*, 49 N. Y., 47, 1872; *Johnson v. Winona and St. Peter R. R. Co.*, 11 Minn., 296, 1866.

3. — The question of negligence is generally one of fact, to be decided by the jury, under all the circumstances of the case. *Marquette v. Chicago and Northwestern R. R. Co.*, 33 Ia., 562, 1871; *Louisville, Cincinnati and Lexington R. R. Co. v. Mahoney's Adm'r*, 7 Bush. (Ky.), 235, 1870; *Carroll v. Minnesota Valley R. R. Co.*, 14 Minn., 57, 1869; *Kennedy v. North Missouri R. R. Co.*, 36 Mo., 351, 1865; *Wright v. Georgia R. R. Co.*, 34 Ga., 330, 1866; *Baltimore and Ohio R. R. Co. v. Shipley*, 31 Md., 368, 1869; *Baltimore and Ohio R. R. Co. v. Fitzpatrick*, 35 Md., 32, 1871; *Cumberland and Pennsylvania R. R. Co. v. The State*, 37 Md., 156, 1872.

4. — Negligence and unskillfulness are matters of fact for the jury to determine. *Huelsenkamp v. Citizens' R. R. Co.*, 34 Mo., 45, 1863.

5. — Though the facts may so clearly prove negligence, as to render it the duty of the court to pronounce upon them as a matter of law; yet, in cases of controverted facts, the existence or nonexistence of which may fairly be presumed to effect the mind in a given exigency, the question of the character of the acts, whether negligent or otherwise, is neces-

Burden of Proof—Comparative Negligence.

sarily for the jury. *Pennsylvania R. R. Co. v. Ogier*, 35 Penn. St., 60, 1860; *Louisville and Nashville R. R. Co. v. Collins*, 2 Duvall (Ky.), 114, 1865; *Greenleaf v. Illinois Central R. R. Co.*, 29 Ia., 14, 1870; *Greenleaf v. Dubuque and Sioux City R. R. Co.*, 33 ib., 52, 1871; *Barton v. St. Louis and Iron Mountain R. R. Co.*, 52 Mo., 253, 1873; *Cook v. New York Central R. R. Co.*, 3 Keyes (N. Y.), 476, 1867; *Maloy v. New York Central R. R. Co.*, 40 Howard's Pr. (N. Y.), 274, 1870; *Bernhard v. Rensselaer and Saratoga R. R. Co.*, 1 Abbott's Ct. of Ap. Dec. (N. Y.), 131, 1860; *Cook v. New York Central R. R. Co.*, ib., 432, 1867; *Dickens v. Same*, ib., 504, 1864; *Jenkins v. Little Miami R. R. Co.*, 2 Disney (Ohio), 49, 1858.

6. — It is error to submit the question of negligence to the jury where there is no proof of it. *Railroad Co. v. Skinner*, 19 Penn. St., 298. 1852.

7. — The court in charging upon the question of negligence should say what negligence would and what would not make the party liable. A failure to do this is error. *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Evans*, 53 Penn. St., 250. 1866.

8. — The question of negligence may be answered by reference to a great variety of incidents and circumstances proper for the jury to consider, and in respect to which they may exercise a judicious discretion. *Dickens v. New York Central R. R. Co.*, 1 Keyes (N. Y.), 23, 1864; see *Same v. Same*, 28 Barbour (N. Y.), 41, 1858.

9. **Burden of proof.** In an action for negligence, the burden is upon the plaintiff to show affirmatively that he is not guilty of any negligence proximately contributing to the injury. *Button v. Hudson River R. R. Co.*, 18 N. Y., 248. 1858.

10. — Such negligence is not to be presumed, and, therefore, direct evidence to disprove it is not required from the plaintiff in the first instance; but where there is conflicting testimony as to the fact, the preponderance must be with the plaintiff to enable him to recover. *Ib.*

11. **Children.** There is no absolute rule as to what constitutes negligence, and in cases where it is concurrent, the same rule will not apply to adults and children. It is, therefore, always a question of fact for the jury, under the instructions of the court, as to the relative

degree of care, or the want of it, growing out of the circumstances and conduct of the parties. *Philadelphia and Reading R. R. Co. v. Spearren*, 47 Penn. St., 300. 1864.

12. — The same rigid rule in determining what would be a bar to an action on the ground of contributory negligence, would not be applied to an infant, an idiot, or an insane person, as to one who had arrived at an age to possess ordinary judgment and discretion. *O'Flaherty v. Union R. R. Co.*, 45 Mo., 70. 1869.

13. — To constitute negligence on the part of the parents, there must be an omission of such care as persons of ordinary prudence exercise and deem adequate in the care of their children. *Ib.*

14. That which would be but ordinary negligence toward grown persons may be gross negligence as respects a child. *Schierhold v. North Beach and Mission R. R. Co.*, 40 Cal., 447. 1871.

15. **Coaches.** What evidence of negligence of a carrier, running coaches, is sufficient to go to the jury, decided with reference to a particular case. *Geddes v. Metropolitan R. R. Co.*, 103 Mass., 391. 1869.

16. **Comparative Negligence.** Although the plaintiff may have himself been guilty of some degree of negligence, yet if it be but slight in comparison with that of the defendant, it should be no bar to his recovery. *Chicago, Burlington and Quincy R. R. Co. v. Triplett*, 38 Ill., 482. 1865.

17. — The doctrine of comparative negligence as established in Illinois is, that there must be fault on the part of the defendant, and no want of ordinary care on the part of the plaintiff; and when both parties are at fault, the plaintiff may in some cases recover, as, where it appears that his negligence is slight and that of the defendant gross. *Chicago and Alton R. R. Co. v. Gretzner*, 46 Ill., 74. 1867.

18. — Although the plaintiff may have been at fault, he may still recover if the defendant was guilty of gross negligence and might have prevented the injury by the use of ordinary care. *Augusta and Savannah R. R. Co. v. McElmurry*, 24 Ga., 75. 1858.

19. — The doctrine of "comparative negligence" does not prevail in Iowa. It is only recognized in Georgia and Illinois. *O'Keefe*

Concurrent Negligence — Contributory Negligence.

v. Chicago, Rock Island and Pacific R. R. Co., 32 Ia., 467. 1871.

20. Concurrent negligence. Where the party inflicting the injury, by proper care, might avoid the consequences of the negligence of the party injured, or where the latter could not avoid the consequences of the former's negligence, an action will lie. *North ern Central R. R. Co. v. The State*, 31 Md., 357. 1869.

21. — But where, from the proof of the nature of the accident, it appears that the negligence of the parties was concurrent, and co-operated to produce the injury, no action will lie — the law refusing to apportion the fault, and regarding the negligence of each party as equally proximate. *Ib.*

22. — The question of concurrent negligence is to be determined by the particular circumstances of the case. *Pennsylvania R. R. Co. v. Kilgore*, 32 Penn. St., 292. 1858.

23. Contract. In an action against a railway company for a breach of a contract to leave freight cars on a side track for the purpose of receiving and taking away freight, the defendant alleged in one count of its answer that the plaintiff had negligently permitted freight cars to stand upon the said side track so near the main one that one or two collisions had taken place, and there was danger of others, and that defendant was unwilling to become responsible for the injuries that might result from such negligence. *Held*, that this defense was not a counterclaim or setoff, and was not stated as a defense in bar, and it was properly stricken from the answer. *Amsden v. Dubuque and Sioux City R. R. Co.*, 13 Ia., 182. 1862.

24. Contractor. Where an employé of a contractor engaged in furnishing wood to a railway company, received an injury, which was occasioned by the negligence of the employés of the railway company and by the negligence of the contractor, the negligence of the latter being the proximate cause, the court below refused to instruct the jury that the company was not liable unless the acts of its servants were wanton and willful. The supreme court being equally divided, the action of the lower court was affirmed. *Michigan Central R. R. Co. v. Leahy*, 10 Mich., 193. 1862.

25. Contributory negligence. Contributory negligence on the part of the injured

party will defeat a recovery. *Louisville and Nashville R. R. Co. v. Burke*, 6 Coldwell (Tenn.), 45, 1868; *Owen v. Hudson River R. R. Co.*, 35 N. Y., 516, 1866; *Same v. Same*, 2 Bosworth (N. Y.), 374, 1858; *Same v. Same*, 7 ib., 329, 1860; *McKeon v. Citizens' R. R. Co.*, 43 Mo., 405, 1869; *Toledo and Wabash R. R. Co. v. Goddard*, 25 Ind., 185, 1865; *Catawissa R. R. Co. v. Armstrong*, 49 Penn. St., 186. 1865.

26. — Hence, in case of the injury by a backing train, of a person on a hand car on the track, though the jury were instructed that if the injured party was guilty of negligence, which contributed to the accident, the defendant was not liable, yet it was error to add in connection that very slight negligence on the part of the injured party would not prevent a recovery. *Catawissa R. R. Co. v. Armstrong*, 49 Penn. St., 186. 1865.

27. — The negligence which disables the plaintiff from recovering must be negligence which directly or by natural consequence conduces to the injury. The question of negligence in a particular case is one of fact for the jury. *Richmond v. Sacramento Valley R. R. Co.*, 18 Cal., 351, 1861; *Central R. R. Co. v. Moore*, 4 Zabriskie (N. J.), 824, 1854.

28. — Where there is mutual negligence and the negligence of both the company and the owner of the cattle was the proximate cause of the injury, no action can be sustained. *Stucke v. Milwaukee and Mississippi R. R. Co.*, 9 Wis., 202, 1859; *Indianapolis and Cincinnati R. R. Co. v. Caldwell*, 9 Ind., 397, 1857.

29. — And where the negligence of the plaintiff is proximate, and that of the defendant is remote, no action can be sustained. *Ib.*

30. — But where the negligence of the defendant is proximate and that of the plaintiff is remote, the defendant will be held liable if the injury could have been prevented by the exercise of reasonable care. *Ib.*

31. — Any negligence, however slight, on the part of the injured person, if proximate, or contributing to the injury, would prevent a recovery in an action therefor. *Potter v. Chicago and Northwestern R. R. Co.*, 21 Wis., 372. 1867.

32. — Where the injury complained of by the plaintiff is the result of his own negligence or fault, or of the negligence or fault of both parties, without intentional wrong on the part of the defendant, no action can be main-

Degrees of Care—Evidence.

tained. *Williams v. Michigan Central R. R. Co.*, 2 Mich., 259, 1851; *Memphis and Charleston R. R. Co. v. Whitfield*, 44 Miss., 466, 1870.

33. — The question of contributory negligence is one of fact for the jury under proper instructions from the court. *Ib.*

34. — Where both parties are at fault, neither can recover. *Reeves v. Delaware, Lackawanna and Western R. R. Co.*, 30 Penn. St., 454. 1858.

35. — The judge's charge that no fault of the plaintiff could excuse the defendant unless it had some effect to produce the collision, disapproved. *Colegrove v. New York and New Haven R. R. Co.*, 20 N. Y., 492, 1859; *Same v. Harlem and New Haven R. R. Co.*, 6 Duer (N. Y.), 382. 1857.

36. — damages. Upon a hearing in damages after a demurrer to a declaration charging an injury by the negligence of the defendant, the defendant may show, for the purpose of reducing the damages to a nominal sum, that the plaintiff was guilty of negligence directly contributing to the injury. *Daily v. N. Y. and New Haven R. R. Co.*, 32 Conn., 356. 1865.

37. — death. It is not necessary in the first instance to disprove contributory negligence in the deceased. *Cleveland and Pittsburgh R. R. Co. v. Rowan*, 66 Penn. St., 395. 1870.

38. — If negligence appears from the plaintiff's testimony, the defendant may rest upon it. *Ib.*

39. — Love of life and the instinct of preservation being the highest motive for care, they will stand for proof of it till the contrary appear. *Ib.*

40. — In actions under the statute, against a railroad company, for damages for the death of a person caused by the negligence of defendant, the negligence of the deceased, in order to defeat the action, must have been the direct and proximate, and not the indirect and remote, cause of the death. *Meyer v. People's R. R. Co.*, 43 Mo., 523. 1869.

41. Degrees of care. It is error to charge the jury that if the plaintiff, by his own fault, has contributed to his injury, the defendant must then show that he was without fault himself, and that no man can be shown without fault, unless he has done all in his power to avoid the injury. *Pendleton Street R. R. Co. v. Stallman*, 22 Ohio St., 1. 1871.

42. — The different degrees of negligence commented upon. *French v. Buffalo, New York*

and Erie R. R. Co., 4 Keyes (N. Y.), 108. 1868.

43. — When there is such an obvious disregard of duty and safety as amounts to misconduct, the court may declare it to be negligence. *Westchester and Philadelphia R. R. Co. v. McElwee*, 67 Penn. St., 311. 1871.

44. — Negligence consists in the absence of that ordinary care which a party ought to observe under the particular circumstances in which he is placed. A different degree of care is required where there is reason to apprehend danger, from that which is necessary where none is to be expected. *Pennsylvania R. R. Co. v. Ogier*, 35 Penn. St., 60. 1860.

45. — Ordinary care is that degree of care which a person of ordinary prudence is presumed to use, under particular circumstances, to avoid injury, and should be in proportion to the danger to be avoided, and the fatal consequences involved in the neglect. *Toledo and Wabash R. R. Co. v. Goddard*, 25 Ind., 185. 1865.

46. — "Ordinary care" has relation to the situation of the parties and the business in which they are engaged, and varies according to the particular circumstances under which it is to be exercised. *Fletcher v. Boston and Maine R. R. Co.*, 1 Allen (Mass.), 9. 1861.

47. Employees. In an action against a railroad company for damages sustained by the negligence of an engineer, who is alleged by the plaintiff to have been employed by the defendant at low wages because of his want of skill, the defendant may prove by its president that he employed him as a competent and safe engineer. *Robinson v. Fitchburg and Worcester R. R. Co.*, 7 Gray (Mass.), 92. 1856.

48. Evidence. In actions for injuries committed by immediate force, proof of the forcible act and the resulting injury is *prima facie* evidence that the act was willful or negligent. *Galpin v. Chicago and Northwestern R. R. Co.*, 19 Wis., 604. 1865.

49. — Where the gist of the action is negligence it is not error to admit testimony of all surrounding circumstances that may tend to show the degree of care necessary in the case. *Pacific R. R. Co. v. Nash*, 7 Kans., 280. 1871.

50. — In an action against a railroad corporation for damages sustained by the negligence of its engineer, his statements as to the accident, made a few days afterwards, are

Explosion of Boiler of Locomotive — Presumption.

inadmissible in evidence against the corporation. *Robinson v. Fitchburg and Worcester R. Co.*, 7 Gray, (Mass.), 93. 1856.

51. Explosion of boiler of locomotive. The mere fact that a boiler had exploded, is *prima facie* evidence of negligence. *Illinois Central R. R. Co. v. Phillips*, 49 Ill., 234. 1868; *Same v. Same*, 55 ib., 194. 1870.

52. Gross negligence. *Semble*, that in law there is no difference between negligence and gross negligence, the latter being nothing more than the former, with the addition of a vituperative epithet. *McPheeters v. Hannibal and St. Joseph R. R. Co.*, 45 Mo., 22. 1869.

53. Inference of care. Where evidence is conflicting, as to whether an injured person contributed by negligence to his own injury, the jury may, in connection with all the facts and circumstances of the case, infer the absence of fault from the known disposition of men to avoid injury to themselves. *North-ern Central R. R. Co. v. State*, 31 Md., 357. 1869.

54. — To sustain an action for an injury received by the plaintiff through the defendant's negligence, it is not necessary for the plaintiff to prove due care on his part by directly affirmative evidence, but such care may be inferred from the absence of all appearance of fault. *Mayo v. Boston and Maine R. Co.*, 104 Mass., 137. 1870.

55. Neglect of injured party after the injury. In an action brought by the plaintiff for a personal injury received through the negligence of the defendant, the defendant claimed that the injury was originally slight and was aggravated by his neglect to take care of himself and to follow the advice of his physician, and prayed the court to instruct the jury, that if the plaintiff did not regard the advice of his physician, they had a right to infer that the injury was thereby aggravated, and that the plaintiff could recover for nothing after his own imprudence. The court did not so instruct the jury, but directed them that, if they should find a verdict for the plaintiff, he was entitled to recover full compensation for all the mental and physical injury which they should find on the evidence that he had sustained by reason of the defendant's negligence. On a motion of the defendants for a new trial, it was *held* that this course was proper. *Lawrence v. Housatonic R. R. Co.*, 29 Conn., 390. 1860.

56. — The question of negligence on disputed facts is for the jury. The rule applied to a case where, among other defenses founded on negligence, it was claimed by defendant that the injury to the arm of plaintiff, which was the subject of the action, was aggravated by the negligence of plaintiff in omitting remedies which he ought to have applied to relieve himself. *Maloy v. New York Central R. R. Co.*, 40 Howard's Pr. (N. Y.), 274. 1870.

57. Nonsuit. Negligence is generally inferred from facts and circumstances, which it is the province of the jury to find, and in an action for an injury caused by negligence, a nonsuit, upon the ground of contributory negligence, should only be granted, when, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in his favor must be set aside. *Schierhold v. North Beach and Mission R. R. Co.*, 40 Cal., 447. 1871.

58. Pleas in bar. Where A. and his wife were injured at the same time, in consequence of the insufficiency of a highway, which insufficiency was occasioned by the neglect of the defendant; and A. recovered against the town for an injury to himself and carriage, and the town recovered the same of defendant, and subsequently A. brought his action against the town and recovered for the injury to his wife, it was *held*, in an action by the town against defendant to recover the amount paid A., by reason of the recovery for the injury to his wife, that the first recovery against defendant, although for the same neglect, was no bar to the second suit. *Newbury v. Connecticut and Passumpsic Rivers R. R. Co.*, 25 Vt., 377. 1853.

59. — Each injury constitutes, when the town is legally fixed with the burden, a distinct, complete and independent cause of action. *Ib.*

60. Presumption. Negligence on the part of a servant will not be presumed, where the fact of such negligence is not found by the jury or referee before whom the cause was tried. *Keegan v. Western R. R. Co.*, 8 N. Y., 175. 1853.

61. — Negligence cannot be presumed without any evidence. *Lyndsay v. Connecticut and Passumpsic Rivers R. R. Co.*, 27 Vt. 643. 1855.

62. Trespasser. A person is bound to conduct himself with reasonable care and pru-

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dence towards a wrongdoer. The act of the wrongdoer will not excuse an injury done to him, unless his wrongful act was a proximate cause of the injury. Proximate cause means negligence at the time the injury happened. *Needham v. San Francisco and San José R. R. Co.*, 37 Cal., 409. 1869.

63. Two companies using the same track or train. Where a declaration averred that the defendant and the R. & W. R. R. Co. had made a contract and an arrangement, by which the latter company had the right to run its trains over a section of the defendant's road, and that defendant had a switch and side-track under its exclusive control on said section, and that by the gross negligence of defendant's employes in the management of said switch, a locomotive of the R. & W. R. R. Co. was thrown from the track, and the plaintiff, who was an employé of the latter company, and engineer on said engine, was injured. *Held*, that the obligation under which the plaintiff was entitled to recover was one created by law, irrespective of the contract, and that the averments as to the contract were only material for the purpose of showing that the plaintiff was rightfully on defendant's railway. The duty of defendant was of a general and public character, and for its nonperformance any one who might be injured thereby while engaged in the lawful use of the road, could sustain his action. *Sawyer v. Rutland and Burlington R. R. Co.*, 27 Vt., 370. 1855.

64. — A railroad company is responsible for an injury occasioned by want of proper care and prudence on the part of its servants in the management of a train which is under its exclusive care, direction and control, although the train belongs to another company. *Fletcher v. Boston and Maine R. R. Co.*, 1 Allen (Mass.), 9. 1861.

65. — If such injury results from the negligence of another railroad company, which has a joint right with the defendant to use the defendant's track, under a lease from the defendant, and which is accordingly running trains over the defendant's road on its own account, the defendant is not responsible. *Ib.*

66. Warning of danger. A warning of danger to the deceased was but evidence of negligence, and as such for the jury; and where the court charged that knowledge of the danger would be proof of negligence, giv-

ing the legal consequences, and leaving the jury to apply the law to the facts, but declined to instruct them that the warning constituted negligence, it was not error. *North Pennsylvania R. R. Co. v. Robinson*, 44 Penn. St., 175. 1863.

NEW PROMISE.

1. Reorganization of company. Where the property and franchises of a railroad company have been sold and conveyed under a deed of trust given to secure a debt of the company, and the purchasers reorganize; to prove a new promise by the reorganized company to pay a debt owing by the company as originally organized, there must be shown some action on the part of the directors of the new company from which the promise can be clearly inferred. *American Central R. R. Co. v. Miles*, 52 Ill., 174. 1869.

NEWSPAPERS.

See EVIDENCE.

NEW TRIALS.

See COSTS; EMINENT DOMAIN.

1. Abolition of court. After verdict, and before judgment, the court, in which an action was pending, was abolished, and the business transferred to an appellate court, by which the appeal was lost. *Held*, on motion, that the court had no power to set aside the verdict to give another trial. *Cummings v. White Mountains R. R. Co.*, 43 N. H., 114. 1861.

2. Accident and misfortune. Where it distinctly appears that a trial has not been had, by reason of accident, mistake or misfortune, the court will generally grant a review, without inquiring into the merits of the controversy between the parties, if satisfied that a matter of controversy actually exists, which the party claiming the review desires and intends to try, and would have tried but for accident, mistake, or misfortune shown. R. S.

Assessment of Damages—Evidence.

ch. 192. *Nashua and Lowell R. R. Co. v. Stimpson*, 35 N. H., 286. 1857.

3. Amendment of pleadings. The fact that new counts, which vary the form but do not change the cause of action, have been added to the declaration after two new trials have been granted, will not affect the operation of the act of 1801, ch. 6, § 59, which provides that not more than two new trials shall be granted to the same party in the same cause at law, or upon a trial of an issue of fact in equity. *East Tennessee and Georgia R. R. Co. v. Hackney*, 1 Head (Tenn.), 169. 1858.

4. Appeal. Where the court below may have granted a new trial upon questions of fact, the decision is not reviewable on appeal. *Dickson v. Broadway and Seventh Avenue R. R. Co.*, 47 N. Y., 507. 1872.

5. — A stronger showing is required to reverse an order granting a new trial than to reverse an order refusing one. This rule applies where the district court has denied the new trial and the general term has granted it. *Jenkins v. Chicago and Northwestern R. R. Co.*, 32 Ia., 97. 1871.

6. Assessment of damages. Where in an assessment for damages for the taking of land for railway purposes, it appears that there has been injustice done, through the mistake of the jury, the verdict will be set aside. *Cadmus v. Central R. R. Co.*, 2 Vroom (N. J.), 179. 1865.

7. Bill of exceptions. The evidence should all be preserved in the bill of exceptions, in order to justify a claim that the court below erred in refusing to grant a new trial, asked for on the ground that the evidence was insufficient to sustain the verdict. *Midland Pacific R. R. Co. v. McCartney*, 1 Neb., 398, 1870; *Same v. Williamson*, ib., 406; *Same v. Day*, ib., 407; *Same v. Newman*, ib., 408; *McCool v. Galena and Chicago Union R. R. Co.*, 17 Ia., 461, 1864.

8. — Only two new trials can be granted, under the statute, to the same party; and where exceptions are taken to the overruling of a motion for a new trial, as a means of reversing points alleged to have been decided erroneously during the trial, the supreme court will not consider the points raised. If such questions are to be presented, they must be set out in bills of exceptions presented during the trial in the court below. *Thorn-*

ton v. West Feliciana R. R. Co., 29 Miss., 143. 1855.

9. Discretion. An order made upon a motion to dismiss an application for a new trial, on the ground that the same has not been prosecuted with due diligence, is very much in the discretion of the court or judge making it; and unless it is apparent that such discretion has been abused, the order will not be reversed. *Hopkins v. Western Pacific R. R. Co.*, 44 Cal., 389. 1872.

10. Error of law. If a legal charge, pertinent to the issue, be asked in writing, it should be given to the jury. But if, from all the evidence in the cause, it appears that the verdict is right, and the jury should have found the same if the charge requested had been given, a new trial will not be granted on account of such refusal. *Georgia R. R. Co. v. Scott*, 37 Ga. 94. 1867.

11. Evidence. A new trial will not be granted on the ground that the verdict is against the evidence when the evidence supports the verdict. *Toledo, Peoria and Warsaw R. R. Co. v. Firth*, 60 Ill., 451. 1871.

12. — A verdict supported by the evidence will not be disturbed. *Toledo, Peoria and Warsaw R. R. Co. v. Hogle*, 55 Ill., 212. 1870.

13. — Where the evidence justifies a verdict, a case will not be disturbed upon the facts alone. *Illinois Central R. R. Co. v. Hays*, 19 Ill., 166, 1857.

14. — A verdict must be clearly against the weight of the evidence in order to justify the court in setting it aside. *Webb v. Portland and Kennebec R. R. Co.*, 57 Me., 117. 1869.

15. — A verdict will not be set aside when there is evidence reasonably tending to sustain it. *Hinkle v. Lake Superior and Mississippi R. R. Co.*, 18 Minn., 297, 1872; *Chicago and Northwestern R. R. Co. v. Williams*, 44 Ill., 176, 1867.

16. — To justify a new trial on the ground that the verdict is against the evidence, the mind should be brought irresistibly to the conclusion that the verdict was not the result of a free, sound, unbiased exercise of judgment on the part of the jury, and that manifest injustice would result if the verdict were permitted to stand. *Bergert and Brother v. Davenport City R. R. Co.*, 34 Ia., 571. 1872.

17. — If the verdict of the jury is manifestly against the weight of the evidence, the

Excessive Damages — Motion.

judgment will be reversed. *Columbus, Chicago and Indiana Central R. R. Co. v. Troesch*, 57 Ill., 155, 1870; *Chicago and Alton R. R. Co. v. Purvines*, 58 Ill., 38, 1871.

18. — A verdict which has no evidence to sustain it will be set aside. *McNair v. South Carolina R. R. Co.*, 10 Richardson's Law (So. Car.), 284, 1856; *Union Pacific R. R. Co. v. Convers*, 4 Kans., 206, 1867.

19. — Upon a slight preponderance of evidence against a verdict, the court will not disturb it. *Chicago and Rock Island R. R. Co. v. Crandall*, 41 Ill., 234. 1866.

20. — This court will not disturb the judgment of the court below overruling a motion for a new trial where the evidence is conflicting. *Union Pacific R. R. Co. v. Coldwell*, 5 Kans., 82, 1869; *Donaldson v. Mississippi and Missouri R. R. Co.*, 18 Ia., 280, 1865.

21. — The rule that the supreme court will not disturb a verdict, where the evidence is conflicting, does not apply to district or circuit courts. Such courts should grant new trials whenever they believe that substantial justice has not been done between the parties. *Dewey v. Chicago and Northwestern R. R. Co.*, 31 Iowa, 373. 1871.

22. — A new trial will not be granted to enable a party to introduce new evidence which was known to him at the first trial and withheld. *Wright v. Central R. R. Co.*, 21 Ga., 345. 1857.

23. — A new trial will not be granted upon the ground of newly discovered evidence, where such evidence is merely cumulative. *Toledo, Wabash and Western R. R. Co. v. Seitz*, 53 Ill., 452. 1870.

24. **Excessive damages.** In a case where extrinsic circumstances may properly be introduced to aid in the construction of a deed, a new trial should be granted when it appears such circumstances were not fully before the court and jury, and the damages awarded by the jury were excessive. *Morris and Essex R. R. Co. v. Bonnell*, 5 Vroom, (N. J.), 474. 1871.

25. — When the verdict is set aside on the ground of excessive damage, the court, instead of simply ordering a new trial, will give the plaintiff the option of reducing the verdict to the sum which the court considers reasonable, and upon his remitting the excess, will give him judgment for the residue, and deny the

motion for a new trial, and this in actions of tort as well as upon contract. *Belknap v. Boston and Maine R. R. Co.*, 49 N. H., 358. 1870.

26. — Where a verdict of a jury rests in calculation, and they find excessive damages, a new trial may be granted, if asked for, for such cause, and no remittitur is offered. *Nutter v. Junction R. R. Co.*, 13 Ind., 479. 1859.

27. **Excusable neglect.** One member of a law firm, who had the sole management of a cause on defendant's part after being informed, in New York city, where he had been unavoidably detained by business, that the cause was to be tried during the last week in the term, started promptly for the place of trial, but was prevented from reaching it in time by a disarrangement of the trains; and his partner, who was not familiar with the case, after objecting to hearing on the ground that the term was legally at an end, took no part in the trial; and a verdict was found against the defendant. *Held*, that this was a case of "excusable" neglect under the statute, and an order refusing a new trial was reversed. *Stoppelfeldt v. Milwaukee, Manitowoc and Green Bay R. R. Co.*, 29 Wis., 688. 1872.

28. **Interest of jurymen.** It is no ground for a new trial that a jurymen had an interest in the case unknown to the party. *Josey v. Wilmington and Manchester R. R. Co.*, 12 Richardson's Law, (So. Car.), 134. 1859.

29. — A party, seeking a new trial on the ground of interest in a juror, should negative his knowledge of such interest by affidavit. *Jameson v. Androscoggin R. R. Co.*, 52 Maine, 412. 1864; *Merrill v. Same*, ib; *White v. Same*, ib.

30. **Jurisdiction.** That a court had no jurisdiction of the defendant is not a ground for a new trial. *North Missouri R. R. Co. v. Akers*, 4 Kans., 453. 1868.

31. **Misconduct of attorney.** The action of the court in granting a new trial, on the ground of misconduct of an attorney in presenting his case to the jury, will not be disturbed, unless an abuse of discretion is clearly shown. *Boardman v. Chicago and Northwestern R. R. Co.*, 32 Ia., 391. 1871.

32. **Motion.** A statement on motion for a new trial must contain a specification of the particular errors upon which the party moving for a new trial will rely; if one of the grounds is that the evidence is insufficient, it

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must specify in what particulars, or it will be disregarded by the court. *Butterfield v. Central Pacific R. R. Co.*, 37 Cal., 381. 1869.

33. — The errors relied upon must be contained in the statement. An assignment of errors appended to the transcript, is insufficient. *Id.*

34. — Errors in the refusal or admission of testimony, or in refusing or giving instructions, will be deemed waived, unless complaint thereof be made in the motion for a new trial. *Midland Pacific R. R. Co. v. McCartney*, 1 Neb., 398, 1870; *Same v. Williamson*, *ib.*, 406; *Same v. Day*, *ib.*, 407; *Same v. Newman*, *ib.*, 408.

35. — Where exceptions are properly saved in the court of common pleas, errors of such court may be alleged in the district court without a motion for a new trial being filed. *Earp v. Pittsburgh, Fort Wayne and Chicago R. R. Co.*, 12 Ohio St., 621. 1861.

36. — The truth of facts set forth in an affidavit in support of a motion for a new trial, may be controverted by the adverse party. *Newcastle and Richmond R. R. Co. v. Chambers*, 6 Ind., 346. 1855.

37. — Unless the judge of the superior court is of opinion that a verdict is against the evidence, he ought not, in the exercise of the discretion given him by the statute, to allow a motion for a new trial for a verdict against evidence; and as a matter of practice, it will be understood that the allowance of such a motion imports the judge's dissatisfaction with the verdict, whether the motion states such dissatisfaction or not. *Daley v. Norwich and Worcester R. R. Co.*, 26 Conn., 591. 1858.

NITRO-GLYCERINE.

See CONSTRUCTION OF RAILWAYS.

NONSUIT.

See NEGLIGENCE; WRIT OF ERROR.

1. **Demurrer.** Where a demurrer to a petition is improperly sustained in part and overruled in part, and the court improperly strikes out a portion of the petition, and the plaintiff

takes a nonsuit, he will be entitled to have the nonsuit set aside. *Leimer v. Pacific R. R. Co.*, 26 Mo., 26. 1857.

2. **Evidence.** A nonsuit should not be ordered where there is evidence tending to establish the plaintiff's cause of action. *Muldowney v. Illinois Central R. R. Co.*, 32 Ia., 176, 1871; *Bryan v. Southwestern R. R. Co.*, 37 Ga., 26, 1867.

3. — Where the defense to an action for wages was, that the defendant, with the plaintiff's knowledge and consent, had made an arrangement with third parties by which it was liable to them for defendant's board, the court charged the jury "that there was no satisfactory evidence in the case that any such arrangement had been made," and that "under the law, no liability existed on the part of the company to pay" defendant's board bill. *Held*, that this was equivalent to taking the question of fact from the jury; and there being evidence from which the jury might have found the fact differently, the judgment for the plaintiff was reversed. *Hunkins v. Milwaukee and St. Paul R. R. Co.*, 30 Wis., 559. 1872.

4. — In actions for injuries caused by negligence, it is only where there is an entire absence of evidence tending to establish the cause, or where the negligence of the party injured is affirmatively and clearly proved by the plaintiff, so as to admit of no doubt or controversy, that a nonsuit may properly be ordered. *Langhoff v. Milwaukee and Prairie du Chien R. R. Co.*, 19 Wis., 489, 1865; *Imhoff v. Chicago and Milwaukee R. R. Co.*, 22 *ib.*, 682, 1868.

5. — In case of a conflict of plaintiff's evidence, the court will, on motion for a nonsuit, credit that part which tends to sustain his action. *Id.*

6. — If on the whole of plaintiff's evidence being submitted to the jury, they would not be justified in finding a verdict against the defendant, a nonsuit should be entered. Act March 11, 1836, § 7. *Pittsburgh and Steubenville R. R. Co. v. Gazzam*, 32 Penn. St., 340. 1858.

7. — Where the facts are not controverted, a nonsuit may be properly granted if a verdict in favor of the plaintiff would be set aside as against the evidence. *Brown v. European and North American R. R. Co.*, 58 Me., 384. 1870.

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8. Judgment. Where an action has been pending more than three years, and plaintiffs have had ample time to procure testimony to establish their demand, but have not done so; and, on motion for a new trial, it was not urged that there was surprise or any expectation of obtaining any further evidence, a final judgment, and not one of nonsuit, will be rendered in favor of defendant. *New Orleans and Carrollton R. R. Co. v. Chaney*, 3 La. An., 262. 1848.

9. Plaintiff may take nonsuit. At any time before trial, a plaintiff may take a voluntary nonsuit, so far as his claim is concerned. And when he takes such nonsuit, he is liable to pay all costs. *Burlington and Missouri R. R. Co. v. Sater*, 1 Ia., 421. 1855.

NOTARY PUBLIC.

1. Acknowledgments. Outside of the county in which a notary resides, his official character in the acknowledgment of a deed must be attested by the proper county clerk. *Utica and Black River R. R. Co. v. Stewart*, 33 Howard's Pr (N. Y.), 312. 1867.

NOTICE.

See JURISDICTION; MORTGAGE.

1. Possession. Staking out the line of a railroad and setting posts for fences is not such possession as will amount to notice to purchasers or incumbrancers of a grant of a right of way to a railway company. *Merritt v. Northern R. R. Co.*, 12 Barbour (N. Y.), 605. 1852.

NUISANCE.

See BRIDGES; EMINENT DOMAIN; HIGHWAYS; INTERSECTIONS; FIRES.

1. Arm of the sea. Where a bill in equity was brought by an individual against a railway company, alleging that the defendant was engaged in extending its road across a certain cove, which is an arm of the sea, in which the

tide ebbs and flows, communicating with the ocean through a navigable river; but the waters of the cove are navigable, and from time immemorial have been used and enjoyed as such; and that the plaintiff, and all other persons, have been accustomed to pass and re-pass, at their pleasure, up and down the cove, into the river, to the ocean or elsewhere, in boats, schooners or other vessels, without molestation or obstruction; and that by means of the road so extended, the navigation of the cove will be greatly obstructed and rendered almost wholly useless; it was held, that the case stated by the bill was that of a public nuisance. *O'Brien v. Norwich and Worcester R. R. Co.*, 17 Conn., 372. 1845.

2.—Where the plaintiff in such bill stated also, that he resided near the head of the cove; that the right to navigate the cove was a common right, the enjoyment of which was valuable to him, in respect to trade and commerce, the building and launching of vessels, and for agricultural purposes and fisheries; and that he was in danger of being deprived of his lawful right to navigate the cove; it was held, that the injury complained of was not one peculiar to the plaintiff, but common to him and all others having occasion to use the cove for such purposes. *Id.*

3. Backwater. A person who has a judgment against another for consequential damages to his lands, resulting from the erection of a public work, not touching his said lands, which was carefully and skillfully erected, in accordance with authority duly conferred by the state, can not have such work declared a nuisance, subject to abatement. *New Albany and Salem R. R. Co. v. Higman*, 18 Ind., 77. 1862.

4. Cattle pens. Where a railroad company has erected cattle pens upon its right of way, for purposes of shipping, it should exercise such a supervision over them as will insure their cleanliness, so that they will not become a nuisance. *Illinois Central R. R. Co. v. Grabill*, 50 Ill., 241. 1869.

5.—In estimating the damages resulting from a nuisance caused by cattle pens, it is proper to consider the depreciation in the value of the plaintiff's property, occasioned thereby, and the injury and annoyance to the plaintiff while occupying the premises. *Id.*

6.—The noise made by the cattle and stock

Damages -- Highways and Streets.

hands, being beyond the control of the company, is not a ground for damages against the company. *Same v. Same*, ib., 248. 1869.

7. **Damages.** In a suit for damages for creating a nuisance in the vicinity of a dwelling house, the difference between its rental value during the existence of the nuisance and prior to it is not excessive. *Illinois Central R. R. Co. v. Grabill*, 50 Ill., 248. 1869.

8. — The decisions in actions for damages resulting from nuisances collated. *Conhocton Stone Road v. Buffalo, New York and Erie R. R. Co.*, 51 N. Y., 573. 1873.

9. — In case for a nuisance, if the act done is necessarily injurious, and is of a permanent nature, the party injured may at once recover his damages for the whole injury. *Troy, Town of, v. Cheshire R. R. Co.*, 3 Foster (N. H.), 83. 1851.

10. — If the act done is not necessarily injurious, or if it is contingent whether further injury may arise, the plaintiff can recover damages only to the date of the writ. *Id.*

11. — No person can maintain an action for nuisance unless he has sustained special damage from it. *Hatch v. Vermont Central R. R. Co.*, 28 Vt., 142. 1855.

12. **Equity.** Where damages will compensate either the benefit derived, or the loss suffered from a nuisance, equity will not interfere. *Grey v. Ohio and Pennsylvania R. R. Co.*, 1 Grant's Cases (Penn.), 412. 1856.

13. — Although a court of equity has jurisdiction in cases of public nuisance, it ought not to interfere when the desired end can be obtained in a court of law. *Attorney General v. New Jersey R. R. Co.*, 2 Green's Ch. (N. J.), 136, 1834; *Morris and Essex R. R. Co. v. Prudden*, 5 C. E. Green's Ch. (N. J.), 530, 1869.

14. — The extent of an injury resulting from a nuisance cannot be ascertained with precision. It is permanent; consequently suits at law for relief must be endless, and adequate relief can only be obtained by injunction. *Works v. Junction R. R. Co.*, 5 McLean, 425. 1853.

15. — A private person cannot apply to a court of chancery to prevent or remove a public nuisance which does him no special injury. But he may, if the nuisance is immediately injurious to himself, although it may also affect the public. *Id.*

16. — A public nuisance may be abated by

a proceeding in equity brought by a private party, who has suffered special damage. *Mississippi and Missouri R. R. Co. v. Ward*, 2 Black, 485. 1862.

17. — But it is necessary in such bill for the plaintiff to show that he has sustained and is still sustaining damage by the nuisance. *Id.*

18. — But where the bill is filed in a federal court, it is not necessary to show that the amount of the damage is equal to the sum required to give said court jurisdiction. The jurisdiction is tested by the value of the object to be gained, and that object is the removal of the nuisance. *Id.*

19. — The private party, though nominally suing on his own account, acts rather as a public prosecutor on behalf of all who may be injured. *Id.*

20. — It is not necessary that he should join his partners in business as plaintiffs. *Id.*

21. — Such bill is a local suit, and must be brought in the district where the nuisance is situated. *Id.*

22. — Where the nuisance is caused by several persons or corporations, those not within the jurisdiction of the court need not be joined as defendants. *Id.*

23. — In a bill for abatement of a nuisance brought in the district court of Iowa, that court cannot exercise local jurisdiction beyond what might have been exercised by a state court. *Id.*

24. — The nuisance, being a bridge over the Mississippi River, the district court has no power to abate it beyond the state line. *Id.*

25. — If the removal of that part of the bridge within the jurisdiction of the court would not improve the navigation of the river, so far as plaintiff is concerned, he is not entitled to a decree in his favor. *Id.*

26. — In such case, the same rule as to jurisdiction applies as upon an indictment. *Id.*

27. — Where a bridge erected for public purposes over a navigable stream leaves a reasonable space for the passage of vessels, it is not indictable. *Id.*

28. — In a proceeding by bill in equity to abate a nuisance, the rule of criminal law, that the defendant is entitled to the benefit of all reasonable doubts, applies. *Id.*

29. **Highways and streets.** Railway companies may be indicted and fined for obstruct-

Indictment — Quo Warranto.

ing a public highway contrary to the powers granted in their charters. *Louisville and Nashville R. R. Co. v. State*, 3 Head (Tenn.), 523. 1859.

30. — An incorporated railway company is indictable for a nuisance for erecting and continuing a building, and placing and leaving its cars in the public highway. *State v. Morris and Essex R. R. Co.*, 3 Zabriskie (N. J.), 360. 1852.

31. — A railway, constructed over a highway in such a manner as to obstruct public travel, is liable to indictment as a nuisance, notwithstanding St. 1849, ch. 222, § 4, conferring on county commissioners "the original jurisdiction of all questions touching obstructions to turnpikes, highways or town ways, caused by the construction or operation of railroads." *Commonwealth v. Nashua and Lowell R. R. Co.*, 2 Gray (Mass.), 54. 1854.

32. — The South Carolina Canal and R. R. Co. is not authorized to use steam in propelling its cars on that part of its line which extends from Line street to Mary street on Charleston Neck. A charter to construct a railway does not necessarily authorize the use of steam in its operation. And when the use of such motive power becomes a nuisance on any portion of its line, the parties operating the road are liable to indictment. *State v. Tupper et al.*, Dudley (So. Car.), 135. 1838.

33. Indictment. An indictment for nuisance described the venue as in Cecil county. In the indictment, the crime was alleged to have been committed in the "county aforesaid," the county of Cecil being the only county named in the indictment. *Held*, that the indictment was sufficient. *Philadelphia, Wilmington, etc., R. R. Co. v. State*, 20 Md., 157. 1863.

34. — The suit to recover a penalty provided for by section 25 of ch. 102, 1 R. S., 1852, is a civil suit and is no bar to a criminal prosecution. *Indiana Central R. R. Co. v. Potts*, 7 Ind., 681. 1856.

35 Lease. Although a corporation causing or continuing a nuisance had leased the premises on which the same was erected to another, and given possession prior to the happening of the injury complained of, it is liable for the damages sustained. *Conhocton Stone Co. v. Buffalo, New York and Erie R. R. Co.*, 52 Barbour (N. Y.), 390. 1868.

36. Municipal corporations. The power to abate a nuisance in a town or city is vested in the town or city government, and is not within the jurisdiction of a justice of the peace. *South Carolina R. R. Co. v. Ellis*, 40 Ga., 87. 1869.

37. — An action brought to recover money expended from the treasury of a city or town by its board of health to remove a nuisance, may be maintained in the name of the city or town. *Salem v. Eastern R. R. Co.*, 98 Mass., 431. 1868.

38. Pleading. The sufficiency of the pleadings in a particular case — determined. *Ohio and Mississippi R. R. Co. v. Simon*, 40 Ind., 278. 1872.

39. — When a declaration charges a railway company with obstructing a public street adjoining the residence of plaintiff, and thereby preventing a free passage to and from his dwelling house, that the company kept up dangerous fires, generated and deposited about his premises noxious vapors and smoke, jarred and disjointed his house, made his residence unwholesome and uncomfortable, and that the railroad company did these things unlawfully and with intent to injure the plaintiff, a good cause of action is shown. *Parrott v. Cincinnati, Hamilton and Dayton R. R. Co.*, 3 Ohio St., 330. 1854.

40. Ponds and surface water. If an order of a board of health, under the Gen. Sts., ch. 26, § 8, to a railway company for the removal of a nuisance, recites that the company, by filling up parts of a certain pond without supplying suitable culverts or other means of drainage, has created and is maintaining a nuisance at said pond, it sufficiently informs the company of the nature and locality of the nuisance to be removed. *Salem v. Eastern R. R. Co.*, 98 Mass., 431. 1868.

41. — The formation of an embankment upon the land of a railway company by debris, so that the water is prevented from flowing in its natural course, and is diverted upon the land of another person, is a nuisance. *Cincinnati, Hamilton, etc. R. R. Co. v. Ahr*, 2 Cincinnati Superior Ct. Rep., 504. 1873.

42. Quo warranto. The remedy by an information in the nature of a *quo warranto* against a corporation, as provided by the statute, does not prevent a proceeding in equity in case of a private nuisance. *Fall River*

Miscellaneous.

Iron Works Co. v. Old Colony and Fall River R. R. Co., 5 Allen (Mass.), 221. 1862.

43. Squares. The defendant in this case, having executed a covenant to the city of Rochester, not to erect any buildings upon the square, nor to suffer any trains of cars to stand or remain thereon; *held*, that the inconveniences affecting the rights of the plaintiffs, by running the defendant's road on the side of the square — such as the obstruction of light, air, prospect, and of a public promenade, etc. — could not be considered such annoyance as to amount to a private nuisance. *Anderson v. Rochester, Lockport and Niagara Falls R. R. Co.*, 9 Howard's Pr. (N. Y.), 553. 1854.

OBSTRUCTING RAILWAY TRACKS.

1. Evidence. Upon an indictment for maliciously placing obstructions upon the track of a railroad, evidence showing that the prisoner placed on the track other obstructions than those mentioned in the indictment is competent, provided the acts are so connected that they may be regarded as a part of the same transaction. *State v. Wentworth*, 37 N. H., 196. 1858.

2. Former acquittal. A former acquittal upon an indictment on the Gen. Sts., ch. 63, § 107, for obstructing an engine passing upon a railroad by putting a rail across the track, will not bar the prosecution of another indictment against the same defendant, on § 108, for putting the rail across the track with intent to obstruct the passage of the engine. *Commonwealth v. Bakeman*, 105 Mass., 53. 1870.

3. Indictment. An indictment under the Gen. Sts., ch. 63, § 108, charging that the defendant, on one day, intending to obstruct an engine passing upon a railroad, did on another day put a rail across the track, is bad for want of averment that the act charged was done with a criminal intent, or the intent charged was accompanied by any act. *Ib.*

4. — The indictment need not aver that the road was a corporation, or carrier, or a way, or road used for travel. *State v. Wentworth*, 37 N. H., 196. 1858.

5. — An averment that the road obstructed was the B. and M. R. R. is not an averment of property, but merely of description. *Ib.*

6. — In such an indictment, it is not necessary to set out the names of the persons whose lives were imperiled by the act of the defendant. *Ib.*

7. Intent. On the trial of an indictment under the statute, for placing obstructions upon a railroad, with intent to endanger the safety of persons conveyed on such road, the defendant has no ground of exception to a ruling that if he did the act, and the ordinary and usual consequences of so doing would be to cause such danger, it is competent for the jury to infer that he did it with such intent, even if he designed to injure no particular person. *Commonwealth v. Bakeman*, 105 Mass., 53. 1870.

8. Owner of land. A breach of contract by which a railroad company has secured the right of way over certain lands, does not justify the owner in placing obstructions on the track of the railroad where it crosses his land. *State v. Hessenkamp*, 17 Ia., 25. 1864.

OFFER TO COMPROMISE.

1. Evidence. It is a question of law for the court to decide, and not of fact for the jury, whether an offer of a certain sum for land was by way of compromise, and, therefore, not competent testimony. *Davis v. Charles River Branch R. R. Co.*, 11 Cushing (Mass.), 506. 1853.

OFFICERS.

•See COMPENSATION; DIRECTORS; ELECTION OF CORPORATE OFFICERS; OFFICIAL BONDS.

1. Action to test rights of individuals to corporate offices. Persons who are not the *de facto* officers of a corporation cannot maintain an action in the name of the company, without authority of the corporation, for the purpose of indirectly trying the title to the offices by means of an action ostensibly brought to enforce an obligation in favor of the company, *Hudson River West Shore R. R. Co. v. Kay*, 14 Abbott's Pr., N. S. (N. Y.), 191. 1873.

2. Assignment. Where the board of directors of a railway company have ordered

De Facto Officers — Ratification.

the assignment of a claim, which is done by the president and secretary, it will be presumed, as to third persons, that they are the proper officers to make the assignment. *Carroll v. Cone*, 40 Barbour (N. Y.), 220, 1862; see 41 N. Y., 216.

3. De facto officers. There can be no such officer as an officer *de facto*, as against the people, in an action at the suit of the people, to try the title of office. *People v. Albany and Susquehanna R. R. Co.*, 55 Barbour (N. Y.), 344, 1869; *Same v. Same*, 38 Howard's Pr. (N. Y.), 228, 1869; 7 Abbott's Pr., N. S. (N. Y.), 265, 1869.

4. — To constitute a person an officer *de facto*, there must be color for the claim, and a colorable title to the office. *Rochester and Genesee Valley R. R. Co. v. Clarke National Bank*, 60 Barbour (N. Y.), 234. 1871.

5. Evidence of authority. Where individuals, as president and secretary of a railway company, acting for the company, contracted with the plaintiff for the construction of depot buildings for the company, and assigned to him, in part payment, an agreement between the company and the defendant; and the company, after the buildings were erected, occupied the same, thereby recognizing the authority of their officers; *held*, that the official character of those persons and their authority to assign the agreement, in behalf of the company, were sufficiently proved. *Kennedy v. Cotton*, 28 Barbour (N. Y.), 59. 1858.

6. Powers of officers. The acting president of a railway company being empowered to sell certain iron, it was competent for him to engage the services of a broker in finding a purchaser and effecting the sale. Such an act, in absence of proof to the contrary, was within the scope of his agency, as a reasonable and proper means of accomplishing the business intrusted to his charge. *Northern Central R. R. Co. v. Bastian*, 15 Md., 494. 1859.

7. — Under the principles which usually govern such corporations, neither a director nor vice president of a railway company is empowered to bind it by his acts, such as appointing agents to protect its lands, or to sell the lands or timber. *Chicago and Northwestern R. R. Co. v. James*, 22 Wis., 194. 1867.

8. — A president of a railway company has no authority merely by virtue of his office to make a sale of railroad ties belonging to the

company. *Walworth County Bank v. Farmers' Loan and Trust Co.*, 14 Wis., 325. 1861.

9. — Nor would he be permitted to make such sale by virtue of a previous resolution of the board of directors, appointing him the fiscal agent of the company, and authorizing him "to purchase such equipments for the road as the board might direct, to purchase all necessary materials for the car shops, and to contract for all necessary transportation by the company." *Ib.*

10. — Where the president and vice president of a railway company were authorized jointly to sell and dispose of the property of the company in payment of its debts, and the president sold to a bank to which it was indebted, with the assent of the vice president, who was also president of the bank and acted for it in making the purchase, a quantity of railroad ties in part payment of the debt, it was *held*, that such assent of the vice president was not a due execution of the power, and that he could not act as agent both for the bank and the railroad company in making such sale, and that it stood as if made by the president alone. *Walworth County Bank v. Farmers' Loan and Trust Co.*, 16 Wis., 629. 1863.

11. — If the fact of such sale had been communicated to the board of directors, who had authority to manage the affairs of the company, and was openly talked of in one of their meetings, and they did nothing to disaffirm it, this would be deemed a ratification of the sale. *Ib.*

12. — Neither the charter nor by-laws of the C. & P. H. R. R. Co., conferred any authority upon the cashier to release one debtor by substituting another. *Com'rs of Clinton and Port Hudson R. R. Co. v. Kernan*, 10 Robinson (La.), 174, 176. 1845.

13. Ratification. The president of a railway company was allowed for three years to purchase locomotives, giving bills for them purporting to bind the company, and to run them upon the road, which he managed in his discretion. Afterwards, the directors resumed the charge of the road and of the property thus obtained, and for several years, though they did not settle, did not question the accounts rendered by the president of these transactions. This acquiescence is such a ratification as to be evidence of the president's original authority to bind the corporation by bills given for

Acceptance of Bond — Station Agent.

the locomotives. *Olcott v. Tioga R. R. Co.*, 27 N. Y., 546, 1863; *Same v. Same*, 40 Barbour (N. Y.), 179. 1862.

14. **Suspension.** An officer of a corporation should not be suspended from exercising his office, except upon clear and positive proof. *Ramsey v. Erie R. R. Co.*, 38 Howard's Pr. (N. Y.), 193. 1869.

OFFICIAL BONDS.

1. **Acceptance of bond.** The formal vote of a corporation accepting its treasurer's bond needs to be shown, in order to entitle it to maintain an action thereon. *Lexington and West Cambridge R. R. Co. v. Elwell*, 8 Allen (Mass.), 371. 1864.

2. **Estoppel.** A corporation is not estopped from maintaining an action upon its treasurer's bond by having accepted a report of an auditing committee who had approved his accounts, nor by making a report founded thereon to the legislature. *Ib.*

3. **Evidence.** The indorsement by the treasurer of a corporation upon notes signed by himself, and running to the corporation, is sufficient evidence to render the sureties upon his bond liable for the amount indorsed, as for moneys received by him in his official capacity. *Ib.*

4. **Freight agent.** The sureties on a general freight agent's bond are not liable for a deficit in his accounts, arising from the default of his subordinates, under a general clause in the bond that "such agent shall well and truly perform and execute the duties of freight agent, and shall render a just and true account of all moneys, goods and chattels, which shall come into his charge or possession," where the subordinates are appointed by the company, although appointed with the approval of the general agent, and acting under his direction. *Chicago and Alton R. R. Co. v. Higgins*, 58 Ill., 128. 1871.

5. **Liability of sureties.** The sureties upon the bond of the treasurer of a railroad company, the condition of which provided for the faithful discharge of the duties of the office "during his continuance in office during the present year, and for such further periods as he may from time to time be elected to said

office," were held not liable for defaults which occurred after an omission to reelect him at a regular meeting for that purpose, and after such further time as might be considered reasonably sufficient for the election and qualification of his successor, although he continued to act as treasurer, and was reelected at the next regular meeting thereafter; but they were not discharged from their liability by a vote of the corporation postponing for five weeks the time of the regular meeting for the election of officers, and the consequent postponement of an election for that period, nor by the corporation's assuming the entire management of the railroad, after having leased it to another corporation. *Lexington and West Cambridge R. R. Co. v. Elwell*, 8 Allen (Mass.), 371. 1864.

6. — Mere forbearance by the creditors to the principal, however prejudicial to the surety, will not discharge the surety. *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Schaeffer*, 59 Penn. St., 350. 1868.

7. — The same rule applies to sureties for officers of corporations. *Ib.*

8. — The rules of a company required from the cashier monthly reports and payments; his bond was conditioned that he should faithfully discharge his duties as required by the rules, "a copy of which he acknowledged to have received;" the cashier neglected to account and pay over for six months, when he was dismissed, and the sureties were not notified of his default for three months afterwards. *Held*, that they were not discharged. *Ib.*

9. **Pleading and practice.** Where an action was brought upon the bond of a railroad official, dated in 1857, and it was alleged in the declaration that the bond had been broken by the failure of the official to account before and up to the time of his death, which it was alleged took place in 1868. And on the calling of the case, the defendant moved to dismiss the case, because the affidavit was not filed as to the payment of the taxes. *Held*, that it did not appear that the debt sued on was contracted or implied before the 1st of June, 1865. *Sirrine v. Southwestern R. R. Co.*, 43 Ga., 280. 1871.

10. **Station agent.** A bond to the Baltimore and Ohio R. R. Co., in the penalty of \$3,000, recited that the principal had been "appointed by the said company, as ticket

Miscellaneous.

and freight agent, at Ellicott's Mills," and was conditioned for the faithful performance of the duties of such office so long as he should hold the same. At the date and delivery of the bond, Ellicott's Mills was a second class station, but the company subsequently made it a first class station. At first class stations a greater amount of freight is paid than at second class stations, but the duties of the ticket and freight agent are the same at both, viz.: to receive all sums payable at his station, both for freight and passengers. *Held*, that the change in the regulations of the company, by which this was made a first class station, did not discharge the sureties on this bond. *Straubridge v. Baltimore and Ohio R. R. Co.*, 14 Md., 360. 1859.

11. **Time of default.** Where the treasurer of a corporation has appropriated to his own use sums of money received from a certain source during the time covered by his official bond, and other sums received from the same source after the bond has expired, and he has afterwards entered upon the books a sum as received from that source, and such sum was not in fact received at the date of the entry, and there is nothing to show when the same, or the items of which it is composed should have been entered, it is proper, in an action upon the bond, to apply one half of it to the time covered by the bond. *Lexington and West Cambridge R. R. Co. v. Elwell*, 8 Allen (Mass.), 371. 1864.

ORDERS.

1. **Demand.** Where an order is drawn by the secretary of the company upon the treasurer thereof for a sum of money actually due from the corporation to the payee, it is not necessary to make a demand before bringing suit upon it. *Indiana and Illinois Central R. R. Co. v. Davis*, 20 Ind., 6. 1863.

ORDINANCES.

See EVIDENCE.

ORGANIZATION OF CORPORATION.

See CHARTER; SUBSCRIPTIONS BY CITIES AND TOWNS; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY INDIVIDUALS.

1. **The existence of a railroad corporation, and the right to make an appropriation of land for its roadway, under the statute authorizing and regulating such corporations, passed May 1st, 1852, depend on the legal validity of the certificate and public record of its organization.** *Atlantic and Ohio R. R. Co. v. Sullivant*, 5 Ohio St., 276. 1855.

OVERRULED CASES.

See TABLE AT END OF THIS VOLUME.

PARENT AND CHILD.

See INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK.

1. **Damages.** The plaintiff's son, a boy of fourteen, while riding in defendant's cars, had both his legs broken by the upsetting of a car. The accident was caused by the neglect of a servant of the company. *Held*, that the jury might consider not only the expense of nursing, medical attendance, and loss of service both present and future, but they might also consider the plaintiff's loss in business while attending his son during his sickness. *Black v. Carrollton R. R. Co.*, 10 La. An., 33. 1855.

2. — Under Art. 1928, Civil Code, the jury is not confined to the actual pecuniary loss in such cases. *Ib.*

3. — But the shock to the feelings of the father cannot be considered in estimating the damages. *Ib.*

4. **Evidence.** The deceased was on his way to consummate an arrangement to go as a substitute for a drafted man, with the expressed intention of giving his bounty to his parents. *Held*, that these facts were proper evidence on the question of the continuance of the family relation. *Pennsylvania R. R. Co. v. Adams*, 55 Penn. St., 499. 1867.

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5. — The rule is that if there be a reasonable expectation of pecuniary advantage from a person bearing such relation, it will sustain the action. *Ib.*

6. **Injuries to child.** Where a father sues for damages resulting from the injury of his child, he can only recover compensatory damages; to be measured by the loss of the child's services, and his expenses in nursing and curing him; he cannot recover for his lacerated feelings or his disappointed hopes. *Pennsylvania R. R. Co. v. Kelley*, 31 Penn. St., 372. 1858.

7. — The loss of limb and personal sufferings of the child are a subject of an action by the child himself, and should not enter into a computation of the father's damages. *Ib.*

8. — It is error in such an action to instruct the jury that "there is no absolute measure of damages, and that they might give such damages as they believed to be right, to compensate the plaintiff for the loss and injury sustained." *Ib.*

9. **Mothers.** An action by a mother may be maintained where the son is above age, if the family relation existed between them at time of his death, and there was reasonable ground for expecting pecuniary advantage from the continuance of the relation. *Pennsylvania R. R. Co. v. Keller*, 67 Penn. St., 300. 1871.

10. — The evidence must show that she has sustained pecuniary loss by his death, but it is not necessary that the precise amount of damages in dollars and cents should be shown. *Ib.*

11. — The sound sense of the jury must ascertain the pecuniary value from the evidence in the case as best they may. *Ib.*

12. — At law, a mother has no implied right to the services of her minor son, she not being bound for his maintenance. *Fairmount and Arch Street R. R. Co. v. Stutler*, 54 Penn. St., 375. 1867.

13. — The relation of mistress and servant can be constituted between them only as it may be done between strangers in blood, except that less evidence might establish it. *Ib.*

14. — The mother's right of action cannot be rested on her liability for his support under the poor laws. *Ib.*

15. — For torts springing from contract which consist in a mere omission of a contract

duty, no legal remedy exists except by an action on the case, which must be by the party injured, and cannot be by the master. *Ib.*

16. — The contracts of a minor are limited to his necessities and advantages, and cannot enure to the benefit of another. *Ib.*

17. — Where a minor, having no father, was a passenger on a railway, and was injured by the negligence of the company's servants, and was nursed, supported and medical attendance supplied, by the mother, *held*, that the contract to carry safely was with the minor; that the mother was a stranger to it, and could not recover. *Ib.*

18. — A mother may recover damages for injuries accruing to her infant son by reason of negligence of a railway company. *Stettler v. Railroad Co.*, 6 Philadelphia Rep. (Penn.), 178. 1866.

19. **Statute.** The words "parents" and "children," in the act of April 26, 1855, relating to actions for personal injuries by negligence, are used to indicate the family relation in point of fact as the foundation of the right of action, without regard to age. *Pennsylvania R. R. Co. v. Adams*, 55 Penn. St., 499. 1867.

20. — Under age, the relation is presumed to exist until the contrary appears; over age it must be shown to exist. *Ib.*

PARTIES TO ACTIONS.

See ACTIONS; HUSBAND AND WIFE; PARTITION; PLEADINGS.

1. **Agents.** Where one has deposited securities with agents, who have, in violation of their trust, disposed of them in different transactions to different parties, such various transferees and agents cannot be joined in one and the same action brought for relief by the owner. *Lexington and Big Sandy R. R. Co. v. Goodman*, 25 Barbour (N. Y.), 469, 1857; See *Same v. Same*, 15 Howard's Pr. (N. Y.), 85, 1857; 5 Abbott's Pr. (N. Y.), 493, 1857.

2. **Annulling corporation.** A corporation being a defendant to a suit in equity, which seeks to have it declared null, the holders of its stock are not proper parties to defend the suit. *Washington, Alexandria, etc. R. R. Co.*

Attorney — Real Party in Interest.

v. Alexandria, etc. R. R. Co., 19 Grattan (Va.), 592. 1870.

3. — In such a suit the stockholders claiming that if the corporation is annulled, they have equitable interests in the property, may be admitted as parties defendants to protect their interests. *Ib.*

4. **Attorney.** An attorney, who is to receive a contingent fee out of the amount of the recovery, is not a necessary party plaintiff. *McDonald v. Chicago and Northwestern R. R. Co.*, 26 Iowa, 124. 1868.

5. **Bills and notes.** An action was brought by A. against B. upon a promissory note. C., upon his own application, and upon motion of B., was made a party defendant, and filed his answer, alleging that the note was given by B. to A., solely for the accommodation of C., and for the balance of the price charged by A. for making certain repairs upon a steam engine for C.; that the materials used in such repairs were defective, and the work was not skillfully done, and that such work and materials were worth no more than the money already paid; that C. had no opportunity to examine such work and materials before, etc. B. adopted the answer filed by C. *Held*, that as C. disputed the consideration of the note, B. had a right to notify him to appear and defend the action. *Siner v. Toledo, Logansport and Burlington R. R. Co.*, 27 Ind., 365. 1866.

6. — Under the plea of an entire failure of consideration, the defendant was entitled to the benefit of such evidence as he could produce, showing a partial want or failure of consideration. *Ib.*

7. — If the court erred in making C. a party defendant, the error was not available to the plaintiff, as he was not prejudiced. *Ib.*

8. **Carriage of goods.** A written contract for the transportation of goods, entered into by the real owner of the property in the name of those from whom he purchased — they having been the original shippers by another line, from which the defendants received them, and required by the defendants to be thus made in the name of such original shippers — may be sued upon by said real owner of the property in their names. *Sisson v. Cleveland and Toledo R. R. Co.*, 14 Mich., 489. 1866.

9. — The consignors and owners of goods conveyed by common carriers, are the proper parties to sue for negligence in the transporta-

tion. *Sanford v. Housatonic R. R. Co.*, 11 Cushing (Mass.), 155. 1853.

10. **Contract.** Where the record shows that all the persons who originally entered into a contract with the defendants are plaintiffs, it will be no objection that others, who became subsequently interested in the contract, without the privity of the defendants, are not made parties to the suit. *McCord v. West Feliciana R. R. Co.*, 1 Robinson (La.), 519. 1842.

11. **Injunction.** Persons or corporations interested must be made parties, especially where the object of the bill cannot be attained, without seriously affecting the interests of such persons or corporations. *Northern Indiana R. R. Co. v. Michigan Central R. R. Co.*, 5 McLean, 444. 1853.

12. **Judgment.** The remedy of parties to a judgment alleging matters *in pais*, against one not a party to the record, is by an action in the ordinary form and not by rule. *New Orleans and Carrollton R. R. Co. v. Bosworth*, 8 La. An., 80. 1853.

13. — An infant may either sue by his guardian or by his next friend. *Hurt v. Southern R. R. Co.*, 40 Miss., 391. 1866.

14. **Misjoinder.** Where a petition alleges that one defendant erected an obstruction in an alley and transferred it to another, who maintained it, it was *held*, that both such parties could not be made defendants to the same action. *Hess v. Buffalo and Niagara Falls R. R. Co. et al.*, 29 Barbour (N. Y.), 391. 1859.

15. **Order in writing.** On a written order, made for a consideration, moving from the Eastern R. R. Co. to deliver property to "J. S., president of the Eastern R. R. Co.," the company may sue in its own name. *Eastern R. R. Co. v. Benedict*, 5 Gray (Mass.), 561. 1856.

16. **Real party in interest.** The provision in the new practice act, that suits shall be brought in the name of the real party in interest, does not apply where part of a cause of action only is assigned. In such case, the suit for the whole must be brought in the name of the original owner. *Cable v. St. Louis Marine R. R. and Dock Co.*, 21 Mo., 133. 1855.

17. — Where, by the requirement of the laws of a state, a suit is prosecuted in the name of the real party in interest, and by the common law, it would have been prosecuted in the name of one person for the use of another, the plaintiff

Assignment of Contract. — Purchase of Partner's Interest.

iff in the state court will be permitted to remain as plaintiff in the federal courts. *Thompson v. Railroad Companies*, 6 Wallace, 134. 1867.

PARTITION.

1. Parties. A railway company is not a necessary or proper party to a process for partition in consequence merely of having laid out and constructed its road over lands owned by tenants in common. *Weston v. Foster*, 7 Metcalf (Mass.), 297. 1843.

PARTNERSHIP.

See EMINENT DOMAIN; EVIDENCE; SUBSCRIPTIONS BY INDIVIDUALS.

1. Assignment of contract. A. and B. contracted with a railway company to build its road, and afterwards sold and assigned to C. and D. a part of the contract, so that C. and D. should be equally interested with A. and B. in the profits of the contract. *Held*, that C. and D. became partners and jointly liable with A. and B. for work done on the road; and where a note was given for labor or materials, signed A. and B., C. and D. were liable on such note as partners. *Voorhees v. Jones*, 5 Dutcher (N. J.), 270. 1861.

2. Connecting lines. An agreement between certain individuals and a railway company to make connections at certain points and carry goods, the company carrying over a certain part of the line, and the other parties carrying over a certain other portion of the line, the freight charges to be divided in proportion to the distance, does not constitute the parties to such contract partners. *Mohawk and Hudson R. R. Co. v. Niles*, 3 Hill (N. Y.), 162. 1842.

3. Hotel. A railroad company which leases to an individual a house owned by it, he paying a certain rental and "half the net proceeds arising from keeping said house as a hotel," and keeping an account open to the inspection of the company, and giving his own time and attention, and having free passage over the railroad for himself and all persons employed and all articles used by him in carrying on the

house, does not thereby become a partner, even as to third persons, in the business of keeping the house. *Holmes v. Old Colony R. R. Co.*, 5 Gray (Mass.), 58. 1855.

4. Payment to partner. N., one of two partners to whom large sums of money were due from a railway company on an unsettled account, gave notice to the company not to make a settlement unless both partners were present. E., the other partner, was endeavoring to obtain the money due for the purpose of applying it to his own private use, and of defrauding N., and the railway company, knowing of this intention, and for the purpose of aiding him in accomplishing it, as well as for the purpose of getting a more favorable settlement of the account, made a secret settlement with E., and paid him a sum agreed to by him as the balance due, and took a discharge of the partnership debt. N. had no knowledge of the settlement until E. had left the state with the money, when he gave immediate notice to the company that he should not recognize the settlement. In an action of assumpsit brought in the name of the partnership against the company to recover the amount of the account, it was *held*, that whatever remedy N. might have in any other form, yet that no action could be sustained in the name of the partnership to recover again the money so paid. *Noyes v. New Haven, New London and Stonington R. R. Co.*, 30 Conn., 1. 1861.

5. — A payment to a partner is a good payment to the firm, although the other partner or partners have given notice to the debtor not to pay to such partner. The debtor has a right to pay his debt, and cannot be affected by the disagreement of the partners as to who shall receive the money. Any partner wishing to prevent such payment must seek the aid of a court of chancery. *Id.*

6. Purchase of partner's interest. A party purchasing the right of a partner comes into nothing more than an interest in the partnership which can only be made available by an accounting between the partnership and the partner. *Bank v. Carrollton R. R. Co.*, 11 Wallace, 624. 1870.

7. — A bill for settlement will not lie in such case unless all the parties are made defendant. *Id.*

8. — Hence this bill was dismissed, for the reason that if an amendment was permitted,

Carriage beyond destination — Delays.

and proper parties brought in, the court, from the character of its jurisdiction, would have had no jurisdiction of the controversy, owing to the residence of one of the necessary parties. *Ib.*

PASSENGERS.

See BAGGAGE; DAMAGES; INJURIES TO EMPLOYES; INJURIES TO PASSENGERS. For expulsion of passengers, see INJURIES TO EMPLOYES; STREET RAILWAYS; RATES.

1. Carriage beyond destination. In actions sounding in damages, where the law furnishes no legal rule of measurement, save the discretion of the jury, upon the evidence before them, courts will not disturb the verdict upon the ground of excessive damages, unless it be so flagrantly improper as to evince passion, prejudice, or corruption in the jury. And the court refused to disturb the verdict in this case, although four thousand five hundred dollars damages were allowed for carrying a passenger four hundred yards beyond the proper station, and compelling him to alight there. *New Orleans, Jackson and Great Northern R. R. Co. v. Hurst*, 36 Miss., 660. 1859.

2. — Railway companies, furnishing reasonable means for the carriage of passengers to all their stations, have the right to run trains that only stop at designated or principal stations on their roads. And when a person purchases a ticket, he should ascertain, before getting on a train, whether such train will only stop at the principal stations, or at all of them. *Chicago and Alton R. R. Co. v. Randolph*, 53 Ill., 510. 1870.

3. — If a railway passenger, holding a ticket entitling him to alight at a particular station, is carried past such station without being allowed a reasonable opportunity of leaving the train, the company is liable for the damages. *Illinois Central R. R. Co. v. Able*, 59 Ill., 131. 1871.

4. Change of cars. A railway company does its duty with reference to giving notice of the necessity of changing cars, when it gives such notice in the trains at any particular station, that any traveler by the use of reasonable prudence would obtain all requi-

ite information as to the route to be traveled. *Page v. New York Central R. R. Co.*, 6 Duer., (N. Y.), 523. 1857.

5. Colored persons. No one can be excluded from carriage by a public carrier on account of color, religious belief or political relations or prejudices. *Westchester and Philadelphia R. R. Co. v. Miles*, 55 Penn., St., 209. 1867.

6. — It is not an unreasonable regulation to seat passengers so as to preserve order and decorum and prevent contacts and collisions arising from natural and well known repugnances, which are liable to breed disturbances by promiscuous sitting. *Ib.*

7. — Before the act of March 22, 1867, the separation of black and white passengers in a public conveyance was the subject of a sound regulation to secure order. *Ib.*

(See STREET RAILWAYS.)

8. Delays. It is no defense to an action against a railway company for its failure to carry a passenger with proper despatch, that the detention was the willful act of the conductor in charge of the train. *Weed v. Panama R. R. Co.*, 17 N. Y., 362, 1858; *Same v. Same*, 5 Duer., (N. Y.), 193. 1856.

9. — It is immaterial whether a breach of contract result from the negligence or the willfulness of the defendant's agent, if his act is within the scope of his employment. *Ib.*

10. — In an action brought against a common carrier of passengers, to recover damages for a failure to carry the plaintiff within the appointed time, to the place for which he had taken passage, by reason of which he did not perform his errand there, and was detained at expense, and to the injury of his business at home, he must produce some evidence that if he had arrived at the appointed time, he might have done his errand and would have promptly returned, or that he could not, with due effort, accomplish his errand by reason of his delay in arriving. *Benson v. New Jersey R. R. and Trans. Co.*, 9 Bosworth (N. Y.), 412. 1862.

11. — A passenger was pointed by an agent of the carrier to a train then standing in his sight as one which would convey him to Lyons. That train, after running one hundred and fifty miles, deflected to a branch road not passing through Lyons, but was followed an hour afterwards by another train which passed

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through Lyons. *Held*, that the passenger was in fault for being miscarried, if, at or before reaching the point of divergence, the carrier used such means as would have conveyed to a traveler of ordinary intelligence, using reasonable care and attention, information of the necessity of his transferring himself to the second train. *Barker v. New York Central R. R. Co.*, 24 N. Y., 599. 1862.

12. — The publication of a time table, in the common form, imposes upon a railway company the obligation to use due care and skill to have the trains arrive and depart at the precise moments specified in the table; but it does not import an absolute and unconditional engagement for such arrival and departure, and does not make the company liable for want of punctuality which is not attributable to its negligence. *Gordon v. Manchester and Lawrence R. R. Co.*, 52 N. H., 596. 1873.

13. — An extraordinary, unusual and unexpected number of passengers having taken passage upon defendant's train, this fact was *held* to be a sufficient excuse for the failure of the train to stop at a certain station, there being no room on the train for more passengers. *Ib.*

14. **Duty of carrier.** If a common carrier have reasonable ground for refusing to carry passengers and goods, he must insist upon it at the time the transportation is applied for. If not thus insisting, he receives the passengers and their baggage, his liability is the same as though no ground for refusal existed. *Hannibal R. R. Co. v. Swift*, 12 Wallace, 262. 1870.

15. **Payment of fare.** Common carriers have the right to demand payment of fare in advance; if payment in advance is not demanded, they must rely on the responsibility of the passengers or their lien on the baggage. *Hurt v. Southern R. R. Co.*, 40 Miss., 391. 1866.

16. **Pleading.** The character of the action, whether *ex contractu* or in tort, depends on the character of the grievance instead of the form of the pleading, and the courts are inclined to consider actions for the breach of duty in not putting passengers off at the proper station as actions founded in tort. *New Orleans, Jackson and Great Northern R. R. Co. v. Hurst*, 36 Miss., 660. 1859.

17. **Steamboat lines.** Railway companies

have the right to own and control steamboats, for the purpose of transporting their freight and passengers across navigable waters on the line and constituting a part of their route, and those lying at the end of them and separating them from the ostensible and substantial termini of their routes. *Wheeler v. San Francisco and Alameda R. R. Co.*, 31 Cal., 46. 1866.

18. — But if they use and own such vessels, they must convey all persons who apply and tender the usual price. *Ib.*

PASTURAGE.

See EMINENT DOMAIN; INJURIES TO DOMESTIC ANIMALS.

PATENTS.

See EVIDENCE.

1. **Assignment.** The effect of an assignment of letters patent for a car brake — determined. *Mowry v. Grand Street and Newtown R. R. Co.*, 10 Blatchford (U. S. C. C.), 89. 1872.

2. — Where an agreement was made for the sale of an interest in an invention in consideration of certain payments to be made to third parties, which payments are never made, and the grantee in his lifetime made no claim under the grant but recognized the exclusive rights of the grantor: *held*, after the grantee's death, that the agreement did not prevent the grantor's bringing suit for an infringement without naming the grantee. *Railroad Co v. Trimble*, 10 Wallace, 367. 1870.

3. **Consolidation of railways.** Where two corporations are consolidated, with all the powers of both the old corporations, the new corporation may use any patented invention that the old corporations had been licensed to use. *Lightner v. Boston and Albany R. R. Co.*, 1 Lowell (U. S. C. C.), 338. 1869.

4. **Construction.** Patents are not to be treated as monopolies, and therefore odious in law, but are to receive a liberal construction. *Turrill v. Michigan Southern, etc., R. R. Co.*, 1 Wallace, 491. 1863.

5. — Hence the "claim" following the description may be construed in connection with

 Damages — License.

the explanations contained in the specification. *Ib.*

6. Damages. A person using a patent right without authority will be compelled to pay therefor. And the use of such invention is evidence of its utility. *Simpson v. Mad River R. R. Co.*, 6 McLean, 603. 1855.

7. — Counsel fees are not to be considered in estimating the damages in a patent case. *Stimpson v. Railroad Companies*, 1 Wallace, Jr., 164. 1847.

8. Estoppel. It is no bar to an action for the infringement of a patent that, before making his application to the patent office, the patentee had orally explained his invention to several persons, and that subsequently, the defendant had perfected the same thing, and described it in the presence of the patentee, without his making a claim to it. Silence of a party works no estoppel unless he has misled another to his hurt. *Railroad Co. v. Dubois*, 12 Wallace, 47. 1870.

9. Evidence. The burden of proof is on the defendant, in a patent cause, to show that he gave the notice required by the statute to enable him to examine a witness as to the novelty of an invention. A party, offering evidence for one purpose, must sustain his right to introduce it for that purpose; he cannot prevail in a court of errors by showing that the evidence was admissible for some other purpose. *Philadelphia and Trenton R. R. Co. v. Stimpson*, 14 Peters, 457. 1840.

10. — The novelty of a patented invention cannot be assailed by any other evidence than that of which the plaintiff has received the notice provided by the patent act of 1836. *Railroad Co. v. Dubois*, 12 Wallace, 47. 1870.

11. — A patent is *prima facie* evidence that the patentee is the first inventor of the improvement. *Knight v. Baltimore and Ohio R. R. Co.*, Taney's Dec., 106. 1840.

12. — The patent act of 1836 does not require notice of the names and places of residence of the witnesses by whom it is introduced to prove prior knowledge of the use of the invention. *Wilton v. Railroad Companies*, 1 Wallace, Jr., 192. 1847.

13. — Though the declarations of the patentee that, at some prior date, he had made the invention, is not admissible to prove that fact, yet his conversation in which he described the invention, is evidence that he had then

invented the thing he described. *Philadelphia and Trenton R. R. Co. v. Stimpson*, 14 Peters, 457. 1840.

14. Extensions. The assignee of a patent holding at the expiration of the first term a right during that term to "make, construct and use" the article patented, may, during the term of its subsequent extension, continue to use it, and even repair it, but is not entitled to make it for use, or for any other purpose. *Wood v. Michigan Southern and Northern Indiana R. R. Co.*, 2 Bissell (U. S. C. C.), 62. 1868.

15. — A grant by a patentee of a patent or an extension thereof, before any extension is issued, will carry, if the terms of the grant be proper ones, the legal as well as the equitable interest in the patent. *Railroad Co. v. Trimble*, 10 Wallace, 367. 1870.

16. Jurisdiction. Where proofs are to be laid before a public officer, and he is to do an act on being satisfied of certain facts, his doing the act is *prima facie* evidence that the proceeding was regular, nor can a reexamination be had before another tribunal, if the law has made him their proper judge. *Philadelphia and Trenton R. R. Co. v. Stimpson*, 14 Peters, 457. 1840.

17. Liability for use of patented articles. A railway company incorporated under the laws of Pennsylvania, which has built and owns a railway in that state, is liable for the use of a patented improvement on cars run on that road, though another corporation, created by the laws of the state of Maryland, held all of its stock, provided the cars and worked the road for the Pennsylvania corporation. *York and Maryland Line R. R. Co. v. Winans*, 17 Howard, 30. 1854.

18. License. A license granted under letters patent for a railroad car brake, to a railroad company, to construct and use the invention "on any and all cars belonging to said company, and to use the same improvement upon the entire length of the road, and upon all parts thereof * * * for and during the term for which said letters patent are or may be granted," covers the use of brakes belonging to the company, attached to trucks and running gear belonging to it, even though the superstructures which are borne upon the trucks do not belong to the company. *Hodge v. Hudson River R. R. Co.*, 6 Blatchford (U. S. C. C.), 85. 1868.

Miscellaneous.

19. — extension of railways. A license to a railway company extends no further than the road which is used or it was authorized to construct at the time of the license; it cannot use the patent on lines afterward built or leased. *Emigh v. Chicago, Burlington and Quincy R. R. Co.*, 1 Bissell (U. S. C. C.), 400. 1863.

20. Novelty. No one can claim a patent upon an invention that has been before used, although its use may not have been continuous. *Sayles v. Chicago and Northwestern R. R. Co.*, 1 Bissell (U. S. C. C.), 468. 1865.

21. — A patent for an appliance to "railway and other carriages" is not good if it appears that the invention was not new as to such "other carriages." *Winans v. Boston and Providence R. R. Co.*, 2 Story (U. S. C. C.), 412. 1843.

22. Re-issue. Under patent act of July 3, 1832, § 3 (4 stat. at lar., 559), as well as under that of July 4, 1836, § 13 (5 stat. at lar., 122), no use of the thing patented prior to a surrender on account of defective specification, can confer a right to continue the use after the reissue of the letters in a corrected form. *Stimpson v. West Chester R. R. Co.*, 4 Howard, 380. 1845.

23. — The seventh section of the act of March 3, 1839 (5 stat. at lar., 354), has reference to an original application for a patent, not to its reissue. *Ib.*

24. — It is not necessary to recite in a reissued patent for an invention that the prerequisites of a reissue have been complied with. *Philadelphia and Trenton R. R. Co. v. Stimpson*, 14 Peters., 448. 1840.

25. Special cases — Cawood's patent. The patent of Cawood for an improvement in repairing railroad bars held valid. *Turrill v. Illinois Central R. R. Co.*, 3 Bissell (U. S. C. C.), 66, 1867; *Same v. Same*, ib., 72, 1871.

26. — Goodyear patent. The patent of Goodyear for the preparation of "vulcanized India rubber" — examined. *Goodyear v. Railroad Co.*, 2 Wallace, Jr., 356. 1853.

27. — Imlay's patent. The patent of Imlay for an improvement in the support of railway cars — examined. *Imlay v. Norwich and Worcester R. R. Co.*, 4 Blatchford (U. S. C. C.), 227. 1858.

28. — Smith's patent. The effect of the letters patent of Alba F. Smith for an im-

provement in locomotive trucks — determined. *Locomotive Co. v. Erie R. R. Co.*, 10 ib., 292. 1872.

29. — Stevens' patent. Stevens' patent for an improved car brake — examined. *Emigh v. Chicago, Burlington and Quincy R. R. Co.*, 1 Bissell (U. S. C. C.), 400. 1863.

30. — Tanner's patent. The Tanner car brake patent — examined. *Sayles v. Chicago and Northwestern R. R. Co.*, 3 ib., 52. 1871.

31. — Whitney's patent. Asa Whitney's patent of April 25, 1848, for an "improvement in the process of manufacturing cast iron wheels," was for a process, not for a combination. *Mowry v. Whitney*, 14 Wallace, 620. 1871.

32. — Winans' patent. The legality of Winans' patent of Oct., 1, 1834, upon railway cars — determined. *Winans v. Schenectady and Troy R. R. Co.*, 2 Blatchford (U. S. C. C.), 279. 1851.

33. — It was proper to instruct the jury that if they found from the evidence, that before the time when Winans claimed to have made the discovery, carriages arranged in substantially the same manner and on the same mechanical principles as his, were used publicly, then Winans could not recover. *Winans v. New York and Erie R. R. Co.*, 21 Howard, 88. 1858.

PAYMENT.

1. Agent. Receiving the note of an agent in settlement by him of his principal's indebtedness is not in itself payment, even though the agent was at the time largely indebted to the principal, and had charged the principal on account of that indebtedness, with the amount of the note. *Higby v. New York and Harlem R. R. Co.*, 7 Abbott's Pr. (N. Y.), 259, 1858; see *Same v. Same*, 3 Bosworth (N. Y.), 497. 1858.

2. Application. The party making a payment has the right to say where it shall be applied, but if he fails to do so, the creditor may make the application. *Hempfield R. R. Co. v. Thornburg*, 1 W. Va., 261. 1866.

3. Mistake. During the period from July, 1864, to March, 1871, the P. Coal Co. paid to the C. and P. R. R. Co. a large sum of money as freight for carrying coal. Afterwards, the Coal Co. sued the R. R. Co. in *indebitatus as-*

Illegal Notes — Qui tam.

sumpsit to recover back a portion of this freight, on the ground that the rate of freight charged the Coal Co. was illegal, and that it exceeded the rates paid by other shippers. *Held*, that the money having been voluntarily paid under no mistake of facts, and there being no circumstances of duress, fraud or extortion, the plaintiff was not entitled to recover. *Potomac Coal Co. v. Cumberland and Pennsylvania R. R. Co.*, 38 Md., 226. 1873.

4. — Where the agent of a railroad company agreed to pay only what the engineer of the company certified, and supposed he was paying no more, while in fact he did pay more to the contractor, *held*, that the company might recover back the money erroneously paid. *Baltimore and Susquehanna R. R. Co. v. Faunce*, 6 Gill (Md.), 68. 1847.

PENALTIES.

See CHARTER; FERRIES; INJURIES TO DOMESTIC ANIMALS; LIMITATIONS; SUBSCRIPTIONS BY INDIVIDUALS; RATES.

1. **Illegal notes.** When a conductor on a railway pays out an illegal note in change to a passenger, the penalty cannot be recovered from the company, without proof that he had the authority from the officers of the company to do so; but this authority may be inferred from circumstances. *Commonwealth v. Ohio and Pennsylvania R. R. Co.*, 1 Grant's Cases (Penn.), 329. 1856.

2. — An open and notorious custom of all the ticket agents and conductors employed by a railroad company, to pay out illegal notes in making change to passengers, is evidence that should be left to a jury to enable them to determine whether the custom was authorized by the company. *Ib.*

3. **Injunction.** Where seventy-seven different suits for penalties were commenced by defendant against a railway company, an injunction was granted to prevent the prosecution of all but one until that one should be determined. *Third Avenue R. R. Co. v. New York*, 54 N. Y., 159. 1873.

4. **Judgment.** The judgment for the penalty under act of 1869, so far as it is to go to the state, is properly rendered in favor of "the people of the state of Illinois," and should

not be entered, in terms, in favor of "the state." *Illinois Central R. R. Co. v. Herr*, 54 Ill., 356. 1870.

5. — Where a judgment for several penalties and interest is reversed as to part of the penalties, it must be deemed reversed as to the interest on such part. *Mann v. New York Central R. R. Co.*, 12 Abotts' Pr., N. S., (N. Y.), 380. 1872.

6. **Pleading.** In an action brought against a railway company to recover several penalties incurred by it for running its locomotives in violation of the statute, the first count set forth the statutes under which the penalties were claimed, and in the other counts the statutes were only referred to in the introductory part of each count *held*, that all the counts, except the first one, were insufficient. *Crawford v. New Jersey R. R. Co.*, 4 Dutcher, N. J., 479. 1860.

7. — Where an action is brought to recover penalties, the manner in which they were incurred must be explicitly stated. *Ib.*

8. **Proceedings.** An action to recover a penalty given by statute is an action on contract, within the meaning of § 129 of the code, and the summons should be in the form prescribed by subdivision 1 of that section. *McCoun v. New York Central, etc., R. R. Co.*, 7 Lansing (N. Y.), 75. 1872.

9. — A suit brought to recover a statute penalty is not an action upon a contract within the meaning of § 129 of the code, and the summons in such an action should be in the form prescribed by the second subdivision of that section. *McCoun v. New York Central and Harlem R. R. Co.*, 50 N. Y., 176. 1872.

10. — If an action brought to recover a statute penalty can, under the code, be deemed an action on contract, the proper way of objecting to the use, in such an action, of a summons "for relief," instead of a summons "on contract," is not by setting aside the summons or complaint, but by an application for relief after judgment, if the judgment obtained be one to which the plaintiff is not entitled. *Abbott v. New York Central R. R. Co.*, 12 Abbott's Pr., N. S., (N. Y.), 465. 1872.

11. **Qui tam.** A person suing *qui tam* has no vested title in a penalty until he, by a recovery, reduces the claim to a judgment. *Chicago and Alton R. R. Co. v. Adler*, 56 Ill., 344. 1870.

Miscellaneous.

12. — The legislature may remit a penalty, even after verdict and before judgment. *Ib.*

13. Rate of fare. Where a penalty is prescribed for charging an excess of fare, and the law provides that suit for the penalty shall be brought in a justice's court, no other court has jurisdiction. Where there is a statute penalty prescribed and a process provided for its enforcement, that process must be pursued. *Reed v. Omnibus R. R. Co.*, 33 Cal., 212. 1867; *Smith v. Same*, 36 Cal., 281. 1868.

14. — The legislature may establish rates of toll for passengers and freights and enforce the same by penalties. *State v. Winona and St. Peter R. R. Co.*, 19 Minn., 434. 1872.

15. — The power of a railway company to demand fare of a passenger is not an implied or incidental power, but is derived solely from the statute. *Johnson v. Hudson River R. R. Co.*, 2 Sweeny (N. Y.), 298. 1870.

16. — Where such a corporation (created before the passage of the general incorporating act of 1850) was limited as to fare by its charter, such limitation is not, by any fair construction of § 49 of such general act, removed. Therefore, *held*, that the defendant, having demanded and received an amount of fare in excess of the amount limited by its charter, although not in excess of the amount authorized by the general act, had incurred the penalty provided in the act of 1857 for the prevention of extortion by railroad companies. *Ib.*

17. — If certain rates of toll and fare be fixed by the charter of a company, a subsequent act, inflicting severe penalties on the company for exceeding the charter rates, is no violation of the contract of the charter, and is not unconstitutional. *Cumden and Amboy R. R. Co. v. Briggs*, 2 Zabriskie (N. J.), 623. 1850.

18. Remission. The proviso in the act of 1835, that if the B. & O. R. R. Co. shall not "locate the road in the manner provided by this act, then it shall forfeit \$1,000,000 to the state for the use of Washington county," although assented to by the company, is a penalty and not a contract, subject as to its enforcement to the will of the legislature. The release of such penalty by the legislature is no violation of the provision of the constitution of the United States prohibiting the passage of laws that will impair the obligation of contracts. *State v. Baltimore and Ohio R. R. Co.*, 12 Gill & Johnson (Md.), 399. 1842.

19. Signals. In such cases, evidence that a road was there, used by the public, and recognized and repaired, so far as repairs were needed, by the officers having charge of highways, would, *prima facie*, prove its existence as a highway. *Chicago and Alton R. R. Co. v. Adler*, 56 Ill., 344. 1870.

20. — Under the statute imposing a penalty of \$50 on railway companies for failure to sound a whistle or ring a bell at a crossing, the action may be brought either by the prosecuting attorney in the name of the people, or *qui tam* by an informer. *Toledo, Peoria and Warsaw R. R. Co. v. Foster*, 43 Ill., 480. 1867.

21. — Under the statute of 1869, which provides that one-half the penalty to be recovered against a railroad company for an omission to ring the bell or sound the whistle on the approach of a train to a crossing of a public highway, shall go to the "prosecuting witness," it is not essential, to entitle the person in whose name the suit is brought, to recover, that he should actually have testified in the case. *Illinois Central R. R. Co. v. Herr*, 54 Ill., 356. 1870.

22. — An act which exempts a railway company from the duty of ringing a bell or blowing a whistle, as required by § 38 of the general railway act of 1849, may be repealed by another act, in amendment of the charter of the company so exempted, and rejected by such company, so as to render the company liable for a breach of such duty. *Galena and Chicago Union R. R. Co. v. Appleby*, 28 Ill., 283. 1862.

PERSONAL INJURIES.

See CONTRACTORS; DAMAGES; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; INJURIES TO PERSONS GENERALLY; MUNICIPAL CORPORATIONS; PARTIES TO ACTIONS; PLEADING; RELEASE.

PLANKROADS.

1. Charter. The grant of a charter for a road, a bridge or a ferry, does not estop the legislature from granting a subsequent charter for a road, a bridge or ferry, which may compete with the former in the transportation of

General Principles and some General Matters.

freight and passengers between given points; and the mere fact that the two run parallel, and mutually diminish the business of each other, is no ground for a claim by either for damages. *Lafayette Plankroad Co. v. New Albany R. R. Co.*, 13 Ind., 90. 1859.

2. — The ground occupied by an existing company, or its franchise, may be taken, if authorized by the legislature, by a subsequently chartered company, upon making compensation. *Ib.*

3. — Where any part of the road bed or track of an existing company, or the property of an individual is taken so that a proceeding under the statute may be had for the assessment of damages, all the damages occasioned by the taking, both to the ground and franchise, must be assessed and recovered in the statutory proceeding. *Ib.*

4. Taking for railway purposes. Since the act of 1851, in relation to railroad companies, such companies have no right to enter upon, occupy or cross a turnpike or plankroad, without the consent of the owners, except upon the payment of the damages sustained. *Ellicottville and Great Valley Plankroad Co. v. Buffalo and Pittsburgh R. R. Co.*, 20 Barbour (N. Y.), 644. 1855.

5. — Although by the general railroad act, a railroad company is empowered to construct its road across, along or upon any plankroad or turnpike, which the route of its road shall intersect or touch, this provision is to be construed as granting only the right which the public had in such plankroads, turnpikes, etc. *Ib.*

PLEADING.

See AMENDMENT; ARREST OF JUDGMENT; BAGGAGE; CONSTITUTIONAL LAW; CONSTRUCTION OF RAILWAYS; EMINENT DOMAIN; EVIDENCE; FEDERAL COURTS; INJUNCTIONS; INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; PARTIES TO ACTIONS; PENALTIES.

[Questions of pleading will be found under nearly every important title.]

I. GENERAL PRINCIPLES AND SOME GENERAL MATTERS.

II. DECLARATIONS, BILLS, COMPLAINTS AND PETITION.

III. PLEAS AND ANSWERS.

IV. REPLICATION AND REPLY.

V. DEMURRERS.

VI. VARIANCE AND EVIDENCE.

VII. AMENDMENTS.

VIII. VERIFICATION.

IX. VERDICT.

I. GENERAL PRINCIPLES AND SOME GENERAL MATTERS.

1. Administrators. Suit was brought by one who was widow and administratrix of an intestate, to recover damages against the proprietor of a railroad, for the carelessness, negligence and unfitness of the employes and agents of the company in running an engine over and killing her husband, and the style of the action in the petition was "E. L., plaintiff administratrix of M. L., deceased, against R. B. B., defendants." *Held*, that this shows conclusively the character in which she sues, and an amended petition in which it is distinctly averred that the action is brought as administratrix does not therefore change the character of the action. *Bowler v. Lane*, 3 Metcalfe (Ky.), 311. 1860.

2. — An administrator under the statute is not bound to plead specially, but may make all proper defenses under the general issue. *Hawkins v. Mississippi and Tenn. R. R. Co.*, 35 Miss., 688. 1858.

3. Assignment. A cause of action cannot be served and assigned, so as to be made the foundation of several suits, so *held* in an action on a contract for the manufacture of railway cars. *Chicago and Northwestern R. R. Co. v. Nichols*, 57 Ill., 464. 1870.

4. Cross bill. A cross bill which makes nobody defendant, which prays for no process, and under which no process is issued is a nullity. *Washington R. R. Co. v. Bradleys*, 10 Wallace, 299. 1869.

5. — A decree on such bill is fatally erroneous. *Ib.*

6. Default. Upon a failure to plead, the plaintiff may have a default entered in vacation, under the statute and rules of the courts. *Woosley v. Memphis and Charleston R. R. Co.* 28 Ala. N. S., 536. 1856.

General Principles and some General Matters.

7. Dates. A plaintiff by limiting his claim to services performed between certain dates, may make those dates material, so that he cannot claim for services before or after. *Manchester and Lawrence R. R. Co. v. Fisk*, 33 N. H., 297. 1856.

8. Exhibits. The revision of 1860, § 2964, does not contemplate that instruments of evidence merely, which do not constitute the basis of the action, should be copied in, or annexed to, the pleading in order to render them admissible in evidence. *Taylor v. Cedar Rapids and St. Paul R. R. Co.*, 25 Ia., 371. 1868.

9. Highways. The sufficiency of the pleadings in an action against a railway company for failing to restore certain highways to their former state — determined. *Sipperly v. Troy and Boston R. R. Co.*, 9 Howard's Pr. (N. Y.), 83. 1853.

10. Immaterial facts. The object of pleading is to ascertain the truth of the material facts in controversy between the parties; and if it judicially appear by the record that the matter pleaded is false or immaterial, no issue is raised thereby, and the matters thus pleaded will not be submitted to the jury. *Thigpen v. Mississippi Central R. R. Co.*, 32 Miss., 347. 1856.

11. Judgments. A general denial, as an answer to an action brought upon a judgment, does not put in issue the regularity of the proceedings on which the judgment was based, or the correctness of the judgment. The only inquiry that can be made on such an issue when the judgment is offered in evidence is, was such a judgment rendered, and had the court rendering it jurisdiction of the parties and the subject matter? *Union Pacific R. R. Co. v. McCarty*, 8 Kans., 125. 1871.

12. — In a proceeding to restrain the collection of, and vacate a judgment, and have an execution set aside, the execution is not the foundation of the action in that sense which is contemplated by the section of the code requiring a copy to be filed with the complaint. *Fuller v. Indianapolis and Cincinnati R. R. Co.*, 18 Ind., 91. 1862.

13. — A judgment rendered upon the same cause of action by a foreign court which had jurisdiction of the subject matter and the parties, may be set up in bar of a suit in Indiana. *Cincinnati, Union and Ft. Wayne R. R. Co. v. Wynne*, 14 Ind., 385. 1860.

14. Minors. A minor may sue by his next friend, and in such action, it is proper to prove infancy. *Byers v. Lessees of Des Moines Valley R. R. Co.*, 21 Ia., 54. 1866.

15. Personal injuries. An action against a railroad company for negligence in causing the death of a father is properly brought in the name of all the children; the recovery is for the benefit of all, the amount to be distributed as in case of intestacy. *North Pennsylvania R. R. Co. v. Robinson*, 44 Penn. St., 175. 1863.

16. — The value of the life lost, estimated by a pecuniary standard, is what is to be recovered, to be divided among all the children alike; though the action is in tort, yet under the statute, there can be a joint recovery without showing that a joint damage has been sustained. *Ib.*

17. — In an action against a common carrier, it is not necessary to allege that the defendant was authorized by its charter to become a common carrier — where a company has made a contract pertaining to the business of such pursuit, it will not be permitted to deny its power to make such contract. *Fuller v. Naugatuck R. R. Co.*, 21 Conn., 557. 1852.

18. — In an action under the statute for negligently causing the death of the plaintiff's intestate, the injury was alleged to have been received "in the city of Janesville," the words "in this state" being omitted. *Held*, that the court takes judicial notice of the existence of such a city in this state, and does not take notice of the existence of a city of the same name in any other state; and the averment is sufficient. *Woodward v. Chicago and Northwestern R. R. Co.*, 21 Wis., 309. 1867.

19. — In an action for personal injuries, it is not necessary to aver that the plaintiff was free from fault. *Lloyd v. Hannibal and St. Joseph R. R. Co.*, 53 Mo., 509. 1873.

20. — In an action brought to recover damages for an injury to the person, it was held that an answer alleging that the injury resulted from the negligence of the plaintiff was properly stricken out on motion, as evidence of the fact pleaded was admissible under the general denial, which was also pleaded. *Indianapolis and Cincinnati R. R. Co. v. Ruthersford*, 29 Ind., 82. 1867.

21. — In such cases, an omission in pleading, which it may be fairly presumed was

Declarations, Bills, Complaints and Petitions.

covered by the proof, is cured by verdict. *Illinois Central R. R. Co. v. Simmons*, 38 Ill., 242, 1865; overruling *Chicago, Burlington and Quincy R. R. Co. v. Hazzard*, 26 ib., 373. 1861.

22. Private carriers. When the liability of a common carrier is changed to that of a private carrier by contract, the company cannot be declared against as a common carrier, but the action must be on contract, for a breach of duty arising out of the contract. *Kimball v. Rutland and Burlington R. R. Co.*, 26 Vt., 247. 1854.

23. Redundant matter. Irrelevant and redundant matter in a pleading should be struck out on motion, and will not invalidate matters of substance properly stated. *Hurt v. Southern R. R. Co.*, 40 Miss., 391. 1866.

24. Replevin. Where the petition in an action of replevin alleges the right of possession as in the plaintiff, an answer which does not specifically deny this in words, but states facts which under the law would defeat the plaintiff's action, is sufficient. *Skinner v. Chicago and Rock Island R. R. Co.*, 12 Iowa, 191. 1861.

25. Rule of court. A rule of court provided that upon a claim with affidavit being filed, items not denied by the affidavit of defense should be taken as admitted. The rule was held not to apply to a claim of items on a construction contract and items of loss by having been stopped in the work by the company. *Howard v. Allegheny Valley R. R. Co.*, 69 Penn. St., 489. 1871.

26. Setoff. A claim arising out of tort can not be set off against a demand arising out of a contract. *Indianapolis and Cincinnati R. R. Co. v. Ballard*, 22 Ind., 448. 1864.

27. Statute. The act of 1853 (12 Stat., 212), incorporating the bank of Newberry, is a public act which the court will take judicial notice of, and need not be specially pleaded. *Bank of Newberry v. Greenville and Columbia R. R. Co.*, 9 Richardson's Law (So. Car.), 495. 1855.

28. — Where a party claims damages under a foreign statute, he must set out said statute and the facts entitling him to damages under it in his declaration. *Great Western R. R. Co. v. Miller*, 19 Mich., 305. 1869.

29. Supplemental complaint. Under the code of procedure, leave to file a supplemental complaint may be granted *ex parte*. *Fisk v.*

Albany and Susquehanna R. R. Co., 8 Abbott's Pr. N. S. (N. Y.), 309. 1870.

30. Torts of employees. That principle of law which renders the employer liable for the tortious act of his servant in the performance of the employer's business, within the scope of the general authority, is the same as that which subjects him for the act of his servant, done by his express direction; but the remedy for the injury in the former case is by an action on the case; in the latter, by an action of trespass. *Thames Steamboat Co. v. Housatonic R. R. Co.*, 24 Conn., 40. 1855.

31. — The liability of the employer, in an action of trespass for the act of his servant done by his express direction, does not rest upon the relationship of master and servant, but upon the fact that the act was done by the master's express direction. *Ib.*

32. — In an action of trespass *vi et armis*, it was proved that the plaintiff's steamboat took fire in the night season, while it was fastened by the plaintiff's cable to the defendant's wharf, upon which stood an old wooden freight house; but before endangering said freight house, and while the fire could have been extinguished, the cable was cut by the defendant's watchman, and the boat drifted away and was burned. No evidence of any authority for the act of the watchman was introduced, other than such as might have been implied from the watchman's general employment as such, in the business of the defendant. The court rendered judgment as in case of nonsuit. *Held*, that such nonsuit was properly granted. *Ib.*

33. — An action on the case is an appropriate remedy for injuries caused by the wrongful acts of a servant of the defendant, even though such acts have been acts of force, and such that trespass would have been the only proper remedy against the servant. *Havens v. Hartford and New Haven R. R. Co.*, 28 Conn., 69. 1859.

II. DECLARATIONS, BILLS, COMPLAINTS AND PETITIONS.

34. Agent. A petition for the value of services rendered must state a promise of defendant to pay, or facts from which the law will imply a promise. An averment that the services were rendered at the request of an

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agent of defendant is not an averment that they were rendered at the request of the defendant. *Wells v. Pacific R. R. Co.*, 35 Mo., 164. 1864.

35. Assumpsit. An action on the case includes assumpsit as well as tort. *Hathorn v. Calef*, 53 Me., 471. 1866.

36. — Where the time of performance of a contract under seal is extended by a parol agreement, a recovery may be had on such contract in assumpsit. *Barker v. Troy and Rutland R. R. Co.*, 27 Vt., 766. 1855.

37. — Where one enters upon the land of another, under an agreement of purchase, which he subsequently fails to carry out, the owner cannot maintain an action of assumpsit for use and occupation against him. To support such an action, the relation of landlord and tenant must have existed between the parties, either under an express or implied contract. *Stacy v. Vermont Central R. R. Co.*, 32 Vt., 551. 1860.

38. — Where the plaintiff in assumpsit relies upon a liability implied by law from facts and circumstances, he must prove such facts and circumstances as alleged, as fully as he would be required to prove a special contract as declared upon. Therefore, where the plaintiff relies upon the common law liability of common carriers, all the circumstances necessary to show such liability must be proved. *Michigan Southern and Northern Indiana R. R. Co. v. McDonough*, 21 Mich., 165. 1870.

39. Bills and notes. The sufficiency of a complaint upon promissory notes not due, in connection with a contemporaneous agreement in writing, that they should mature upon certain conditions, determined. *Brown v. Southern Michigan R. R. Co.*, 6 Abbott's Pr. (N. Y.), 237. 1858.

40. Bonds. Where it is averred in the complaint that one of the defendants, a railway company, issued certain bonds for the sum of \$1,000 each, with interest coupons attached, and that default had been made in not paying the coupons according to the condition of said bonds, by reason of which the bonds became due and payable; and that the plaintiff owns a certain number of said bonds and coupons, which have long since become due and payable, such complaint shows an existing obligation to pay money, a default in its

payment and a right of action for its recovery. *Bangs v. Blue Ridge R. R. Co.*, 45 Howard's Pr. (N. Y.), 169. 1873.

41. — A railway bond, payable to bearer, is a negotiable instrument, and may be declared upon and described in an action of assumpsit as a bond; and a count thereon describing the cause of action as a "bond," and setting up the promise contained in the bond, need not aver a consideration, and may be joined with the common counts in *indebitatus assumpsit*. *Ide v. Passumpsic and Connecticut Rivers R. R. Co.*, 32 Vt., 297. 1859.

42. Carriage of goods. Where the plaintiff, in an action brought against a railway company, to recover damages for the non-delivery of goods intrusted to it, does not allege in his complaint that the defendant was a common carrier, it cannot be held responsible in that character. *Bristol v. Rensselaer and Saratoga R. R. Co.*, 9 Barbour (N. Y.), 158. 1850.

43. Assumpsit. Where the plaintiff declared on a special contract with defendant, to furnish a car to carry certain sheep of the plaintiff's, and the contract was fairly susceptible of the interpretation that defendant's contract was upon the consideration of plaintiff's promise to pay a reasonable freight at the end of the carriage, and the plaintiff in his declaration alleged, that "for a certain reasonable hire or reward to be thereupon paid by the plaintiff to the defendant in that behalf," etc., it was held, on a motion in arrest, after verdict, for the want of an allegation of readiness to pay the freight to the defendant, at the time of demanding the car, that the declaration was sufficient. *Waterman v. Vermont Central R. R. Co.*, 25 Vt., 707. 1853.

44. — Where the plaintiff cannot, before the evidence is taken, know whether the defendant is liable as a carrier or warehouseman, he may state his cause of action variously, and should not be compelled to elect upon which he will proceed. *Whitney v. Chicago and Northwestern R. R. Co.*, 27 Wis., 327. 1870.

45. — Where the plaintiff has alleged the carrier's negligence, which is denied, the mere proof of the loss of the goods is not sufficient, where there is rebutting proof. *Childs v. Little Miami R. R. Co.*, 1 Cincinnati Superior Ct. Rep., 480. 1871.

46. — A declaration was against defendant

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for loss of goods as a carrier; after verdict it was to be presumed that this was made out. *Aronson v. Cleveland and Pittsburgh R. R. Co.*, 70 Penn. St., 68. 1871.

47. — In another action for the loss of the same goods against the defendant as a warehouseman, the plaintiff would be estopped by his allegation that it was a carrier. *Ib.*

48. **Code system.** The same cause of action under the code cannot be set out in two different modes, as was the practice by courts under the common law system. But all the facts upon which the action is based may be set out in a narrative method. *Fox v. Pennsylvania R. R. Co.*, 2 Handy (Ohio), 169. 1856.

49. **Contract.** An action to recover damages for the breach of a special contract, comes within subdiv. 1, § 129 of the code, and is essentially an action for the recovery of money only. *Trapp v. New York and Erie R. R. Co.*, 6 Howard's Pr. (N. Y.), 237. 1851.

50. **Corporation.** It need not be averred in the complaint of a railway company that it is a corporation. *Emery v. Evansville, Indianapolis and Cleveland R. R. Co.*, 13 Ind., 143, 1859; *Heaton v. Cincinnati and Ft. Wayne R. R. Co.*, 16 Ind., 275, 1861; *Kennedy v. Cotton*, 28 Barbour (N. Y.), 59, 1858; *Henderson and Nashville R. R. Co. v. Leavell*, 16 B. Monroe (Ky.), 358, 1855.

51. Where the name of the plaintiff is such as might be probably adopted by a corporation, and the complaint does not show that it is not a corporation, it will be presumed to be a corporation with capacity to sue. *O'Donald v. Evansville, Indianapolis and Cleveland R. R. Co.*, 14 Ind., 259, 1860; *Baker v. Same*, *ib.*, 363; *Anderson v. Same*, *ib.*, 388; *Williams v. Same*, *ib.*, 428; *McDaniel v. Same*, *ib.*, 464.

52. — In an action before a justice of the peace, an averment that the defendant is "a company doing business in this state under the laws thereof," is a sufficient averment of the corporate capacity of defendant. *Root v. Illinois Central R. R. Co.*, 29 Ia., 102. 1870.

53. — A domestic corporation, created by a private act, in bringing suit must aver and prove its corporate existence. *Holloway v. Memphis, El Paso and Pacific R. R. Co.*, 23 Tex., 465. 1859.

54. — In an action of trespass against a railroad company, it should be alleged in the petition that it is a corporation or copartnership,

or that it acts as such. *Byington v. Mississippi and Missouri R. R. Co.*, 11 Ia., 502. 1861.

55. — An averment that certain railroad companies, authorized by law to consolidate, did consolidate and become one corporation, under a certain name, is a sufficient averment of consolidation, without setting forth in detail the steps taken to effect such consolidation. *Collins v. Chicago, St. Paul and Fond du Lac R. R. Co.*, 14 Wis., 492. 1861.

56. **Covenant.** Where a declaration in covenant alleged full performance upon the part of the plaintiff, and a breach upon the part of the defendants, evidence was admissible to show that the plaintiff was prevented from performing his covenants in full by the default of the defendants, as an excuse for, and as equivalent to, performance on his part. *Huntington and Broad Top R. R. Co. v. McGovern*, 29 Penn. St., 78. 1857.

57. — Where one covenants to pay an existing debt due from another — the creditor being no party to the agreement, and the sole consideration being between the covenantor and the covenantee — the action for a breach must be brought by the covenantee. The creditor cannot sue in the name of the covenantee to his use without authority of the covenantee. *Mississippi Central R. R. Co. v. Southern R. R. Association*, 4 Brewster (Penn.), 79. 1869.

58. — Where two parties bring an action of assumpsit against a company and issue is joined upon it, and afterwards a new party is introduced upon the record by leave of the court, and a declaration in covenant is filed, and issue also joined thereon, it will be presumed, after a trial upon the merits and verdict, that such new party and declaration were introduced by their consent. *Huntington and Broad Top R. R. Co. v. McGovern*, 29 Penn. St., 78. 1857.

59. — Though two persons are named in an indenture as "party of the first part," if only one seals the deed, he alone is that party, and he may sue alone on the covenants. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Howard*, 13 Howard, 307. 1851.

60. — Where plaintiffs contracted under seal to perform certain labor upon defendant's road by a specified time, which was subsequently enlarged by parol, it was held, that plaintiffs could not sue in covenant. *Sherwin*

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v. Rutland and Burlington R. R. Co., 24 Vt., 347. 1852.

61. — A written contract under seal cannot be varied by a parol contract, though a written contract not under seal may. *Ib.*

62. Draft. Action was brought upon certain drafts drawn by the president of a railway company upon the treasurer, for the payment of certain sums of money, etc. The paragraphs upon the drafts did not allege that the drafts had been presented for payment, nor show any excuse for not presenting them. *Held*, that they were bad. *Marion and Missisineva R. R. Co. v. Dillon*, 7 Ind., 404, 1856; *Same v. Spence*, 8 ib., 415; *Same v. Lomax*, ib., 459.

63. — Where a debt is due from a corporation, and it is the duty of one officer, or set of officers, to allow demands, and draw upon another officer who has the custody and is charged with the duty of disbursing the funds, for payment, the order must, as a general rule, be presented, in a reasonable time, for payment. *Ib.*

64. Ejectment. Where a complaint in ejectment avers possession by the defendant as a corporation, and the answer admits possession as alleged, there is substantial admission of the defendant's corporate existence. *Chapman v. Delaware, etc. R. R. Co.*, 3 Lansing (N. Y.), 261. 1870.

65. — The sufficiency of the pleadings determined in a particular case. *Northern Central R. R. Co. v. Canton Co.*, 24 Md., 492. 1866.

66. Equity. Where a bill in equity is filed by a third party to set aside as fraudulent completed judicial proceedings, regular on their face, the plaintiff in those proceedings should be brought in as a party. *Harwood v. Railroad Company*, 17 Wallace, 78. 1872.

67. — To obtain a decree that will decide the respective rights of codefendants, as well as the rights of plaintiffs and defendants, the pleadings must be specially framed for that purpose. *Minnesota Co. v. Chamberlain*; *Graham v. Same*, 3 Wallace, 704. 1865.

68. — In New Jersey, exceptions may be filed to a bill for impertinence or scandal. *Camden and Amboy R. R. Co. v. Stewart*, 4 C. E. Green's Ch. (N. J.), 343, 1868; see *Same v. Same*, 6 ib., 484, 1870.

69. Frivolousness. Whether a party who writes his name on the back of a promissory

note before delivery is liable to the payee as indorser, is not so well settled that a demurrer to a complaint showing such a state of facts will be deemed frivolous. *Cahoon v. Wisconsin Central R. R. Co.*, 10 Wis., 290. 1860.

70. — To constitute a pleading frivolous, it must be apparent on a mere inspection, without examination or research, that it is invalid. *Ib.*

71. — Where judgment has been ordered on motion, for the frivolousness of a demurrer, no assessment by the clerk of the amount due is necessary, if the complaint be verified. Code, § 158. *Ib.*

72. Injuries to domestic animals. The sufficiency of the pleadings determined in an action against a railway company for killing cattle. *Colwell v. New York and Erie R. R. Co.*, 9 Howard's Pr. (N. Y.), 311. 1854.

73. — Although a declaration is objectionable for duplicity, where it avers in one count that certain animals were injured by reason of the neglect of a railway company to fence its road and carelessness in its operation, yet the general issue having been pleaded, the plaintiff may recover upon either ground. *Chicago, Burlington and Quincy R. R. Co. v. Magee*, 60 Ill., 529. 1871.

74. Joinder of causes. A count in assumpsit cannot be joined with a count for deceit. *Pennsylvania R. R. Co. v. Zug*, 47 Penn. St., 480. 1864.

75. — A count in tort against a railroad company for not building a wagon way over its road where it crosses a farm, as required by its charter, cannot be joined with a count to recover the cost of a wagon way which the plaintiff had erected over the road. One count is founded on tort, the other on contract. *Green v. Morris and Essex R. R. Co.*, 4 Zabris-kie (N. J.), 486. 1854.

76. — Several causes of action for injuries to person or property, whether real or personal, direct or consequential, and whether the damages are given by statute or by common law, single or double, may be included in the same petition. *Clark v. Hannibal and St. Joseph R. R. Co.*, 36 Mo., 202. 1865.

77. — A cause of action for damages for the detention of property cannot be united in the same petition with causes of action founded upon contracts. *Hoagland v. Hannibal and St. Joseph R. R. Co.*, 39 Mo., 451. 1867.

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78. — Where personal injuries and injury to personal property are sustained by the same wrongful act, such injuries may all be united in one count. *Baltimore and Ohio R. R. Co. v. Ritchie*, 31 Md., 191. 1869.

79. — A claim for damages done to land occupied adversely by the defendant cannot be sued for and recovered until after the plaintiff has recovered possession. A claim for injuries of that nature cannot be united with a claim to recover the possession of the land. *Hotchkiss v. Auburn and Rochester R. R. Co.*, 36 Barbour (N. Y.), 600. 1862.

80. — Separate causes of action, all arising out of the same class, may be united in the same complaint, provided they are separately stated. *Durkee v. Saratoga and Washington R. R. Co.*, 4 Howard's Pr. (N. Y.), 226. 1849.

81. Joinder of parties. Two of several parties to a joint and several agreement, they being the only ones entitled to recover, may sue without joining all the other parties to the contract. *Titus v. Railroad Co.*, 5 Philadelphia Rep. (Penn.), 360. 1864.

82. — In an action against two railroad corporations, if the judgment is against both, without any proof to justify a finding as to one of them, it will be reversed. *Chicago, Burlington and Quincy R. R. Co. v. Coleman*, 18 Ill., 297. 1857.

83. — Where an injury is done to the freehold of a married woman, as in the erection of a nuisance adjacent thereto, and the married woman acquired the title to the premises prior to the passage of the act of Feb., 1861, and the land was in the joint occupancy of the husband and wife, then, in an action on the case for such injury, the husband and wife must join. *Illinois Central R. R. Co. v. Grable*, 46 Ill., 445. 1868.

84. — An action for the loss of a child, killed by the negligence or misconduct of a railway company, was held properly brought in the name of both parents, and that the joinder of the mother was not error. *Pennsylvania R. R. Co. v. Zebe*, 37 Penn. St., 420. 1860.

85. — The code (§§ 17, 18, 19, 2 R. S., pp. 30, 31) substantially reenacts the old equity rules for the joinder of parties. *Tate v. Ohio and Mississippi R. R. Co.*, 10 Ind., 174. 1858.

86. — But two or more persons having separate causes of action against the same defendant, though arising out of the same trans-

action, cannot unite; nor can several plaintiffs, in one complaint, demand several distinct matters of relief; nor can they enforce joint and separate demands against the same defendant. *Id.*

87. — Four joint owners of a vessel having leased her, two of them, afterwards, brought suit for the hire. *Held*, that a legal action could only be sustained by all four, suing together. *Coster v. New York and Erie R. R. Co.*, 3 Abbott's Pr. (N. Y.), 332, 1856; *Same v. Same*, 5 Duer (N. Y.), 677, 1856; *Same v. Same*, 6 ib., 43, 1856;

88. Misjoinder. A misjoinder of causes of action must be objected to by demurrer or answer in the court below, or it will be waived. *Jesup v. City Bank of Racine*, 14 Wis., 331. 1861.

89. — A cause cannot be reversed for error in overruling a demurrer for misjoinder of causes in action. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Gent*, 35 Ind., 39. 1871.

90. Misnomer. The commencement of an action, in the maiden name of a female, after her marriage, is a misnomer merely, amendable by the court, and not a ground for nonsuit upon the trial. The mistake should be met by answer. *Traver v. Eighth Avenue R. R. Co.*, 3 Keyes (N. Y.), 497. 1867.

91. Multifariousness. A bill in chancery was filed by the C. P. R. R. Co., against the defendants, alleging that the defendants claimed title to distinct parcels of land adversely to the corporation, that the description of the lands was unknown to the company, but that the company had a prior right, under Act of Congress of July 1, 1862, to the right of defendants. *Held*, that the bill was not subject to the objection of multifariousness, because it averred the ownership of defendants to be in distinct parcels. The determination of the principal question involved concerned all the defendants. *Central Pacific R. R. Co. v. Dyer et al.*, 1 Sawyer (9 U. S. Cir. Ct.), 641. 1871.

92. — When the object of a bill is to reach equitable assets of a corporation in satisfaction of a judgment at law, and the assets are supposed to consist of the unpaid subscriptions to the capital stock, as well as the proceeds which may be produced upon setting aside an alleged fraudulent deed executed by the corporation, the bill is not multifarious

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because individual stockholders are joined as defendant with the trustees and purchasers under the alleged fraudulent deed. *Allen v. Montgomery R. R. Co.*, 11 Ala. N. S., 437. 1347.

93. — A bill is not multifarious in joining two causes of complaint growing out of the same transaction, where all the defendants are interested in the same right, or the relief sought is of the same general nature. *Cumberland Valley R. R. Co.'s Appeal*, 62 Penn. St., 218. 1869.

94. — To constitute multifariousness as respects the subject matter of a bill, the different grounds of suit must be wholly distinct, and each must be sufficient as stated to sustain a bill. *Kennebec and Portland R. R. Co. v. Portland and Kennebec R. R. Co.*, 54 Me., 173. 1866.

95. Negligence. In case for an injury resulting from the alleged negligence of the defendant, it is not necessary to allege that the plaintiff was without fault. *Smith v. Eastern R. R. Co.*, 35 N. H., 356. 1857.

96. — It is enough for a complaint to allege that the injury complained of happened through the negligence of the defendant, without alleging that the plaintiff was free from negligence. *Potter v. Chicago and Northwestern R. R. Co.*, 20 Wis., 533. 1866.

97. Nonjoinder. In action *ex delicto*, the nonjoinder of a party who ought to have been made plaintiff, can be taken advantage of only by plea in abatement, or by way of apportionment of damages. *Cooper v. Grand Trunk R. R. Co.*, 49 N. H., 209. 1870.

98. Several causes. The several causes of action upon which the plaintiff relies should be set out with precision and the amount due upon each cause should be separately stated. *Watson v. San Francisco and Humboldt R. R. Co.*, 41 Cal., 17. 1871.

99. Subscriptions to stock. Where, in a petition, it is averred that directors of a railway company had been duly elected by the stockholders, in pursuance of notice, it is to be presumed that the requisite amount of stock had been subscribed to authorize such election, and also to authorize the location of the road and the making of assessments by the directors so elected. *Ashtabula and New Lisbon R. R. Co. v. Smith*, 15 Ohio St., 328. 1864.

100. — A subscription by A. as executor

and one made by him at the same time as an individual are independent contracts. An action pending upon one of these subscriptions cannot be pleaded in abatement of an action upon the other. *Erie and New York R. R. Co. v. Patrick*, 2 Keyes, (N. Y.), 256. 1865.

101. — It is the settled law of Vermont that a person beneficially interested in a simple contract, or in a promissory note, may sue and sustain an action in his own name, upon the same. *Rutland and Burlington R. R. Co. v. Cole*, 24 Vt., 33. 1851.

102. — Where C., for assessments upon stock in a railway company, gave his note payable to the order of S. H., treasurer, etc., it was held, that the plaintiff might, by parol evidence, show that the note was in fact given to it. *Id.*

103. — Assumpsit lies for unpaid installments of a subscription to the stock of an incorporated company. *Bavington v. Pittsburgh and Steubenville R. R. Co.*, 34 Penn. St., 358. 1859.

104. — An allegation that calls for unpaid installments were "duly made," is a sufficient averment that they were made in compliance with the law. *Id.*

105. — An averment in a declaration, that the defendant had subscribed for stock in a railway company "according to the statute incorporating the company," will be held, on general demurrer, to mean that he had done everything required by the charter in order to become a subscriber. *Fiser v. Mississippi and Tennessee R. R. Co.*, 32 Miss., 359. 1856.

106. — A declaration alleging that the plaintiff, at the request of the defendant, a railway company, had conveyed his stock therein to a third person, to be held, in trust for certain purposes, and that the defendant, in consideration thereof, agreed with such trustee not to issue any additional stock without the consent of the contractors who were constructing the road, but the defendant, without such consent, has issued other stock whereby the value of that conveyed in trust for the plaintiff had been materially diminished,—discloses no ground of an action either *ex contractu* or *ex delicto*. *Poor v. European and North American R. R. Co.*, 59 Me., 271. 1871.

107. — The sufficiency of the pleadings determined, in a case where the complainants are seeking to enforce a claim upon specific

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stock subscriptions. *Dunham v. Eaton and Hamilton R. R. Co.*, 1 Bond, (U. S. C. C.), 492. 1861.

108. Trespass. A count, purporting to be in case, and alleging negligent wrongful acts of the defendant is not to be regarded as a count in trespass, simply because it alleges, among such negligent acts, other acts of force, and which in themselves would have been proper matter for a count in trespass. *Havens v. Hartford and New Haven R. R. Co.* 28 Conn., 69. 1859.

III. PLEAS AND ANSWERS.

109. Answer. The answer to a petition must specifically and separately deny the matters intended to be put in issue. *Dare v. Pacific R. R. Co.*, 31 Mo., 480. 1862.

110. — The answer of a corporation aggregate, should be under seal, but not under oath. If a sworn answer is desired, some managing officer should be made a party, who can answer under oath. *Supervisors of Fulton County v. Mississippi and Wabash R. R. Co.*, 21 Ill., 338. 1859.

111. Bill of exceptions. Where a paragraph of an answer is struck out upon motion, the ruling can only be presented in the supreme court for review by a bill of exceptions. *Indianapolis, Cincinnati and La Fayette R. R. Co. v. Dunden*, 39 Ind., 359. 1872.

112. Bonds. A plea that the plaintiff was neither owner, holder or bearer of the bonds sued upon, was *held* good on a general demurrer. *Pendleton Co. v. Amy*, 13 Wallace, 297. 1871.

113. — And also a plea that the bonds were the property of A. R., who was a citizen of the same state with the defendant, was *held* good. *Ib.*

114. — And also the plea that the bonds and coupons were not signed, sealed and delivered as alleged in the declaration, and "so the alleged acts and coupons are not its acts and deeds," was *held* good. *Ib.*

115. Corporation. A plea of the general issue, to an action by a corporation, admits its legal organization under its charter, so far as to maintain suits at law. *Penobscot and Kennebec R. R. Co. v. Dunn*, 39 Me., 587, 1855; *Dunning v. New Albany and Salem R. R. Co.*, 2

Carter (Ind.), 437, 1850; *Harrison v. Martinsville and Franklin R. R. Co.*, 16 Ind., 505, 1861.

116. — The existence of a corporation being denied in the answer, must be proven. *Village of Jamaica v. Long Island R. R. Co.*, 37 Howard's Pr. (N. Y.), 379. 1869.

117. — An answer denying the corporate capacity of the defendant must set out a specific statement of the facts relied upon as a denial; and must deny such capacity as existing at the time the action was commenced. *Coates v. Galena and Chicago Union R. R. Co.*, 18 Ia., 277. 1865.

118. — **bills and notes.** Since the adoption of the Code of 1852, an objection to an averment in a complaint against a corporation, that the defendant indorsed a bill of exchange by its president, A. S., involving a denial of the execution of, or want of authority to bind by, the indorsement, can only be taken advantage of by plea verified by affidavit. *Montgomery and Bufaula R. R. Co. v. Trebles*, 44 Ala., N. S., 255. 1870.

119. — **consolidation.** In an action against a railway company, an allegation that it was consolidated with another company before the commencement of the action, need not be specifically denied, as provided in § 2925 of the revision of 1860, but a general denial of each and every allegation makes it incumbent on the plaintiff to prove the consolidation. *Koons v. Chicago and Northwestern R. R. Co.*, 23 Ia., 493. 1867.

120. — **misuser.** In a suit by a corporation, it cannot be shown, by way of defense, that the plaintiff has, by misuser or non-user, forfeited its corporate rights. *Hammett v. Little Rock and Napoleon R. R. Co.*, 20 Ark., 204, 1859; *Mississippi, Ouachita and Red River R. R. Co. v. Cross*, *ib.*, 443.

121. — **name.** When the name and description of the plaintiff corporation leaves no doubt of its identity, as the corporation entitled to sue the cause of action, the objection that it has not sued by its proper corporate name, cannot be taken under the general issue, or by plea of *nul tiel corporation*, but only by plea in abatement for the misnomer. *Woonsocket Union R. R. Co. v. Sherman*, 8 R. I., 564. 1867.

122. Nul tiel. Where the plea of *nul tiel* corporation is filed to an action brought by a railway company, it must appear that the char-

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ter was accepted by the company, or that its intention to accept it had been manifested by its acts, or the company cannot recover. *Wheaton v. Peoria, Pekin and Jacksonville R. R. Co.*, 42 Ill., 494. 1867.

123. — To an action brought by a corporation, there may, at its commencement, be an answer of *multiel* corporation, but such answer is in abatement, and must precede an answer to the merits; and on the trial of the issue formed on such answer, the proof is limited to the question of the existence, *de facto*, of a corporation, under an authority sanctioning such a corporation, *de jure*. *Heaston v. Cincinnati and Fort Wayne R. R. Co.*, 16 Ind., 275. 1861.

124. — If the answer denies the existence, at the commencement of the suit, of a corporation which is shown to have once existed, it must particularly set forth the manner in which the corporate powers ceased. *Morgan v. The Lawrenceburgh Insurance Company*, 3 Ind., 285, overruled on this point. *Ib.*

125. — An answer alleging want of proper parties is the correct mode of raising the question of fact, where a plaintiff, suing in a name importing, *prima facie*, a corporation, in fact, is not assuming to act as such, but only as a partnership. *Ib.*

126. — proceedings to condemn land. In an action to condemn land, the defendant denied that the plaintiff was a corporation, and also presented issues as to the value of the land, and the amount of resulting damages. *Held*, that these issues could not be tried together. The defendant declined to elect, and the denial of the plaintiff's corporate capacity was struck out, on motion of the plaintiff. *Oregon Central R. R. Co. v. Wait*, 3 Or., 91, 1869; *Same v. Same*, *ib.*, 428.

127. — A denial of the plaintiff's corporate existence may, in some instances, be a plea in bar; but when establishing the truth of the plea, will not authorize a judgment that will bar a future action, but will abate the present action, the plea is in abatement. *Ib.*

128. — statute. The act of the legislature of 1836, which declares that "all pleas to the action shall be deemed and adjudged as admitting the parties and the character of the parties suing," applies to corporations. *Reed v. Benton and Manchester R. R. and Banking Co.*, 4 Howard (Miss.), 257. 1840.

129. — The proviso of § 6 of the general incorporation act, concerning a collateral inquiry into the existence of a corporation, does not preclude a private person from denying the existence *de jure* or *de facto* of an alleged corporation. *Oroville and Virginia R. R. Co. v. Plumas Co.*, 37 Cal., 354. 1869.

130. — The allegation in a pleading, that a party is a corporation, does not put its existence beyond the reach of inquiry. *Ib.*

131. — When the right to act as a corporation is denied, the company must show that it claims in good faith to be a corporation, and is doing business as such. *Ib.*

132. Failure of consideration. Where a defendant, by way of defense to a note, pleads, in general terms, that it is wholly without consideration and void, and the plaintiff, without requiring a statement of the facts on which the defense is based, joins issue, any evidence is admissible, on the trial, which tends to impeach or sustain the consideration. *Chamberlain v. Painesville and Hudson R. R. Co.*, 15 Ohio St., 225. 1863.

133. Frivolous answer. In an action on a bond payable to bearer, in the possession of the plaintiff, an answer denying any knowledge or information, sufficient to form a belief that the plaintiff is or is not the owner and holder thereof, is frivolous. *Bronson v. Chicago, Rock Island, etc., R. R. Co.*, 40 Howard's Pr. (N. Y.), 48. 1870.

134. General issue. Where the general denial is pleaded in bar, the defendant is not in a position to plead in abatement to the jurisdiction of the court over his person; and such a plea is bad on demurrer. *New Albany and Salem R. R. Co. v. Wilson*, 16 Ind., 402. 1861.

135. — Under the general issue, plea no question could be raised as to the capacity of the parties to sue in the circuit court. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Quigley*, 21 Howard, 202. 1858.

136. Injuries to property. In an action for an injury to property, alleged in the complaint to have been caused by the negligence of the defendant's agents, an answer denying every allegation in the complaint puts in issue the defendant's liability; and it is unnecessary to aver that the injury was done by other persons, who were responsible therefor, and not the defendant. *Schular v. Hudson River R. R. Co.*, 38 Barbour (N. Y.), 653. 1862.

Replication — Demurrer.

137. Payment. Suit upon a subscription of stock. The complaint set forth the article subscribed to, alleged performance on the part of the company, and a subsequent promise to pay, by defendant. Answer, 1. The general denial. 2. Payment. *Held*, that the latter was new matter, not provable under the general denial, and the paragraph setting it up was not demurrable. *Ensley v. Cleveland and St. Louis R. R. Co.*, 10 Ind., 178. 1858.

138. Pleas in bar. A plea which states facts in bar to the plaintiff's demand, is not good, if the facts so stated do not constitute a bar. *Curtis v. Central R. R. Co.*, 6 McLean, 401. 1855.

139. Special plea. A special plea which amounts to the general issue is demurrable. *Ib.*

140. Written instrument. A denial under oath of the delivery of an instrument which is the foundation of an action, is, in effect, a denial of its execution. *Ketchum v. New Albany and Salem R. R. Co.*, 7 Ind., 391. 1856.

IV. REPLICATION AND REPLY.

141. Defective replication. A defective declaration may be cured by sufficient averments in a replication demurred to. *Railroad Co. v. Harris*, 12 Wallace, 65. 1870.

142. Subscriptions to stock. A declaration averred that at the time the defendant subscribed for stock in a railway company, he paid the per centum required by the charter; the defendant by his plea denied this; the plaintiff then, by replication, alleged that the per centum was subsequently paid. *Held*, that the replication was a departure from the declaration, and therefore bad on demurrer. *Fiser v. Mississippi and Tennessee R. R. Co.*, 32 Miss., 359. 1856.

143. Substituted replication. When the plaintiff replies to a plea, and his replication being demurred to, is held insufficient, and he withdraws it and files a new and substituted one complete in itself with no reference to the one which preceded, he waives the right to question on appeal the ruling of the court on the sufficiency of the first. *Clearwater v. Meredith et al.*, 1 Wallace, 25. 1863.

V. DEMURRER.

144. Abandoned demurrer. A demurrer

which the party has abandoned, like a pleading which has been amended, is no longer a part of the record, and will be stricken from the case upon motion. *Brown v. Saratoga R. R. Co.*, 18 N. Y., 495. 1859.

145. After several pleadings. The principle that a demurrer, after several pleadings, reaches back to a defective declaration, has no application where the defect is simply one of form. *Railroad Co. v. Harris*, 12 Wallace, 65, 1870.

146. Amended declaration. An amended declaration is not demurrable for the reason that it may require a change in the defendant's pleas. *Bavington v. Pittsburgh and Steubenville R. R. Co.*, 34 Penn. St., 358. 1859.

147. Answer. When an answer presents several distinct and separate defenses to the action, any one of them may be assailed by demurrer. Rev. 1860, § 2880. *Skinner v. Chicago and Rock Island R. R. Co.*, 12 Ia., 191. 1861.

148. Effect of demurrer. A demurrer admits the truth of the facts well pleaded, but does not admit the conclusions of law set out to be correct. *Smith v. Henry County*, 15 Ia., 385, 1863; *Havens v. Hartford and New Haven R. R. Co.*, 28 Conn., 69, 1859.

149. — The admissions of a demurrer cannot be used against the party demurring, upon a hearing in damages as evidence of the particular matter alleged. *Havens v. Hartford and New Haven R. R. Co.*, 28 Conn., 69. 1859.

150. — Upon a hearing in damages, after the overruling of a demurrer, the case stands, with reference to the evidence necessary for the plaintiff and admissible for the defendant, precisely as it would have stood upon a default. *Ib.*

151. Error without prejudice. Where a plea is erroneously overruled on demurrer, and issue is joined on another plea, under which the same defense might be made, the court will not disturb the verdict. *Junction R. R. Co. v. Bank of Ashland*, 12 Wallace, 226. 1870.

152. Form. It is unnecessary to assign special cause, in a demurrer to a pleading which is so defective, that judgment according to law and the right of the case, cannot be rendered on it. *Hawkins v. Mississippi and Tennessee R. R. Co.*, 35 Miss., 688. 1858.

153. General demurrer. A party having the option to reply or demur, in demurring,

Variance and Evidence.

admits that he has no ground for denial. *Commonwealth v. Cross Cut R. R. Co.*, 53 Penn. St., 62. 1866.

154. — A general demurrer is only for defects of substance; a special demurrer for defects of form, which must be especially assigned. *Ib.*

155. — Where a pleading contains one good paragraph, a demurrer to the whole complaint should be overruled. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Cox*, 37 Ind., 325; 1871; *Wright v. Indianapolis and Cincinnati R. R. Co.*, 18 ib., 168, 1862; *Vail v. Central R. R. Co.*, 8 C. E. Green's Ch. (N. J.), 466, 1873.

156. Judgment on. On demurrer to any pleadings, which are in bar of the action, the judgment for either party is the same as it would have been on an issue of fact joined in the same pleading and found in favor of the same party. *Clearwater v. Meredith et al.*, 1 Wallace, 25. 1863.

157. — A demurrer, whether general or special, puts the whole record before the court, and judgment must be rendered against the party who has first failed in pleading. *Commonwealth ex rel. v. Pittsburgh and Connellsville R. R. Co.*, 58 Penn. St., 26. 1868.

158. Justice of the peace. On appeal to the supreme court from the court of common pleas, in an action commenced before a justice of the peace, no notice will be taken of the ruling of the justice upon a demurrer. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Parkhurst*, 34 Ind., 501. 1870.

159. Statute. Under R. S., ch. 125, a general allegation of performance upon the part of the plaintiff, of the things necessary for him to do, is sufficient. *Smith v. Chicago and Northwestern R. R. Co.*, 19 Wis., 326. 1865.

160. — A demurrer to a complaint, for any other cause than the six specified by the code, should be overruled. *Hutton v. Indiana Central R. R. Co.*, 7 Ind., 522. 1856.

161. Municipal bonds. A municipal corporation, on a suit against it for bonds issued to a railroad, set up that the plaintiff had notice of certain proceedings, which, as the plea alleged, destroyed the plaintiff's right to sue. The plaintiff replied denying the notice. The city demurred to the replication. *Held*, that the city thus admitted that he had no notice. *Lexington v. Butler*, 14 Wallace, 282. 1871.

162. Waiver. An erroneous ruling in sus-

taining a demurrer is waived by amendment of the pleading demurred to. *Smith v. Cedar Falls and Minnesota R. R. Co.*, 30 Ia., 244. 1870.

163. — An objection to the form of the action is waived unless presented by demurrer. *Mississippi Central R. R. Co. v. Whitehead*, 41 Miss., 225. 1866.

164. — Pleas in abatement and demurrers are waived by going to trial upon a plea to the merits. *Bell v. Mobile and Ohio R. R. Co.*, 4 Wallace, 598. 1866.

165. Writ of error. Where a demurrer to a declaration in the circuit court is improperly sustained, and judgment is rendered accordingly, the case may be reexamined in the supreme court upon writ of error without any formal bill of exceptions. *Rogers v. Burlington*, 3 Wallace, 654. 1865.

VI. VARIANCE AND EVIDENCE.

166. Code. The rule requiring the proof to conform to the pleading is not materially changed by the code, but the pleading may be amended to conform to the proof. *Hoben v. Burlington and Missouri River R. R. Co.*, 20 Ia., 562. 1866.

167. Engineer's certificate. In an action against a railway company, on a certificate issued by its engineer for work done by a contractor, there being no sworn plea denying the execution of the certificate — the instrument itself is evidence of the existence of the debt (Code, §§ 2238, 2273-79), and that it was made on sufficient consideration. *Alabama and Mississippi Rivers R. R. Co. v. Sanford*, 36 Ala. N. S., 703. 1860.

168. Effect of variance. A party cannot declare upon one cause of action and recover upon another. *Harris v. Hannibal and St. Joseph R. R. Co.*, 37 Mo., 307. 1866.

169. — An allegation of variance between the averments of a petition and the findings of the court, where there is no allegation that the findings were unwarranted by the proofs, or that the judgment does not conform to the law and justice of the case as presented by the findings, will not be sustained. Such case comes within the thirty-second section of the judiciary act. *Railroad Co. v. Lindsay*, 4 Wallace, 650. 1866.

170. — A variance between the proof and

Amendment.

the pleadings may be taken advantage of on the trial, if a good cause of action be stated or implied in the declaration. It comes too late upon a motion in arrest of judgment. *Smith v. Eastern R. R. Co.*, 35 N. H., 356. 1857.

171. — In assumpsit against a common carrier, alleging that plaintiffs delivered to defendant a large quantity of wool, to wit: 7,837 pounds, which it promised to transport, and the proof was of a smaller quantity; *held*, it was no variance. *Deming v. Grand Trunk R. R. Co.*, 48 N. H., 455. 1869.

172. — A declaration alleged a contract for unusual dispatch in transporting goods. The evidence did not tend to prove that there was any contract for unusual dispatch. *Held*, that the variance was fatal, whether the action was *ex contractu* or *ex delicto*. *Mann v. Birchard*, 40 Vt., 326. 1867.

173. — Though there be a variance between the allegations of a petition and the facts proved on the trial, yet if it be a case where an amendment of the petition ought to be allowed to conform it to the facts proved, the judgment will not be reversed on account of such variance. *Missouri Valley R. R. Co. v. Caldwell*, 8 Kans., 244. 1871.

174. — A variance from the corporate name in a petition filed in an action instituted by a corporation, which cannot mislead the defendant, is immaterial, as where the plaintiff was termed the "New Orleans and Carrollton Railroad and Banking Co.," instead of the "New Orleans and Carrollton R. R. Co." *New Orleans and Carrollton R. R. Co. v. McKelvey*, 2 La. An., 359. 1847.

175. — A contract was declared upon as having been made with Isaac McCord & Co., the proof showed the name to have been McCord & Co.; *held*, that the variance was immaterial. *McCord v. West Feliciana R. R. Co.*, 1 Robinson (La.), 519. 1841.

176. — It is a general rule that the supreme court will not revise any questions, except such as appear to have been raised in the court below; and this rule applies with peculiar propriety to questions of variance, unless the variance appears of record, as such questions, if raised below, can generally be met by further proof or by amendment. *Brintnall v. Saratoga and Whitehall R. R. Co.*, 32 Vt., 665. 1860.

VII. AMENDMENT.

177. Amendment without leave. It is gross irregularity to hear a case without some terms imposed, on an amended bill filed after replication, without leave of court. *Washington R. R. Co. v. Bradleys*, 10 Wallace, 299. 1869.

178. Appeal. The pleadings in equitable causes pending on appeal are not amendable as a matter of right, but only by leave of court upon special cause shown. *Georgia R. R. Co. v. Milnor*, 8 Ga., 313. 1850.

179. Bills and notes. Where a party, on the trial of an action upon a note, amends his declaration by inserting that the note "is without defalcation, payable and negotiable at," etc., it is such a material amendment as entitles the defendant to a continuance. *Ohio and Mississippi R. R. Co. v. Palm*, 18 Ill., 22. 1856.

180. Discretion. The amending of the pleadings at the trial is a matter within the discretion of the court, and its judgment will not be reviewed unless such discretion has been manifestly abused. *Ferguson v. Hannibal and St. Joseph R. R. Co.*, 35 Mo., 452, 1865; *Milwaukee and Mississippi R. R. Co. v. Finney*, 10 Wis., 388, 1860.

181. Effect of amendment. An objection to a pleading must be taken before trial; but where an objection is made after trial, and the adverse party asks leave to amend, and does amend, he cannot afterwards insist that such amendment is unnecessary. *Coates v. Galena and Chicago Union R. R. Co.*, 18 Ia., 277. 1865.

182. Guardian. Where the original summons and complaint are in the name of "C. L. F., guardian of R. H. F.," the complaint cannot be so amended as to make the plaintiff "R. H. F.," by his next friend, C. L. F." Code, § 2403. *Foulkes v. Memphis and Charleston R. R. Co.*, 38 Ala., 310. 1862.

183. Judgments. Misdescription of judgments and contracts in a declaration, may be amended at the discretion of the court as to terms. *Cummings v. Buckfield Branch R. R. Co.*, 35 Maine, 478. 1853.

184. Limitations. An amendment of an answer will not be permitted for the purpose merely of setting up the statute of limitations as a defense. *Sagory v. New York and New Haven R. R. Co.*, 21 Howard's Pr. (N. Y.), 455. 1861.

185. Name. A change of names may be

Miscellaneous.

made, if it be made apparent to the court that there was a mistake in instituting the suit. Act of March 4, 1852. *Pennsylvania R. R. Co. v. Keller*, 67 Penn. St., 300. 1871.

186. Particular case. The right of a plaintiff to amend his declaration—considered. *Sullivan v. Rome R. R. Co.*, 28 Ga., 29. 1859.

187. Service. The service of an amended answer which is in fact a copy of the original answer, does not require the service of an additional reply, if the original answer has been replied to. *Howard v. Michigan Southern R. R. Co.*, 5 Howard's Pr. (N. Y.), 206. 1850.

189. Statute. In case of variance, it is error to nonsuit the plaintiff. He has the right under the Code to amend, and it is only a question of terms. Code §§ 74, 77 and 78. *Fox River Valley R. R. Co. v. Shoyer*, 7 Wis., 365. 1859.

188. Time of amendment. An immaterial amendment of the pleadings may be permitted after a cause has been submitted to the jury, and a portion of the testimony offered. *Mississippi Central R. R. Co. v. Whitehead*, 41 Miss., 225. 1866.

190.—Trespass. Where the plaintiff sues in trespass instead of in case, the mistake is amendable. *Price v. New Jersey R. R. Co.*, 2 Vroom. (N. J.), 229, 1865; *Same v. Same*, 3 ib., 19, 1866.

191. Waiver of ruling on demurrer. A party by amending his plea, after a demurrer has been sustained to it, waives his right to complain of the sustaining of the demurrer. *Jay v. Indianapolis, Pittsburgh and Cleveland R. R. Co.*, 17 Ind., 262. 1861.

VIII. VERIFICATION.

192. Verification. The power of an attorney to verify pleadings—determined. *Imlay v. New York and Harlem R. R. Co.*, 1 Sandford, (N. Y.), 732. 1848.

IX. VERDICT.

193.—Where no valid cause of action, either at common law, or by virtue of any statute, is set up in the complaint, the plaintiff is not entitled to judgment, though a verdict be found in his favor. *Indianapolis and Cincinnati R. R. Co. v. Davis*, 10 Ind., 398. 1858.

PLEADING AND PRACTICE.

See FEDERAL COURTS; PLEADING; PRACTICE.

PLEDGE.

See COLLATERAL SECURITIES; MORTGAGE.

1. Bonds and stocks. When the stocks and bonds of a corporation are pledged, they may, upon default, be sold for the debt; but such sale must be at public auction, and can only be made upon demand of payment, and a notice to the pledgor of the time and place of sale. But if the pledgor cannot be found, so as to have a personal demand made upon him, then the pledgee must resort to his bill, and have a judicial sale. *Indiana and Illinois Central R. R. Co. v. McKernan*, 24 Ind., 62. 1865.

2. Coupons. Where a railway company, to secure a debt, pledged its own bonds, to which were attached interest bearing coupons, it was held that the pledgee, before the maturity of his own demand, had a right to collect the interest on the bonds as it fell due. *Androscoggin R. R. Co. v. Auburn Bank*, 48 Maine, 335. 1861.

3. Redemption. A bill in equity may be maintained to redeem a pledge, if an account is wanted, or if there has been an assignment of the pledge. *White Mountain R. R. Co. v. Bay State Iron Co.*, 50 N. H., 57. 1870.

4.—The pledgors of bonds secured by mortgages may redeem the bonds after the lapse of fifteen years, notwithstanding the pledgee has foreclosed the mortgages. *Id.*

POLICE REGULATIONS.

See CHARTER; CONSTITUTIONAL LAW.

POST ROUTE.

See BRIDGES,

POULTRY.

See CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE.

Account — Discontinuance.

POWDER.

See CONSTRUCTION OF RAILWAYS.

1. **Explosion.** One who knowingly delivers an apparently harmless package, containing a dangerous and explosive substance, to a common carrier for transportation, without giving notice of its contents, is liable for damages caused by its explosion while the carrier is transporting it in ignorance of its contents and with care duly adapted to its apparent nature. *Boston and Albany R. R. Co. v. Shanley*, 107 Mass., 568. 1871.

PRACTICE.

See FEDERAL COURTS; PLEADING.

1. **Account.** The supreme court may appoint an auditor to investigate matters of account. *Sirrine v. South Western R. R. Co.*, 47 Ga., 586. 1873.

2. **Accounts.** In an action brought to recover the amount named in certain certificates of indebtedness, where the petition, instead of declaring directly upon the certificates as notes, set forth a cause of action in account for work and labor done and performed, and referred to the certificates merely as evidence and as exhibits, plaintiff would have no right, answer having been filed, to take judgment at the return term. *Cosgrove v. Tebo and Neosho R. R. Co.*, 50 Mo., 270. 1872.

3. **Agreement in one suit to abide event of another.** Where the same defendant in several causes, sued by different plaintiffs claiming for labor and team work done on defendant's railroad for subcontractors, entered into a written stipulation in all of the causes, providing that all proceedings should be stayed in the above entitled causes, and that they should "abide the result of the final judgment rendered in the case of D. v. The S. H. & S. R. R. Co., defendant in these causes, in which verdict is to be taken on written stipulation as to facts, subject to the opinion of the general term," it was *held*, that the plaintiff in the D. case having subsequently obtained final judgment against the defendant, the plaintiffs in each of these cases were, on a reference for that purpose, simply to prove the amount of their

damages, respectively, allowing the defendant to controvert their proof on that single point only. *Honlahan v. Sackett's Harbor and Saratoga R. R. Co.*, 24 Howard's Pr. (N. Y.), 155. 1858.

4. **Code practice.** Points of practice decided under the code of Kansas. *Missouri River, Fort Scott and Gulf R. R. Co. v. Wilson*, 10 Kans., 105. 1872.

5. — Points of practice under the New York Code — decided. *Unger v. Forty-second Street R. R. Co.*, 4 Robertson (N. Y.), 682, 1866; *Ramsey v. Erie R. R. Co.*, 3 Lansing (N. Y.), 181, 1870; *Lester v. Rome, etc., R. R. Co.*, 2 N. Y. Sup. Ct., 672, 1874; *Hodgskin v. Atlantic and Pacific R. R. Co.*, 3 Daly (N. Y.), 70, 1869; *Ward v. Central Park, etc., R. R. Co.*, 2 Sweeney (N. Y.), 701, 1870; *White v. Delaware, Lackawanna and Western R. R. Co.*, 39 Howard's Pr. (N. Y.), 479, 1869; *Eggleston v. Orange, etc., R. R. Co.*, 1 Code Rep. N. S. (N. Y.), 212, 1851; *Ball v. Syracuse R. R. Co.*, 1 ib., 410; *Trapp v. Erie R. R. Co.*, 1 ib., 384; *Vermont R. R. Co. v. Northern R. R. Co.*, 1 ib., 401.

6. **Contempt: appeal.** A preliminary order before judgment, requiring a party to do a certain thing or be liable for contempt, is not appealable to the court of appeals. *New York and New Haven R. R. Co. v. Ketchum*, 3 Abbott's Ct. of Ap. Dec. (N. Y.), 347. 1866.

7. **County courts.** It is requisite that a case, marked on the county court docket as one in which some question of law is to be settled, should be transferred to the next law term. If it is not so done, the judge presiding at the county court may enter such judgment as to law and justice may appertain. *Farrin v. Kennebec and Portland R. R. Co.*, 36 Me., 34. 1853.

8. **Cross bill.** The filing of a cross bill on a petition, without leave of court, is irregular and such cross bill may be properly set aside. *Bronson v. La Crosse R. R. Co.*, 2 Wallace, 283. 1864.

9. **Discontinuance.** Where the United States as plaintiffs in error brought up a case to the supreme court, and the attorney general moved for a discontinuance upon the ground that he wished other questions to be presented upon the record which he deemed necessary for a full elucidation of the case, the court without an expression of opinion upon these other questions, granted the motion. *United*

Miscellaneous.

States v. Minnesota and Northwestern R. R. Co., 18 Howard, 241. 1855.

10.—The right of the plaintiff to discontinue an action on payment of costs has not been abrogated by the code. *Seaboard and Roanoke R. R. Co. v. Ward*, 1 Abbott's Pr. (N. Y.), 46, 1854; *Same v. Same*, 18 Barbour (N. Y.), 595; 12 Howard's Pr. (N. Y.), 405.

11. Discretion. After the jury is impaneled to try a cause, the court may hold the trial open for a reasonable time to enable a party to procure testimony; and it was held to be no abuse of discretion to hold a trial open for several days, there being no pretense that appellant was prejudiced thereby. *Bigelow v. West Wisconsin R. R. Co.*, 27 Wis., 478. 1871.

12. Dismissal. After a cause had been entered on the docket of the county court, the plaintiff's attorney, during vacation, wrote to the defendant's attorney that he should discontinue it at the next term, at the call of the docket, and subsequently directed the clerk to do so. Later in the term, the plaintiff's attorney in the absence of defendant's attorney moved that the discontinuance be stricken off and the cause continued, which was done. At the next term, defendant moved to dismiss the cause by reason of the foregoing facts. Held, that the cause was not so discontinued as to put it beyond the discretion of the court to reinstate it. *Connecticut and Passumpsic Rivers R. R. Co. v. Newell*, 31 Vt., 364. 1858.

13. Equity. A complainant in equity cannot compel a hearing, unless his case has been "marked at the law term 'law' on the docket of the county where pending," as provided in R. S. of 1857, ch. 77, § 17; or unless he has given the notice provided in rule IX. *Shepley v. Atlantic and St. Lawrence R. R. Co.*, 57 Me., 22. 1869.

14.—Where a court of equity orders an action at law, an appeal lies from the circuit court at law to the law court of appeals. *South Carolina R. R. Co. v. Toomer*, 9 Richardson's Eq. (So. Car.), 270. 1857.

15.—Where an issue is ordered, no appeal lies from the decision at law to any court; but, on the return of the issue to the court from which it emanated, a motion may be made for another issue, or for a new trial. *Ib.*

16.—Points of practice—determined. *Shaw v. Raritan, etc. R. R. Co.*, 3 Vroom (N. J.), 293. 1867.

17. Rules. Where a rule has been continued indefinitely by the district judge, it cannot be subsequently heard without notice to the opposite party. *Hennen v. New Orleans and Carrollton R. R. Co.*, 20 La. An., 544. 1868.

18. Supreme court. A judgment of a circuit court on an agreed statement of facts may be reexamined in the supreme court on a writ of error. *Stimpson v. Baltimore and Susquehanna R. R. Co.*, 10 Howard, 341. 1850.

19. Two issues. When two issues are presented, one for the court and one for the jury, the verdict of the latter will not be set aside because the court neglected to determine the former; but the judgment will be reversed on appeal therefrom, and the cause remanded with directions to try the other issue. *Hegar v. Chicago and Northwestern R. R. Co.*, 26 Wis., 624. 1870.

PRINCIPAL AND AGENT.

See AGENCY; WHARVES.

PRINCIPAL AND SURETIES.

See SURETY.

PRIVATE RAILROAD.

See CHARTER; LATERAL RAILWAYS.

PRIVATE WAYS AND CROSSINGS.

See EMINENT DOMAIN; INJURIES TO DOMESTIC ANIMALS.

1. Bridges. A requirement that a railway company shall erect suitable bridges across its road where crossed by roads, does not require it to erect a bridge at a farm crossing. *Green v. Morris and Essex R. R. Co.*, 4 Zabriske (N. J.), 486. 1854.

2. Central R. R. Co. of N. Y. Under the charter of the S. and E. R. R. Co. (applied to the C. R. R. Co.), the corporation is required

Deed — Pleading.

to construct suitable wagon ways over or under the road, "when the road shall intersect any farms or lands of any individual;" *held*, that the passage way was not necessarily to be constructed at the point of intersection of such lands. *Elleworth v. Central R. R. Co.*, 5 Vroom (N. J.), 93. 1869.

3. Deed. In a conveyance to a railroad company of a strip of land for its location, across which exists an open passage way, a reservation in the deed of "a right of way for carts, teams and cattle, within the location aforesaid, where the said way now exists, the same to be made and kept by the grantees in a convenient state of use for the purposes aforesaid," implies that the corporation is to keep the way open, and unobstructed by gates or other barriers; and no obligation to erect and maintain such barriers across it is necessarily implied by the St. of 1846, ch. 271, by reason of its being a private way. *Eames v. Worcester and Nashua R. R. Co.*, 105 Mass., 193. 1870.

4. — In a deed to a railway company of land covering only a portion of the width of its location, a reservation to the grantor and his assigns of the right to make a crossing over the land conveyed, to a new street on the opposite side of the railroad, creates an easement in the land conveyed, but does not confer a right of way over the other land of the company to the street referred to. *Boston and Maine R. R. Co. v. County of Middlesex*, 1 Allen (Mass.), 324. 1861.

5. — A railway company having accepted and availed itself of a conveyance of land for its right of way, the deed containing certain conditions as to farm crossings, is bound to comply with such conditions. *Aiken v. Albany, Vermont and Canada R. R. Co.*, 26 Barbour (N. Y.), 289. 1857.

6. Defective crossing. Plaintiff, owning land on both sides of a railroad, brought an action to compel the company to construct a suitable farm crossing, also claiming damages. The court which tried the cause found that the crossing actually built by defendant was inconvenient for plaintiff, and that the proper place for a crossing was where plaintiff desired. *Held*, that this established a cause of action. *Wademan v. Albany and Susquehanna R. R. Co.*, 51 N. Y., 568. 1873.

7. — Instead, however, of directing a spe-

cific performance by defendant of its obligation, the court gave plaintiff a pecuniary compensation. *Held*, not to be error. *Id.*

8. Depot buildings. A railway company may lawfully erect a building within the limits of the location of its road, for depot or station purposes, although it thereby obstructs a private way over the land upon which the building stands; and the Gen. Sts., ch. 63, § 46, providing that if a railroad is laid out across a turnpike road or other way, it shall be so made as not to obstruct the same, does not apply to private ways. *Boston Gas Light Co. v. Old Colony and Newport R. R. Co.*, 14 Allen (Mass.), 444. 1867.

9. Farm crossings — charter. Where, by the terms of the charter of a railway company, it is required to place a sufficient causeway on each farm through which its road runs, it may make such causeway upon any part of the farm which the company finds most convenient. *Holmes v. Philadelphia and Reading R. R. Co.*, 1 Penn. Law Jour. Rep., 387. 1843.

10. Inclined plane. Neither a public nor a private road or way can, under the provisions of the revised statutes, be laid out across the fixtures and erections upon the inclined plane of a railroad which are used for the drawing up or letting down of cars, for the conveyance of merchandise or passengers. *Mohawk and Hudson R. R. Co. v. Archer*, 6 Paige Ch. (N. Y.), 83. 1836.

11. Necessity. Where the only way of access to the plaintiff's land was across a tract called "the Factory Field," which was the property of those under whom the plaintiff held his land, and which was owned by them when his land was conveyed to him, or over the land of strangers, it was *held*, that he had a way, of necessity, over the Factory Field. *Kimball v. Cochecho R. R. Co.*, 27 N. H., 448. 1853.

12. Pleading. A count at common law for obstructing a private way may be joined with a count under a statute which forbids an action against a railroad corporation, until after sixty days' notice has been given of the obstruction. *Lamphier v. Worcester and Nashua R. R. Co.*, 33 N. H., 495. 1856.

13. — An action cannot be maintained by an individual for the obstruction of a public way, unless in case of special damage. Spe-

Administrators — Agency.

cial damage must be alleged, or that the way is private. *Ib.*

14. — In case for obstructing a private way, "a certain lot of land in N." is an insufficient description, whether the way is set forth as appendant to the land, or the land is intended as a terminus of the way. *Ib.*

15. — A private way should be described as extending from one place to another, or the declaration will be insufficient. *Ib.*

16. **Proceedings to lay out private road.** The owner of lands through which a private road or way is proposed to be laid out, is entitled to a written notice of the time and place of meeting of the jury of freeholders to determine the question as to the necessity of such road or way. But such notice may be waived by an appearance. *Mohawk and Hudson R. R. Co. v. Artcher*, 6 Paige Ch. (N. Y.), 83. 1836.

17. **Statute.** The sections of the general railway act, providing that the corporations subject to that act shall construct "farm crossings," make no distinction in terms, in respect to this duty to make crossings, between cases in which the lands of the corporation, occupied by the road, were obtained by agreement with, and conveyance from, the owners, and those in which title was acquired by the compulsory proceedings authorized by the act; and none was intended by the legislature. *Clarke v. Rochester, Lockport and Niagara Falls R. R. Co.*, 18 Barbour (N. Y.), 350. 1854.

18. — The provision of the general railway act of 1848, requiring railway companies to erect farm crossings, is not applicable to corporations existing before the passage of that act, and who had previously obtained the right of way for their road, and paid the landowners the damages sustained by them. *Milliman v. Oswego and Syracuse R. R. Co.*, 10 Barbour (N. Y.), 87. 1850.

PROCESS.

See GARNISHMENT; HIGHWAY; SUBSCRIPTIONS BY INDIVIDUALS.

1. **Administrators.** Service on one of two administrators of an estate, of the presentation of a claim against the decedent's estate in the probate court, is sufficient. *Clark's Adm'r v.*

Parkville and Grand River R. R. Co., 5 Kans., 655. 1865.

2. **Agency.** The service of a process upon an agent, other than the law agent of a corporation, is sufficient, if properly made and returned. *Chicago and Rock Island R. R. Co. v. Fell*, 22 Ill., 333. 1859.

3. — **depot agent.** A summons served upon a depot agent of a railway company is sufficient to confer jurisdiction. *Hudson v. St. Louis, Kansas City and Northern R. R. Co.*, 53 Mo., 525. 1873.

4. — **managing agent.** Unless a foreign corporation has a managing agent within the state of Ohio, it cannot be held liable by any proceeding *in personam* in that state. *Barney v. New Albany and Salem R. R. Co.*, 1 Handy (Ohio), 571. 1855.

5. — **Personal service upon the managing agent of a railway company is personal service upon the corporation.** *New York and Erie R. R. Co. v. Purdy*, 18 Barbour (N. Y.), 574. 1854.

6. — **An agent, invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent within the 75th section of the code, and summons may be served on him. It is immaterial where he resides.** *Porter v. Chicago and Northwestern R. R. Co.*, 1 Neb., 14. 1870.

7. — **To authorize legal service upon a foreign corporation, where it is made upon its managing agent in New York (under § 184 of the Code), the managing agent must be one whose agency extends to all the transactions of the corporation.** *Brewster v. Michigan Central R. R. Co.*, 5 Howard's Pr. (N. Y.), 183. 1850.

8. — **return.** Under the act of 1853, in order that return of service upon an agent may be held good, the return must show that the president of the company did not reside in, or was absent from the country. *St. Louis, Alton and Terre Haute R. R. Co. v. Dorsey*, 47 Ill., 288. 1868.

9. — **station agent.** In an action against a railway company under the statute (§ 38, p. 310, W. S.), for failure to ring a bell or sound a whistle before its train reached a crossing, service of summons made upon a station agent of the company would be sufficient. The direction given in the statute (W. S., p. 310, § 42), viz: "that suit may be commenced

Amendment — Summons.

by serving the summons on any director," etc., is permissive and additional to the common mode of service, and not mandatory or exclusive of the methods named in the law. *State, to use of, etc., v. Hannibal and St. Joseph R. R. Co.*, 51 Mo., 532. 1873.

10. — **ticket agent.** Service of a summons on a railway company by the sheriff leaving a copy thereof with a ticket agent of the company, and the railway company having designated no person in said county upon whom summons should be served, is good, without specifying in express terms that the road of the company runs into that county, or that the company transacts its business therein. *Missouri, Kansas and Texas R. R. Co. v. Crowe*, 9 Kans., 496. 1872.

11. **Amendment — of return.** Where judgment is entered by default, and it is assigned for error that the sheriff's return was insufficient, the return may be amended in the court below. *Toledo, Peoria and Warsaw R. R. Co. v. Butler*, 53 Ill., 323. 1870.

12. — Objection was made in the court below to the return of the service of the summons, because the return "showed service upon — Bush." The objection was obviated by amendment. *Held*, on appeal, that there was an implied admission in the form of the objection made, that the manner of the service of the summons was not questioned. *Evansville and Crawfordsville R. R. Co. v. Lawrence*, 29 Ind., 622. 1868.

13. — An officer should be permitted, on leave asked of the court, to so amend his return as to show the real manner of service of process. *Jackson v. Ohio and Mississippi R. R. Co.*, 15 Ind., 192. 1860.

14. — **of process.** A misnomer of the real party intended to be sued, upon whom process has been served, may be corrected by amendment. *New Albany and Salem R. R. Co. v. Laiman*, 8 Ind., 212, 1856; *Same v. Chamberlain*, ib., 278.

15. — Such an amendment does not amount to a substitution of a defendant. *Ib.*

16. **Appearance.** Where there is an appearance to an action, the summons and return are no part of the record, unless made so by a bill of exceptions. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Ross*, 35 Ind., 108. 1871.

17. — Where there is no appearance to an

action, the summons and return are properly a part of the record. *Ib.*

18. — **waiver.** The general appearance of an attorney, without reasonable objection, is a waiver of any defect or want of service of the writ. *Buckfield Branch R. R. Co. v. Benson*, 43 Me., 374. 1857.

19. — A voluntary appearance of a defendant is equivalent to personal service of the summons upon him. *Carpenter v. New York and New Haven R. R. Co.*, 11 Howard's Pr. (N. Y.), 481. 1855.

20. **Baggage master.** An action cannot be legally commenced against a railway company (for loss of baggage or anything else), by the service of a summons upon a "baggage master" in its employ. *Flynn v. Hudson River R. R. Co.*, 6 ib., 308. 1851.

21. **Conductor.** Service of process upon a conductor of a railroad train is sufficient to compel the appearance of the company, under the laws of Indiana. *New Albany and Salem R. R. Co. v. Tilton*, 13 Ind., 3, 1859; *Same v. Mead*, 13 ib., 258; *Same v. Grooms*, 9 ib., 243, 1857; *Same v. Powell*, 13 ib., 373, 1859.

22. — The conductor is at least a special agent of the company. *Same v. Grooms*, 9 ib., 243. 1857.

23. — In an action brought against a railway company, before a justice of the peace for the recovery of damages occasioned by the killing of the plaintiff's horse by the cars of the company, service of process upon a conductor on the road, ten days before the day set for trial, is sufficient. *Same v. McNamara*, 11 ib., 543. 1858.

24. — In actions against railroad companies for the killing of stock by their trains, the summons may, under § 2 of the act of 1863 (acts 1863, p. 187), be served upon a conductor, but the statute does not require such service, and service upon any agent of the corporation, as authorized by § 36 of the code, or by the act of March 4, 1853, is good. *Jeffersonville, Madison and Indianapolis R. R. Co. v. Dunlap*, 29 Ind., 426. 1868.

25. — The act of March 28, 1849 (Comp. L., § 4846), authorizing the service of process against railway companies upon conductors, etc., is not repealed as respects justices' courts, by § 49 of the justices' act of 1855. *Fowler v. Detroit and Milwaukee R. R. Co.*, 7 Mich., 79. 1859.

Constitutional Law — Justice of the Peace.

26. Consolidated corporations. Where two corporations, one foreign and one resident, are consolidated, having resident officers in the state of Rhode Island, suit against such corporation should be commenced by summons and not by attachment. *Sprague v. Hartford, Providence and Fishkill R. R. Co.*, 5 R. I., 233. 1858.

27. Constitutional law. The legislature may prescribe a different rule for the service of process against a corporation, from that in force at the time of its creation; because such rules relate only to the remedy. *New Albany and Salem R. R. Co. v. McNamara*, 11 Ind., 543. 1858.

28. Coroner. Where a notice was served by a coroner, who it was said was not qualified to act, as proof of service would have made the service good, it was presumed that such proof had been made. *Coleman v. Mississippi and Alabama R. R. Co.*, 5 Howard (Miss.), 419. 1841.

29. Defective. A warrant against a railway company for the nonpayment of a certain sum "due by damage sustained," there being nothing in any other part of the proceedings to make it more certain, is fatally defective. *Wagoner v. North Carolina R. R. Co.*, 5 Jones' Law (N. C.), 367. 1858.

30. Director. Service on a director of a corporation is regular, and will give the court complete jurisdiction of the parties. *Curtis v. Avon, Genesee and Mt. Morris R. R. Co.*, 49 Barbour (N. Y.), 148. 1867.

31. — A director of a railway company is not such a head or managing agent thereof, as upon whom a summons and complaint may be served. *Alabama and Tennessee Rivers R. R. Co. v. Burns*, 43 Ala., 169. 1869.

32. Form. An original notice commencing suit need not be as full and specific as the petition. Code, ch. 135. *Des Moines N. & R. R. Co. v. Doran*, 4 Iowa, 553. 1857.

33. — Where the defects, sought to be taken advantage of, are in the form of the authority, or in the service of the writ, it should be by plea in abatement. *Bliss v. Connecticut and Passumpsic Rivers R. R. Co.*, 24 Vt., 428. 1852.

34. — But when the defect complained of is a total want of an essential ingredient, either in the writ, or service of the writ, and that apparent upon the record, it may be taken advantage of upon a motion to dismiss. *Id.*

35. — The following return and service were held sufficient against a foreign corporation: "Served by leaving a true and attested copy of the within writ with an agent of the defendant, December 22, etc., and leaving a certified copy in the office attached to the depot, January 7, 1850." *Kennard v. Railroad Co.*, 1 Philadelphia Rep. (Penn.), 41. 1850.

36. Jurisdiction. There is no way of bringing a party into court and within its jurisdiction against his will but by service of process. *Akin v. Albany Northern R. R. Co.*, 14 Howard's Pr. (N. Y.), 337. 1856.

37. Justice of the peace. The court will take notice of a summons issued by a justice of the peace, and of the indorsements thereon, if set out in a bill of exceptions. *Chicago, Burlington and Quincy R. R. Co. v. Minard*, 20 Ill., 9. 1858.

38. — Railroad companies cannot be sued by a short summons before a justice of the peace of a town through which their railroads pass. They are to be treated as inhabitants and freeholders in each county where their tracks are laid; consequently, entitled to the privilege of a long summons. *Belden v. New York and Harlem R. R. Co.*, 15 Howard's Pr. (N. Y.), 17. 1857.

39. — Where service upon a railway company, having its principal office out of the state, in an action before a justice for killing stock, had been made ten days, and nothing appeared showing the justice that the case was not ready for judgment, and judgment was rendered upon such insufficient notice, it was held, that the defendant might have the judgment opened on application, in ten days, or might have it vacated in a direct proceeding at any time after ten days and before payment, or might appeal. But it was held, also, that the case could not be dismissed on appeal; because the insufficient service was not ground of dismissal, but only of continuance, before the justice; nor would the fact be ground of continuance on appeal, for a continuance in that court would be granted or not, as cause might be shown then and there to exist. *Michigan Southern and Northern Indiana R. R. Co. v. Shannon*, 13 Ind., 171, 1859; *Ohio and Mississippi R. R. Co. v. Quier*, 16 ib., 440, 1861; *Same v. Clement*, ib., 473; *Toledo and Wabash R. R. Co. v. Talbert*, 23 Ind., 438, 1864.

40. — A railway company whose road

Lost Writ — President.

passes through two or more counties, may be sued before a justice in either county, provided the process can be served on the proper officer in such county. *Sherwood v. Saratoga and Washington R. R. Co.*, 15 Barbour (N. Y.), 650. 1852.

41. Lost writ. An original writ has fulfilled its functions when it has brought the defendant into court. Its loss may be supplied by a copy under the orders of the court. *York and Cumberland R. R. Co. v. Myers*, 18 Howard, 246. 1855.

42. Name — amendment. Where a corporation has been brought into court under a wrong name, the court has power to amend the process by striking out that name and inserting the right one. *Lane v. Seaboard and Roanoke R. R. Co.*, 5 Jones' Law (N. C.), 25. 1857.

43. Non-resident corporation. If railway companies, having their officers and offices, do business and have agents and property in Illinois, service of process may be made there in the same manner as upon local corporations. *Mineral Point R. R. Co. v. Keep*, 22 Ill., 9. 1859.

44. — The law of 1861 (spec. sess., p. 73), which required fifteen days' service of process upon a railroad company where the principal office of the company was without the state, is repealed by the acts of 1863 (Acts 1863, p. 25). *Toledo, Logansport and Burlington R. R. Co. v. Shiveley*, 26 Ind., 181. 1866.

45. — In actions against a railroad corporation whose principal office is not within the state, the summons must be served thirty days before the term to which it is returnable, or the cause must be continued. *Ohio and Mississippi R. R. Co. v. Boyd*, 16 Ind., 438. 1861.

46. — Perhaps, where process has been served ten days before court, the defendant should be deemed to be properly in court, unless it is made to appear that the principal office of the company is not in this state. *Ib.*

47. — The sufficiency of service upon a foreign railway company — determined. *Wheeling, etc., Transportation Co. v. Baltimore and Ohio R. R. Co.*, 1 Cincinnati Superior Ct. Rep., 311, 1871; *Caples v. Central Pacific R. R. Co.*, 6 Nev., 265, 1871.

48. Penalty. The object of the section of the revised statutes (2 R. S., 481, § 7), requiring in actions for the recovery of a penalty of for-

feiture, a reference to the statute by which the action is given to be indorsed upon the process issued, was to inform the defendant of the nature and cause of the action against him. If the complaint is annexed to the summons, that is sufficient. *Cox v. New York Central and Hudson River R. R. Co.*, 61 Barbour (N. Y.), 615. 1872.

49. Place of service. Process may be served on a railroad company in any county where there is any office or place of business of the company, although the president or chief officer may not be found in the county or reside therein. *Dixon v. Hannibal and St. Joseph R. R. Co.*, 31 Mo., 409. 1861.

50. Residence of officers. Actions against corporations can be brought, as provided by the statute (W. S., 294, § 28), either in the county where the cause of action accrued, or in the county where such corporations have or usually keep an office or agent for the transaction of their usual or customary business, at the option of the plaintiff. Section 26 (W. S. 294) provides for an enlargement or extension of service, by issuing process to a different county from where the suit is brought when the officers of the company do not reside there. *Mikel v. St. Louis, Kansas City and Northern R. R. Co.*, 54 Mo., 145. 1873.

51. — The So. Car. R. R. Co. may be made a party to a suit by service of a writ on its president in any district where the plaintiff resides or the cause of action accrues. *Glaize v. South Carolina R. R. Co.*, 1 Strobbart's Law (So. Car.), 70. 1846.

52. — Under the act of assembly (Rev. Stat., ch. 26), directing how service of process shall be made on a corporation, the service on the president or other officer of a corporation may be in the county in which he actually resides, or in the one which is his official residence, and where he carries on and attends to the business of the corporation. *Governor v. Raleigh and Gaston R. R. Co.*, 3 Iredell's Ch. (N. C.), 471. 1845.

53. President. Where process against a railway company is returned as served upon one being president of the corporation, it is necessary that proof of his official character should be made to the court, and so appear on the record, to sustain a judgment by default. *Wetumpka and Coosa R. R. Co. v. Cole*, 6 Ala., N. S., 655. 1844.

Principal Officer — Trackmaster — Certificate of Notary.

54. — The service of process upon the president of a corporation is sufficient service on the corporation. *Galveston and Red River R. R. Co. v. Shepherd*, 21 Tex., 274. 1858.

55. — In an action against a railroad company, a service of process on the president is, by R. S. 1852, sufficient. *Branham v. Ft. Wayne and Southern R. R. Co.*, 7 Ind., 524. 1856.

56. **Principal officer.** Where a foreign corporation held in trust a railroad in Wisconsin, its principal agent in managing the road was held not to be a "principal officer" of such corporation for the service of summons, under the provisions of ch. 120, R. S. *Farmers' Loan and Trust Co. v. Warring*, 20 Wis., 290. 1866.

57. **Privilege.** The mere service of summons upon a defendant, without arrest, while he was attending court as a party or witness in another cause, is not to be set aside on the ground that he is privileged from such service. *Pollard v. Union Pacific R. R. Co.*, 7 Abbott's Pr., N. S. (N. Y.), 70. 1869.

58. **Return.** An officer's return cannot be collaterally questioned. *New York and Erie R. R. Co. v. Purdy*, 18 Barbour (N. Y.), 574. 1854.

59. — If the fact of the agency is denied, the return of the officer as to that is not conclusive; this should be put in issue by a plea in abatement. *Mineral Point R. R. Co. v. Keep*, 22 Ill., 9. 1859.

60. — Where the statute designates one or more officers of a corporation upon whom process against it may be served, the return of the constable is evidence as to the official character of the person served with such process, and of the facts which justify such service. *Wheeler v. New York and Harlem R. R. Co.*, 24 Barbour (N. Y.), 414. 1857.

61. **Service upon a state.** In proceedings where the commonwealth is a party or interested, and no other special mode of summons is provided by law, notice to the governor, as the chief executive officer, would, it seems, be considered as sufficient. *Commonwealth v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 25. 1849.

62. **Short summons.** Suit may be commenced in a district or justice's court against a resident corporation by a short summons, when the plaintiff is a nonresident and furnishes the requisite bond and affidavit.

Wilde v. New York and Harlem R. R. Co., 1 Hilton (N. Y.), 302. 1857.

63. **Statute.** Notice can be served on corporations only in the mode pointed out by statute. *Cosgrove v. Tebo and Neosho R. R. Co.*, 54 Mo., 495. 1874.

64. **Superior court.** The clerk of the superior court of one county has no right to issue a summons returnable to the superior court of another county. *Moore v. North Carolina R. R. Co.*, 67 N. C., 209. 1872.

65. **Supreme court.** Where the subject matter is before the supreme court, it may issue process to other parties interested. *Hirst v. Lehigh, etc. R. R. Co.*, 6 Philadelphia Rep. (Penn.), 93. 1865.

66. **Trackmaster.** The service of an original notice against a railway company on a trackmaster, where it appears that the corporation has officers, is not sufficient to give the court jurisdiction of the company (Code, § 1727. Act of January 18, 1853, § 17). *Richardson v. Burlington and Missouri River R. Co.*, 8 Ia., 260. 1859.

67. **Venue.** A railway company resides, in legal contemplation, in the counties through which its road passes, and in which it does business, and may be sued in any county through which its road runs. *Ib.*

PROCHEIN AMI.

See ATTORNEYS; PLEADING.

PROTEST.

1. **Certificate of notary.** The certificate of the notary who presented certain acceptances for payment, recited that he presented an original draft to a person in the office adjoining the one in which they were made payable, and enquired of him for the treasurer of the company to whom it should be presented, and was told, that the company had removed its office to parts unknown, and that he made diligent inquiries for such office and officer, but could not find the same. *Held*, that it was the duty of the notary to present the bill to the person in charge of such office; or if the office

Miscellaneous.

was closed, he should have so found and recited upon his own knowledge, and not upon the statement of another; that the indorsers were discharged. *Gage, Dater and Sloan v. Dubuque and Pacific R. R. Co.*, 11 Ia., 310. 1860.

2. — An answer verified, denying the receipt of notice of protest, will not render the notary's certificate inadmissible in evidence; to produce such result, an affidavit must be annexed to the answer. *Arnold v. Rock River Valley R. R. Co.*, 5 Duer (N. Y.), 207. 1856.

PROXY.

See ELECTION OF CORPORATE OFFICERS.

PUBLICATION OF LAWS.

1. **Presumption.** As the secretary of state was directed by a joint resolution of the legislature of June 9, 1852 (Acts of 1852, p. 178), to publish the "general railroad law," with four other laws, as soon as convenient, it will be presumed that he acted in accordance with this instruction; and, as, by reasonable diligence, the secretary could have caused their legal distribution before February 25, 1853, it will be presumed the acts mentioned were in force before that time. *State ex rel. v. Bailey*, 16 Ind., 46. 1861.

PUBLIC ENEMY.

See CARRIAGE OF MERCHANDISE; INJURIES TO PASSENGERS.

PUBLIC LANDS.

See EMINENT DOMAIN; LAND GRANTS.

1. **Land warrant.** A location of a military land warrant on public land, made before the passage of the act of congress, ap-

proved July 1, 1862, granting to the Central Pacific R. R. Co. alternate odd sections on each side of the road, gave the locator or his grantee, such an interest in the land as, coupled with possession, enables him to maintain trespass against the company for injury done to the same in constructing the road over the land. *Butterfield v. Central Pacific R. Co.*, 31 Cal., 264. 1866.

2. — The location of such warrant is a payment for the land, and a certificate of location, signed by the register of the land office where the location is made, is *prima facie* evidence that the land is the property of the locator. *Id.*

PUBLIC ROADS.

See BAGGAGE; DEDICATION; HIGHWAY.

QUESTIONS PROPOUNDED BY THE LEGISLATURE.

1. **Constitutional law.** The judges of the supreme court have the right to decide for themselves, whether questions presented for their determination by the legislature, and the occasions on which the questions are so presented, are such as to authorize the rendition of opinions as contemplated by the constitution (Art. VI, § 11.) *In matter of North Missouri R. R. Co.*, 51 Mo., 586, 1873; *Governor, opinion in response to*, 49 *ib.*, 216, 1872.

2. — The question as to the constitutionality of the sale of the North Missouri and that of the Missouri Pacific Railroads under the respective acts of March 17, 1868, and March 31, 1868, concerns the property rights of the state, and the vested rights of individuals and corporations, and cannot be passed upon by the supreme court in response to resolutions relating thereto by the legislature. *Id.*

QUORUM.

See CONSTITUTIONAL LAW.

QUO WARRANTO.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; MAN-
DAMUS.

1. Constitutional law. In an information in the nature of a *quo warranto* against a corporation, calling upon it to show by what warrant it uses certain franchises alleged to have been usurped, it is a sufficient answer to say that such franchises were granted by an act of the legislature; it is not competent to the attorney general, in behalf of the people, to allege that the act of the legislature is repugnant to the constitution of the United States and the laws of congress, and therefore void. *People v. Rensselaer and Saratoga R. R. Co.*, 15 Wendell (N. Y.), 113. 1836.

2. Exclusive remedy. The remedies given by statute (Code of Pro., § 482; 1 Rev. Stat., 603, § 5) for testing, by direct action for the purpose, or by a summary inquiry, the title of officers of a corporation, are exclusive. *Hudson River West Shore R. R. Co. v. Kay*, 14 Abbott's Pr. N. S. (N. Y.), 191. 1873.

3. Insolvency. Present insolvency, alone, is not sufficient to support an information in the nature of a *quo warranto* against a corporation. *State ex. rel. v. Bailey*, 16 Ind., 46. 1861.

4. Parties. A proceeding by *quo warranto* is a prosecution which must be carried on in the name of the people. *People v. Mississippi and Atlantic R. R. Co.*, 13 Ill., 66. 1851.

5. — It is the attorney general's duty, under § 405 of the code, whenever he shall have reason to believe that any of the acts or omissions specified in that section can be established by proof, to apply to the court for leave, and, upon leave granted, to bring an action in the name of the people of the state, for the purpose of vacating or annulling the existence of a corporation, other than municipal, in every case of public interest. *People v. Erie R. R. Co.*, 36 Howard's Pr. (N. Y.), 129. 1868.

6. — An action cannot be maintained under the Revised Statutes relative to proceedings against corporations in equity, by a stockholder against the corporation and its trustees, to restrain the trustees from exercising any powers as trustees, and for the appointment of a receiver of the property and effects of the corporation. *Ib.*

7. — A stranger, who has no other interest

in a corporation than that which is common to every citizen, is not entitled to a judgment of *oust* in a writ of *quo warranto*. *Commonwealth ex rel. v. Philadelphia G. and N. R. R. Co.*, 20 Penn. St., 518. 1853.

8. Pleadings. A plea to a *quo warranto* that the defendants have a right to exercise the franchise, accompanied by a negation of the allegations of the writ, is not a plea of *non usurpavit* or a disclaimer, but is a valid plea. *Commonwealth v. Cross Cut R. R. Co.*, 53 Penn. St., 62. 1866.

9. — The sufficiency of the pleadings in a particular case determined. *People v. Northern R. R. Co.*, 42 N. Y., 217, 1870; *Same v. Same*, 53 Barbour (N. Y.), 98, 1869.

10. Proceedings. A question of usurpation, intrusion, or unlawful holding or exercising a corporate office, must be treated as a legal, not as an equitable cause of action. *People v. Albany and Susquehanna R. R. Co.*, 5 Lansing (N. Y.), 25. 1871.

11. — In lieu of proceedings by *quo warranto* under the provisions of the Code of Procedure, an action may be brought by the attorney general, in the name of the people, upon his own information, against several persons, consisting of two distinct classes, each claiming, by virtue of separate elections, to be the board of directors of a corporation, for the purpose of trying their respective rights to such office. *People v. Albany and Susquehanna R. R. Co.*, 55 Barbour (N. Y.), 344, 1869; see *Same v. Same*, 38 Howard's Pr. (N. Y.), 228, 1869; 7 Abbott's Pr. N. S. (N. Y.), 265, 1869.

12. — Such action must be commenced and prosecuted like other civil actions, and is to be governed, in respect to the pleadings and proceedings, by the same rules. *Ib.*

13. — In an information in the nature of a *quo warranto*, it is not necessary to set forth the franchises and privileges alleged to be usurped, except in general terms. It is always the right of the government to call upon those who assume corporate powers to show by what warrant they do so; and when the defendants set forth their claims by plea, the attorney general may show by replication the special grounds he relies on. *People v. River Raisin and Lake Erie R. R. Co.*, 12 Mich., 389. 1864.

14. — But a replication which, to show that defendants usurp the franchise of banking, avers that certificates issued by them are in the

Camden and Amboy R. R. Co. — Constitutional Law.

form and similitude of bank bills, and also that they are issued with intent to be put in circulation as money, is open to objection for duplicity. *Ib.*

15. — The plea set forth a charter as a railway corporation, which gave them no authority to issue circulating notes; and stated the issue by defendants of certain certificates which, as described, might or might not be within the statute against unlawful banking, and then denied that defendants have exercised the franchises charged "except as aforesaid." *Held*, that as the plea neither confessed nor denied the exercise of banking powers, the issue tendered by it was immaterial. *Ib.*

16. **Supreme court.** The right of the supreme court to issue the writ of *quo warranto* is recognized by the statutes of Vermont; the occasions are left to be determined by common law rules. And by those rules, it is apparent this writ is the proper mode in which to try any alleged usurpation of offices or franchises, inconsistent with the state sovereignty. *State v. Boston, Concord and Montreal R. R. Co.*, 25 Vt., 433. 1853.

17. — The judges of the supreme court in their private capacity have no power to direct proceedings in the nature of a *quo warranto*. *Ohio R. R. Co. v. State of Ohio*, 10 Ohio, 360. 1841.

18. **Trustee.** It is only where a corporation is dissolved that the court will appoint a trustee, and where a corporation has both banking and railroad franchises, and the former has been forfeited but the latter franchise still remains, a trustee will not be appointed. *State v. Commercial and Railroad Bank of Vicksburgh*, 24 Miss., 144. 1852.

RATES.

See CONNECTING LINES; INJUNCTION; PENALTY.

1. **Camden and Amboy R. R. Co.** The restriction of rates in § 16 of the charter of the Camden and Amboy R. R. Co. extends to the whole route from Philadelphia to New York, as well upon the water as the railroad. *Camden and Amboy R. R. Co. v. Briggs*, 1 Zabriskie (N. J.), 406, 1848; *Same v. Same*, 2 *ib.*, 623, 1850.

2. **Connecting lines.** A provision in the charter of a railway company that proprietors of certain wharves and lands should have the right to construct upon such lands railways connecting with the main road, and of entering upon that road with their cars and vehicles, "and that the owners and conductors of said cars and vehicles shall be liable to pay the same and no other rates of toll, and be subject to the same rules, regulations and provisions as the owners and conductors of other cars and vehicles traveling upon said main road," does not, since the passage of the St. of 1845, ch. 191, limiting the rights of connecting roads to use a railway, give the proprietors of those wharves and lands the right to have goods transported in the cars of the corporation owning the railroad at the same rate and no higher than those charged to others for the same and similar kinds of goods. *Fitchburg R. R. Co. v. Gage*, 12 Gray (Mass.), 393. 1859.

3. — The St. 1845, ch. 191, which provides for the appointment of commissioners to fix the compensation which shall be paid by one railway company for the drawing of its passengers, merchandise and cars over the railroad of another company, does not infringe upon any rights which the latter company may have under its charter to regulate tolls on its own road. *Vermont and Massachusetts R. R. Co. v. Fitchburg R. R. Co.*, 9 Cushing (Mass.), 369. 1852.

4. **Constitutional law.** The legislature has a constitutional right to regulate the rates of toll for freight and passengers upon railways. *Blake v. Winona and St. Peter R. R. Co.*, 19 Minn., 418, 1872; *Beekman v. Saratoga and Schenectady R. R. Co.*, 3 Paige Ch. (N. Y.), 45, 1831.

5. — Such regulations may be enforced by penalties. *State v. Winona and St. Peter R. R. Co.*, 19 Minn., 434. 1872.

6. — Ch. 169, Laws of 1862, § 2, requiring railway companies to fix rates of fare and freight, and to post up the same, and fixing a penalty for over charges, is not in conflict with Art. 1, § 8, of the Constitution of the the United States. Such laws do not regulate commerce between the states, but are in the nature of police regulations. *Fuller v. Chicago and Northwestern R. R. Co.*, 31 Iowa, 188, 1871; *Same v. Same*, *ib.*, 211.

7. — A requirement of a state law, that rail

Discrimination — Leased Lines.

road companies shall annually fix their rates of transportation and post up the same in their depot buildings, is a police regulation only, and not a regulation of commerce. *Railroad Company v. Fuller*, 17 Wallace, 560. 1873.

8. — The regulation of tolls on bridges and turnpike roads, and fares on railways and ferries, which are used for communication and commerce between states, is part of the powers reserved to the states, and is not delegated to the general government. *Hudson County v. The State*, 4 Zabriskie (N. J.), 718. 1853.

9. Contract. Upon a contract by a railway company to carry freight for the owner at so much per ton, it is not liable to refund to the freightor the amount paid by him for weighing the freight; in the absence of any evidence of an agreement to the contrary. *Johnson v. Cayuga and Susquehanna R. R. Co.*, 11 Barbour (N. Y.), 621. 1852.

10. Discrimination. Three plaintiffs filed a joint bill against a railroad company, averring injury to their business in charging improper tolls, making discrimination against them, etc. A community of interest in the plaintiffs is necessary to sustain the bill. *Cumberland Valley R. R. Co's Appeal*, 62 Penn. St., 218. 1869.

11. — One plaintiff was not especially injured in the matters charged; he had no status in court, and could not complain that the company had exceeded its franchises. *Ib.*

12. — Unless it appears upon the face of the bill that there is a private injury, it is demurrable as to that. *Ib.*

13. — A charge against a railway company for violating a public franchise, being an injury common to the whole public, is a matter for the public and not for an individual to redress. *Ib.*

14. — The rule is that where the injury is not greater to the individual than to the whole public, the remedy is with the public. *Ib.*

15. — A railroad company had authority to place cars on its road, to permit individuals to place cars thereon, and to charge "on all goods, etc., transported on its road not exceeding four cents a mile per ton for toll and three cents for transportation." *Held*, that these were two subjects of charge, one for the use of the road and the other for power. *Ib.*

16. — On a railroad, equality must exist at

the same rates of transportation and, as far as possible, in accommodation. *Ib.*

17. — A railroad company cannot discriminate in favor of itself or any of its employés as against other transporters. *Ib.*

18. Erie R. R. Co. The Erie R. R. Co., as it uses the roads and franchises of the Paterson and Runapo R. R. Co. and Paterson and Hudson R. R. Co., is bound by the rates fixed by law upon such roads. *McGregor v. Erie R. Co.*, 6 Vroom (N. J.), 89. 1871.

19. Evidence. Where a printed tariff of freights is established, any printed copy may be regarded as an original. *Manchester and Lawrence R. R. Co. v. Fisk*, 33 N. H., 297. 1856.

20. — Where copies of such tariff are required by law to be posted at the depots of the railroad, that is a sufficient account of the absence of those copies to render secondary evidence admissible. *Ib.*

21. Foreign corporation. Although the Erie R. R. Co. is a foreign corporation, it is, at the same time domestic to the full extent of the powers and franchises confirmed and invested in it, in New Jersey. *McGregor v. Erie R. R. Co.*, 6 Vroom (N. J.), 115. 1871.

22. — An action *qui tam*, etc., against the Erie R. R. Co., for taking unlawful tolls on parts of its lines in New Jersey, the company may properly be considered as a corporation of that state, and amenable as such to the provisions of the act of March 17, 1870, respecting unlawful tolls. *Ib.*

23. How established. Rates for transportation of freight, upon railroad, may be established by the directors, or by their agents, under their authority. The assent of the directors may be presumed, if nothing appears to the contrary. *Manchester and Lawrence R. R. Co. v. Fisk*, 33 N. H., 297, 1856; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind., 1, 1867.

24. — Where the president of a railway company establishes and puts up tariffs of rates of fare and freight, the legal presumption is that he has acted by the authority of the corporation. *Hilliard v. Gould*, 34 N. H., 230. 1856.

25. Leased lines. The N. Y. C. Co. having by a contract, which was construed to be a lease, run and operated the railway of another company, it had the right to charge such rates as were legal for the company owning the

Legal Tender Act — Statute.

leased line. *Fisher v. New York Central and Hudson River R. R. Co.*, 40 N. Y. 644. 1871.

26. Legal tender act. The Sixth Avenue R. R. Co., in the city of New York, notwithstanding the restriction in its grant to fares of five cents, had the right to increase fares to six cents when paid in paper upon the suspension of specie payments. *Money Penny v. Sixth Avenue R. R. Co.*, 4 Abbott's Pr., N. S. (N. Y.), 357, 1866; *Same v. Same*, 35 Howard's Pr. (N. Y.), 452, 1868; *Same v. Same*, 7 Robertson (N. Y.), 328, 1865.

27. Monopoly. It is competent for a railway company, if not restrained by its charter, to enter, in good faith, into contracts with other companies for the transportation of through freight. *Stewart v. Erie and Western Transportation Co.*, 17 Minn., 372. 1871.

28. Penalty. The act of 1862, ch. 160, making railroad companies liable to a penalty for violations of its provisions, in failing to fix and post rates of fare and freight, and for overcharging, was not intended to deprive a person from whom overcharges were collected, from recovering the amount paid by him in excess of the rates fixed. He may recover the same in an action against the company, and also the penalty provided by the act. *Fulmer v. Chicago and Northwestern R. R. Co.*, 31 Ia., 187. 1871.

29. — Whether the plaintiff could recover if he knew of the over charge at the time of payment, *quære?* *Ib.*

30. — The word "willfully," as used in the said act, does not imply the idea of malice; if the company designedly omitted to comply with the act, it will be liable for the penalty. *Ib.*

31. — Evidence of plaintiff's declarations to the drayman who delivered the goods to him, to the effect that he thought the charges too high, was *held* admissible on the part of the plaintiff, as showing a fact connected with the payment of the overcharge. *Ib.*

32. — In an action to recover such penalty, it is not necessary to show that the overcharges were wilful. *Same v. Same*, *ib.*, 211.

33. — The penalty imposed by ch. 185, Laws of 1857, upon a railway company for exacting a greater rate of fare than is allowed by law, is incurred where its conductor illegally required five cents in addition to the legal fare, because the passenger had no ticket.

Chase v. New York Central R. R. Co., 26 N. Y., 528. 1863.

34. — The penalty of \$50, imposed by ch. 185, Laws of 1857, for charging an excess of fare, was not intended as a compensation to the injured party, but to defray his expenses in prosecuting the corporation for violating the law. *Fisher v. New York Central and Hudson River R. R. Co.*, 40 N. Y., 644. 1871.

35. — And this penalty can be recovered by one who paid the excessive fare simply for the purpose of obtaining the penalty. *Ib.*

36. Pleading — overcharges. Assumpsit for money had and received will not lie to recover from a railroad company an amount paid by the plaintiff for freight in excess of lawful rates, the payment having been made after the goods had been carried and delivered, and without objection. *Kenneth and Gibson v. South Carolina R. R. Co.*, 15 Richardson's Law (So. Car.), 284. 1868.

37. Power to take tolls. Railway companies have no power to take toll by implication, but only by express grant in their charters, and the right granted will not be extended by implication; and on questions of tolls, freight and fares, courts uniformly construe such charters most in favor of the public and against the company. *Camden and Amboy R. R. Co. v. Briggs*, 2 Zabriskie (N. J.), 328. 1850.

38. Raising charges. In a suit brought to recover for the transportation of merchandise over a railway, in the absence of a special contract, evidence is admissible that the plaintiff raised its charges without giving notice thereof to the defendant, and without his knowing that they were different from what he had been accustomed to pay. *Fitchburg R. R. Co. v. Gage*, 12 Gray (Mass.), 393. 1850.

39. Rights of the public. The privilege of making a railway and taking tolls thereon, when granted to an individual or a company, is a franchise. The public have an interest in the use of the road, and the owners of the franchise are liable to respond in damages, if they refuse to transport an individual or his property upon such road, without any reasonable excuse, upon being paid the usual rate of fare. *Beekman v. Saratoga and Schenectady R. R. Co.*, 3 Paige Ch. (N. Y.), 45. 1831.

40. Statute. Under § 40 of the general railroad act of 1850, companies where rates of fare are fixed by their charters may, where

Miscellaneous.

such rates are lower than those provided for by the said act, increase their rates to a sum not exceeding those prescribed by such law. *Johnson v. Hudson River R. R. Co.*, 49 N. Y., 455. 1872.

41. Toll defined. By the charter of the P. & R. R. Co. it was provided that the "toll on any property transported should not exceed four cents per ton per mile, and on each passenger two cents." *Held*, that "toll" does not mean carriage, but that it is a tribute paid for passage. That the company might charge for transportation in addition to the toll. *Boyle v. Philadelphia and Reading R. R. Co.*, 54 Penn. St., 310. 1867.

REAL ESTATE.

SEE CONVEYANCE; CORPORATE POWERS.

1. Powers of company to hold land in fee. Common law corporations generally have the right to take and hold real property in fee. *Page v. Heinberg*, 40 Vt., 81. 1868.

2. — The Vermont Central R. R. Co. acquired real estate by warranty deeds in the usual form, which land the company subsequently abandoned. *Held*, that the land did not revert by reason of such abandonment. *Id.*

REAL ESTATE AGENTS.

1. Commissions. W. & D. contracted with a railway company at the close of the war to obtain for the company a release from the United States authorities of a certain tract of land, and to sell or procure a purchaser at a given price, for a five per cent. commission, or a two and one-half per cent. commission if they failed to find a purchaser. They obtained the release of the property and were paid two and one-half per cent. commission. After several months' delay they failed to make a sale and the property was taken out of their hands and sold by other agents. *Held*, that they were not entitled to commission on

the sale, although the property was subsequently sold by other agents at a lower price to the same purchaser with whom they had been negotiating. *Walton and Deslonde v. New Orleans, Jackson and Great Northern R. R. Co.*, 23 La. An., 398. 1871.

REBELLION.

SEE WAR OF 1861.

RECEIPT.

SEE CARRIAGE OF MERCHANDISE; EVIDENCE.

1. Connecting lines. The language of a receipt for goods delivered to a carrier for shipment construed not to render him liable for losses occurring beyond his own line. *Wright v. Boughton*, 22 Barbour (N. Y.), 561. 1856.

2. Evidence. Although a receipt in full is subject to explanation, yet it is admissible in the first instance to prove payment of all demands existing at its date. *Smith v. Cedar Falls and Minnesota R. R. Co.*, 30 Ia., 244. 1870.

3. — A receipt for goods in "apparent good order," does not prevent the company from showing that the goods most probably had been injured before they came into the possession of the company. *Blade v. Chicago, St. Paul and Fond du Lac R. R. Co.*, 10 Wis., 4. 1859.

4. — Where a receipt is given by a railroad company for goods before they were actually examined, it is *prima facie* evidence only of what it contains. The receptor is not concluded from showing the actual condition of the property. *Porter v. Chicago and Northwestern R. R. Co.*, 20 Ia., 73. 1865.

5. Negotiability. A receipt by which a person acknowledges that he has received from another so many shares of certain stock, entitling the bearer to a certain amount of bonds to be issued, is not a negotiable instrument so as to be free, in the hands of a transferee, from equities originally attaching to it. *Railroad Co. v. Howard*, 7 Wallace, 392. 1868.

Appeal — Ejectment.

RECEIVER.

See APPEALS; FRAUD; HIGHWAYS; INJURIES TO DOMESTIC ANIMALS; INJURIES TO PASSENGERS; MORTGAGE; STOCK.

1. **Appeal.** An order appointing a receiver to receive the revenues, etc., of a railway company, and bring the same into court, subject to its order, etc., and without any application of the funds, except to certain costs accrued, is not a final order from which an appeal can be taken to the district court. *Eaton and Hamilton R. R. Co. v. Varnum*, 10 Ohio St., 622. 1858.

2. — No appeal lies to the court of appeals from an order of the circuit court appointing a receiver to take charge of property conveyed in trust during the pendency of a suit to enforce the trust. *Maysville and Lexington R. R. Co. v. Punnett*, 15 B. Monroe (Ky.), 47. 1854.

3. **Appointment.** The appointment of a receiver is ordinarily, though not always, wholly discretionary with the court below. *Milwaukee and Minnesota v. Soutter*, 2 Wallace, 440. 1864.

4. — Where, in a proceeding to foreclose a mortgage, and the amount due is undetermined, the appointment of a receiver is discretionary with the court where the suit is pending. *Id.*

5. — But where the amount due is settled by the supreme court, and the right of the mortgagor to pay the sum thus settled is clear, the court below has no discretion to withhold restoration. *Id.*

6. — Where other small liens are claimed, the court will, however, before discharging the receiver, require security for their payment, if established as liens. *Id.*

7. — Such appointment ought not to be made, unless in a case of necessity to protect the stockholders or creditors from loss, or to prevent an abuse of the corporate franchises. *City of Rochester v. Bronson*, 41 Howard's Pr. (N. Y.), 78. 1871.

8. — A receiver will be appointed to take charge of corporate property to protect the rights of stockholders from impending danger. *Fisher v. Concord R. R. Co.*, 50 N. H., 200. 1870.

9. — Under the facts in this cause the court refused to appoint a receiver, it appearing that the corporation had not kept separate the funds arising from the sale of alleged ille-

gal shares of stock. *Whelpley v. Erie R. R. Co.*, 6 Blatchford (U. S. C. C.), 271. 1868.

10. — The court refused to appoint a receiver under the facts as alleged in this particular case. *Ward v. Salem Street R. R. Co.*, 108 Mass., 332. 1871.

11. — The court will not grant a sequestration, or appoint a receiver of a corporation against whom an execution has been returned unsatisfied, upon an *ex parte* application of the judgment creditor. But upon filing a petition, the hearing may be set for a future day upon notice; and an injunction will be allowed, restraining the company from selling, assigning, transferring or incumbering its property. *Devoe v. Ithaca and Oswego R. R. Co.*, 5 Paige Ch. (N. Y.), 521, 1835; *Morgan v. New York and Albany R. R. Co.*, 10 ib., 290. 1843.

12. — In general where personal property, or the rents and profits of real estate in dispute, are in imminent danger of being wasted, a receiver may be appointed to take care of it for the benefit of all concerned, during the controversy. *State v. Northern Central R. R. Co.*, 18 Md., 193. 1861.

13. — It is now pretty well settled, that a receiver of a railway company cannot be properly appointed in an action brought by a stockholder or a creditor who has no judgment. *Ramsey v. Erie R. R. Co.*, 38 Howard's Pr. (N. Y.), 193, 1869; *Same v. Same*, 7 Abbott's Pr. N. S. (N. Y.), 156. 1869.

14. **Appointed by foreign state.** Receivers operating a railway under appointment of a court of chancery in another state, who act as common carriers and are there held liable as such to actions at law, may be sued as common carriers in Massachusetts. *Paige v. Smith*, 99 Mass., 395. 1868.

15. **Ejectment.** Where, in an action of ejectment, the defendant claims title and possession under and by virtue of a deed executed to him as receiver, by a corporation, in pursuance of an order of court, the deed, on production, will suffice to show that the defendant is in the possession of the premises and claiming title thereto, under the corporation. The proceedings under which the receiver was appointed, need not be produced. *Schnuyler v. Marsh*, 37 Barbour (N. Y.), 350. 1862.

16. **Failure to operate a railroad.** Where

Highways — Misconduct of Directors.

a railway has ceased to operate for many weeks, and a receiver has been appointed under the "act for the relief of citizens on the line of any railroad that has or may hereafter fail or neglect to operate," the proceedings of the receiver will not be stayed to allow an inquiry into the causes of the failure of the company to operate. *Long Branch and Sea Shore R. R. Co., in matter of*, 9 C. E. Green's Ch. (N. J.), 398. 1874.

17. — On application by claimants for the delivery of possession of a railroad which has under that act been placed in the hands of a receiver, they must show not only that they are able and willing to operate the road, but also that they are entitled to possession. *Ib.*

18. **General liability.** Receivers, operating a railway under the orders of a court of equity, are liable as common carriers. *Blumenthall v. Brainerd*, 38 Vt., 402. 1866.

19. **Highways.** Where a railroad company is authorized by its charter to divert the location of a highway, the right must be exercised with due regard to the public safety; and the company will be held liable for all injuries sustained by travelers on the highway by reason of its negligence in not erecting proper barriers to guard them from driving into cuts or excavations made in the highway by the company, where such travelers are not in fault themselves. The same principles apply where the road is operated by a receiver. *Potter, Receiver, v. Bunnell*, 20 Ohio St., 151. 1870.

20. **Injuries to domestic animals — pleading.** Where a railway company, in its answer to an action to recover the value of animals killed by its machinery, desires to set up the fact that its road is in the possession of, and being operated by, a receiver appointed by a federal court, the answer should be accompanied by the original or a copy of the order of the latter court for the appointment of a receiver. *Ohio and Mississippi R. R. Co. v. Fitch*, 20 Ind., 498. 1863.

21. — The mere appointment of a receiver, with the usual powers, does not relieve the railway company from liability to suit. The receiver operates the road subject to that liability. *Ib.*

22. — The act of March 4, 1863, (Sess. Acts 1863, p. 25), is probably valid where it operates alone on persons and rights under the laws of the state of Indiana, but, so far as it undertakes

to empower the state courts to control the earnings of railroads which have been placed in the care and management of receivers, by orders of federal courts, it is inoperative and void. *Ib.*

23. **Injuries to employes.** Where a receiver operates a railroad under the orders of a court, he incurs the same liabilities that would have been incurred by the company if it had been operated by the company. *Meara's Adm'r v. Holbrook, Receiver*, 20 Ohio St., 137. 1870.

24. — Satisfaction of a judgment obtained against such receiver can only be obtained out of the fund in his hands. *Ib.*

25. **Injuries to persons on the track.** Where a railway is operated by a receiver appointed by a court, the company is not liable for any act of the servant of such receiver. *Ohio and Mississippi R. R. Co. v. Davis*, 23 Ind., 553. 1864.

26. — The possession of the receiver cannot be regarded as the possession of the company. *Ib.*

27. **Land grant.** To prevent a valuable land grant in favor of a railroad company from lapsing, a receiver was appointed at the instance of the bondholders of the company, whose principal security was the said lands, and the receiver was empowered to borrow money to complete the unfinished portions of the road. *Kennedy v. St. Paul and Pacific R. R. Co.*, 2 Dillon (U. S. C. C.), 448. 1873.

28. **Misconduct of directors.** An action will not lie in behalf of a stockholder to remove the directors and appoint a receiver of all the corporate property, upon allegations of misconduct on a part of the directors only, in which the others are not charged with participating, except that they are under the influence of the former. *Belmont v. Erie R. R. Co.*, 52 Barbour (N. Y.), 637, 1869; see *Same v. Same*, 6 Abbott's Pr. (N. S.), 442, 1868.

29. — The misconduct of some, or even of all the directors, affords no ground for taking away the rights of the stockholders who constitute the company, either by dissolving the corporation, or taking away its management and placing it in the hands of an officer of the court. *Ib.*

30. **Operation of road; repairs, etc.** Where the order appointing a receiver of the property of a railway company authorizes him "to pay the amount due and maturing for mate

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rials and supplies about the operation and for the use of said road;" *held*, that it could not properly be construed to include the payment of a renewed promissory note, originally made by the company in payment of a claim for rerolling iron for the use of the road a few years previous. *Brown v. New York and Erie R. R. Co.*, 19 Howard's Pr. (N. Y.), 84. 1859.

31. Powers of Receivers. A receiver of a corporation, displaces the directors or other body that by its charter are authorized to manage its affairs, and under the direction of the court by whom he is appointed, has the sole control of its property and effects; and when authorized so to do, the exclusive power to use its franchises. *City of Rochester v. Bronson*, 41 Howard's Pr. (N. Y.), 78. 1871.

32. Subscription to stock. The provision of the revised statutes authorizing the receivers of insolvent corporations to sue for and recover any sum remaining due upon any share of its capital stock, is merely a cumulative remedy. *Munn v. Currie*, 2 Barbour (N. Y.), 294. 1848.

33.—A creditor of a railway company recovered judgment at law, issued execution, had it returned unsatisfied, and filed his bill in chancery, under § 36 of the statute relating to "proceedings against corporations in equity" (2 R. S., 463), for a sequestration of the effects of the corporation and the appointment of a receiver. The receiver appointed in that suit then instituted a suit in equity against a stockholder to recover the unpaid balance of his subscription. The stockholder sued had paid all the calls made by the corporation, pursuant to the terms of his subscription, and other stockholders who had not paid their subscriptions were not made parties. *Held*, that the bill could not be sustained. *Mann, Receiver, etc., v. Peutz*, 3 N. Y., 415. 1850.

34. Summary process. The United States circuit court has power to compel, by summary process, the restoration of any property abstracted from its custody, whether the party abstracting it be or be not a party to the suit concerning such property. *Erie R. R. Co. v. Heath*, 8 Blatchford (U. S. C. C.), 536. 1871.

RECONSTRUCTION OF STATES.

1. Georgia. The reconstruction of the state

of Georgia and the various acts relating thereto—considered. *Macon and Augusta R. R. Co. v. Little*, 45 Ga., 370. 1872.

2. Virginia. The judges of the court of appeals, who were in office under military appointment when the state was restored to the Union, holding over and continuing to exercise their office, their judgments and decrees are valid and binding. *Washington, Alexandria, etc., R. R. Co. v. Alexandria, etc., R. R. Co.*, 20 Grant (Va.), 31. 1870.

RECORDARI.

1. Laches. Where the president of a railway company was informed that an action was about to be commenced against his company, before a justice of the peace, and gave instruction to the most convenient station agent to attend the trial, and in case of a recovery against the company to appeal to court, and such agent was a diligent and faithful officer, but from ignorance of the law failed to procure security for the appeal, it was *held*, that there was no such laches as deprived the company of a right to a *recordari*. *North Carolina R. R. Co. v. Vinson*, 8 Jones' Law (N. C.), 119. 1860.

RECORD.

See EMINENT DOMAIN; MORTGAGE.

RECORD ENTRIES.

1. Docket. Where a formal record is not required by law to be made up, those entries which are permitted to stand in its place are admissible in evidence. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Howard*, 13 Howard, 307. 1851.

2.—The docket entry of an action is admissible evidence of its pendency in court. *Id.*

3.—A case having been marked "settled" on the docket by mistake, it was ordered, on appeal, that the cause be restored to the docket. *Huffman v. Greenville and Columbia R. R. Co.* 9 Richardson's Law (So. Car.), 404. 1856.

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RECORDING ACTS.

1. **Contract.** The act of 1828, requiring "all deeds and conveyances" of real or personal property in trust to secure debts to be recorded, does not include an agreement, not under seal, by which an incorporated railway company, in consideration of an engagement by the other party to act as its agents in the purchase and shipment of iron, "pledges the real and personal estate of said company" to secure the said agents. *Fash v. Ravesties*, 32 Ala. N. S. 451. 1858.

RECORDS OF CORPORATIONS.

1. **Stockholders.** After the organization of the corporation, its records are competent and sufficient evidence of who are the corporators, and the number of their shares, unless proof to destroy their effect be introduced. *Penobscot R. R. Co. v. White*, 41 Me., 512. 1856.

2. **The secretary** of a corporation cannot hold possession of the books of record of the company after his term of office has expired, notwithstanding that he has purchased the blank books with his own funds. Neither can he claim a lien upon the books for any debt due him from the company. *State ex rel. v. Goll*, 3 Vroom (N. J.), 285. 1867.

REDEMPTION.

See MORTGAGE.

1. **Equity of redemption.** Sections 29 to 37 of ch. 76 of R. S., do not permit the sale of an equity of redemption upon two or more executions jointly in favor of different creditors. *Chapman v. Androscoggin R. R. Co.*, 54 Me., 160. 1866.

2. — A railroad corporation and a portion of its stockholders cannot join as complainants in a bill to redeem the road from a mortgage, there being no allegation that the corporation has been guilty of a violation of its trust. *Kennebec and Portland R. R. Co. v. Portland and Kennebec R. R. Co.*, 54 Me., 173. 1866.

3. — All persons so connected with the mortgages of a railroad as to be liable for income under it should be made parties defendant. *Ib.*

4. — Such bill must also allege a formal offer to pay such an amount as may be found due on the mortgage. *Ib.*

REFERENCE.

See COSTS.

1. **An order** directing a reference in a case in which a reference is not authorized is an appealable order. *St. Paul and Sioux City R. R. Co. v. Gardner*, 19 Minn., 132. 1872.

2. **Exceptions.** Under the Referee Act (Laws of 1861, p. 157); the court will not set aside the judgment rendered upon the report of a referee unless exceptions have been taken thereto. *Amboy, Lansing and Traverse Bay R. R. Co. v. Byerly*, 13 Mich., 489. 1865.

3. **The report** of a referee will be set aside when contrary to the evidence. *Sackett v. New York and New Haven R. R. Co.*, 8 Bosworth (N. Y.), 228, 1861; see also *Morris v. Second Avenue R. R. Co.*, *ib.*, 679.

4. — Where the report of a referee is so defective that the court is unable to ascertain the merits of the case, the judgment will be reversed and a new trial granted. *Carroll v. Grand Trunk R. R. Co.*, 19 Mich., 94. 1869.

5. — It is improper to move for an order referring a cause back to a referee to make a supplemental report, where it appears from the report that he has passed upon all the facts necessary to a decision of the cause. *Lakin v. New York and Erie R. R. Co.*, 11 Howard's Pr. (N. Y.), 412. 1855.

REHEARING.

See EQUITY.

1. **When to be granted.** A rehearing will not be granted, unless the court sees some reason to apprehend that a mistake in law or in fact has been made in the decision. *Attorney General v. New York and Long Branch R. R. Co.*, 9 C. E. Green's Ch. (N. J.), 49. 1873.

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RELEASE.

1. **Damages for personal injury.** If the plaintiff was induced to sign a release of his claim for damages by representations that it covered merely a month's wages, or if he signed it under such a belief, induced by the words or acts of defendant's agents, it would not operate as a bar. *Illinois Central R. R. Co. v. Welch*, 52 Ill., 183. 1869.

REMITTITUR.

1. **Excessive damages.** In actions of tort, the same practice is proper which is pursued in actions of contract, so far as to allow the party in whose favor the verdict has been given, to remit a portion of the damages, instead of the court awarding a new trial, absolutely. *Collins v. Albany and Schenectady R. R. Co.*, 12 Barbour (N. Y.), 492. 1852.

2. — Where the damages assessed by the jury are excessive, but not in a degree to necessarily imply the influence of passion or prejudice in their finding, the court, in the exercise of a sound discretion, may make the remittitur of the excess the condition of refusing to grant a new trial. *Pendleton Street R. R. Co. v. Rahman*, 22 Ohio St., 446. 1872.

3. — Where the recovery was reduced to an amount satisfactory to the judge below, the supreme court will not interfere. *Loyd v. Hannibal and St. Joseph R. R. Co.*, 53 Mo., 509. 1873.

4. **Improper evidence.** Where upon the return of a verdict the plaintiff enters a *remittitur* for such portion of the verdict as was the result of the admission of improper evidence, the error in admitting such evidence will be cured thereby. *Toledo, Wabash and Western R. R. Co. v. Beale*, 50 Ill., 150. 1869.

REMOVAL OF CAUSES.

See FEDERAL COURTS.

REORGANIZATION.

1. **Former debts.** The Somerville and

Easton R. R. Co. executed a mortgage under which its road was sold and the purchasers reorganized a company under the same name. *Held*, that the new company could not be sued at law for a debt arising under the old organization. *Central R. R. Co. v. Bunn*, 3 Stockton's Ch. (N. J.), 336. 1857.

2. — Where a railway company reorganizes under the act of April 11, 1861, and in the agreement therefor, it is stipulated that certain bonds of the original corporation shall be assumed by the new company, and the holder thereof entitled to vote at all meetings of stockholders, upon conditions specified, which he performs, the new company becomes liable to pay the bonds, and the holder thereof entitled to vote without further action on the part of the new company. *State ex rel. v. McDaniel*, 22 Ohio St., 354. 1872.

REPEAL.

See CHARTER.

1. **Construction.** To give effect to a statute repealing a former statute, the repealed statute must be so pointed to as to leave no doubt what statute was intended. *Commonwealth v. Central Passenger R. R. Co.*, 52 Penn. St., 506. 1866.

2. — A statute which refers to and adopts the provisions of another statute, is not repealed by the subsequent repeal of such other statute. *Sika v. Chicago and Northwestern R. Co.*, 21 Wis., 370. 1867.

3. **Implication.** Repeals by implication are not favored, and the incorporation of a portion of a public law into a private statute cannot be treated as the repeal of the provisions omitted. *Pratt v. Atlantic and St. Lawrence R. R. Co.*, 42 Me., 579, 1856; see *People v. San Francisco and San José R. Co.*, 28 Cal., 254, 1865.

REPLEVIN.

See PLEADING; TAXATION.

1. **Bond.** A replevin bond, the penalty of which is "double the value of the property

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hereinafter named to be replevied," is invalid, for want of expressing the amount of the penalty; and if the objection be taken at the return term of the action of replevin, that action must be dismissed. *Clark v. Connecticut River R. R. Co.*, 6 Gray (Mass.), 363. 1856.

2. **Carrier's lien.** Where a common carrier has become liable to the owner of goods for damages in their transportation, to an amount larger than the carrier's charges, and the carrier has refused to deliver the goods until the charges are paid, replevin is maintainable. *Dyer v. Grand Trunk R. R. Co.*, 42 Vt., 441. 1869.

3. — The question as to the carrier's right to freight, and of his liability for damages, can be as well tried in this action as in any other. *Ib.*

4. — The goods in question were bought by the plaintiff in Vermont of a dealer in Detroit, who, to make out a car load, put in forty-three dollars' worth more than the plaintiff had ordered or sent money to pay for, and the defendant voluntarily advanced that amount when they took the goods, without the knowledge or request of the plaintiff. The defendant claimed freight for the whole, and for the money advanced, and the plaintiff replevied the whole without repudiating the acts of defendant in making such advances. *Held*, that the conduct of the plaintiff was a ratification of the act of defendant in making such advances, and that replevin for the whole of the goods is maintainable. *Ib.*

5. — A common carrier, from whom a portion of a consignment of goods is replevied after the delivery of another part, and before the arrival of a third part, may recover freight on the goods already delivered, and also on those which arrive and are taken by the officer and delivered to the consignee after the beginning of the service of the replevin; but not on the goods replevied, and for which judgment is afterwards given on the replevin for the consignee. *Boston and Maine R. R. Co. v. Brown*, 15 Gray (Mass.), 223. 1860.

6. **Demand.** The action of replevin under the statute of Michigan is in the *detinet* whether the taking be wrongful or not. A demand is unnecessary where the taking is wrongful. *Leroy v. East Saginaw R. R. Co.*, 18 Mich., 233. 1869.

7. **Title.** The plaintiff must recover, if at

all, on the strength of his own right of possession or title. *McKinzie v. Baltimore and Ohio R. R. Co.*, 28 Md., 161. 1867.

RESCISSION.

1. **Interest.** Where a purchaser at a credit sale availed himself of the privilege of paying cash, on being allowed a deduction at the rate of eight per cent. per annum from the price of such advance, this circumstance will not entitle him, on obtaining a rescission of the sale, to claim interest at that rate. *Dowlin v. New Orleans and Nashville R. R. Co.*, 5 Robinson (La.), 5. 1843.

REVIEW.

1. **Bill of review.** To justify a bill of review for newly discovered matter, it must be shown that it first came to the knowledge of the party after the time when he could have used it in the former hearing of the case. *West Feliciana R. R. Co. v. Stockett*, 27 Miss., 739. 1854.

2. **Exceptions.** No exceptions lie to the refusal of the judge at *nisi prius*, to grant a review. *York and Cumberland R. R. Co. v. Clark*, 45 Me., 151. 1858.

RIGHT OF ENTRY.

See EMINENT DOMAIN.

RIGHT OF WAY.

See CONVEYANCE; CORPORATE POWERS; EMINENT DOMAIN; FIRES; FRANCHISES; INJUNCTION.

1. **Change of location.** A company, after making a survey, and staking out the same, through the plaintiff's land, purchased of him a strip of land, six rods in width, and took a deed for the same, in which it was described "covered by the location of their railroad, or

Constitutional Conveyance — Contracts, etc.

that may be finally covered by such location." Afterwards the location was changed. *Held*, that the company obtained no rights in the new location under the deed. *Hall v. Pickering et al.*, 40 Me., 548. 1855.

2. — When a release is obtained from the owner of land for the right of way, with a proviso calculated to confine the line of such road to a particular portion of the land, the release will not be operative, if the company afterwards construct its road across the land by a substantially different route. *Douglas v. New York and Erie R. R. Co.*, Clarke's Ch. (N. Y.), 174. 1840.

3. **Conditional conveyance.** Where a person conveys the right of way for a railway, upon condition that crossings and cattle guards should be constructed, it was *held*, that the grantor held an equitable lien upon the land conveyed, not only for the purchase money, but also for the damages in not constructing the road in the manner provided by the contract. *Dayton, Xenia and Belpre R. Co. v. Lewton*, 20 Ohio St., 401. 1870.

4. — The grantor retaining the legal title is a fact sufficient to put subsequent grantees and mortgages upon their guard as to his legal rights. *Id.*

5. — The grantor in such case can either enforce specific performance of the contract or enforce his specific lien. *Id.*

6. — A conveyance to a railway company of land for the right of way of such road, upon condition that the company should erect and maintain a certain dam or embankment, conveys the title to the land subject to be defeated by the failure of the company to comply with the condition, the condition being a condition subsequent. *Underhill v. Saratoga and Washington R. R. Co.*, 20 Barbour (N. Y.), 455. 1855.

7. — The defendant obtained from the plaintiff a deed in fee, of a strip of land for the extension of its railroad; and covenanted to make and maintain the fences, etc.; and the deed was to be void, unless the railroad was completed through the premises granted on or before a certain day therein named. The road was not completed at the time specified, but the plaintiff made no effort to assert his right to the estate. During a period of two years, he saw the defendant make large expenditures over the premises in question; plaintiff

iff gave notice to make the fences which was done about a year before the suit commenced. *Held*, that the plaintiff had waived the forfeiture, and could not recover the premises, in an action of ejectment. *Ludlow v. New York and Harlem R. R. Co.*, 12 Barbour (N. Y.), 440. 1852.

8. — Where a conveyance of a right of way is made on condition that the depot of the company shall be located within a certain distance of a given place, a breach of this condition will defeat the title conveyed by the deed, and the grantor may have his damages assessed as if no deed had ever been made. And the estate conveyed, being less than a freehold, no formal act of entry on his part is necessary in order to avail himself of the right to proceed in this manner. *Taylor v. Cedar Rapids and St. Paul R. R. Co.*, 25 Ia., 371. 1868.

9. — A condition in the deed, that certain portions of the land conveyed shall be kept open as public streets, is not void as imposing a duty or trust upon the corporation inconsistent with its business, and outside of the objects for which it was formed. *Tinkham v. Erie R. R. Co.*, 53 Barbour (N. Y.), 393. 1806.

10. **Consideration.** The grant of the right of way in consideration of the location of a railway is not revocable after it is acted on. *Macon and Augusta R. R. Co. v. Bowen*, 45 Ga., 531. 1872.

11. **Contracts and Conveyances.** A railway company may dispense with the assessment of damages by commissioners for passing over the land of a proprietor, by promising to settle and pay it without assessment, and the land owner may recover upon the special promise. *Plott v. Western North Carolina R. R. Co.*, 65 N. C., 74. 1871.

12. — An action will not lie to recover the price of land sold for right of way to a railway company, where no written contract has been made and subscribed by the vendor and assented to by the purchaser. *Reynolds v. Dunkirk and State Line R. R. Co.*, 17 Barbour (N. Y.), 613. 1854.

13. — Where the petitioner for damages has conveyed the right of way to the company, he is not entitled to damages in this proceeding, and an award giving him damages will be set aside. *Western Pacific R. R. Co. v. Reed*, 35 Cal., 621. 1868.

Crossings—Fences.

14. — Where a tract of land is deeded to a railway company, it is to be presumed that all the contingent damages which would have been included in an assessment of damages by commissioners, were considered in determining the price. *Norris v. Vermont Central R. R. Co.*, 28 Vt., 99. 1855.

15. — Proof of a written contract to sell land to a railway company for an agreed price within a certain time, and of a tender of the amount within the time and a refusal to accept it, will not authorize the company to enter upon the land afterwards and locate its road upon the same, or defeat a petition for the damages sustained by reason of such location. *Whitman v. Boston and Maine R. R. Co.*, 3 Allen (Mass.), 133. 1861.

16. — A conveyance of a right of way will not be held void for uncertainty of description on the ground that it is a deed in fee, when it appears from the instrument that it was only intended as a conveyance of a right of way. *Barlow v. Chicago, Rock Island and Pacific R. R. Co.*, 29 Ia., 276. 1870.

17. — Delivery of a deed or contract is essential to its validity. *Stephens v. Buffalo and New York R. R. Co.*, 20 Barbour (N. Y.), 332. 1855.

18. Crossings. Where the owner of land, incumbered by a mortgage, sold to a railway company a portion of it, to be used for a track, and there was at the time of sale a road over the part conveyed, the right to which had been reserved in the agreement of sale, but was omitted in the conveyance; in an action by one who subsequently purchased the land at a sheriff's sale under the mortgage, against the company and for obstructing this way, it was held, that the right of way did not originate in the reservation in the agreement, but existed previous thereto and was merely recognized therein; that the purchaser under the mortgage was entitled to the road and might maintain an action on the case against the company for obstructing it. *Pennsylvania R. R. Co. v. Jones*, 50 Penn. St., 417. 1865.

19. Culverts and ditches. A grant of the right of way carries with it the right to construct suitable culverts, and the right to construct such culverts includes the power to cut the necessary ditches to carry the water into such culverts, although such ditches may extend beyond the limits of the right of way.

Babcock v. Western R. R. Co., 9 Metcalf (Mass.), 553. 1845.

20. Cuts and embankments. Where the right of way is granted to a railroad company, and it is necessary to make cuts through the ground to the proper enjoyment of the right of way, it is not incumbent on the grantee to build walls to prevent the falling of the banks. *Hortsmann v. Covington and Lexington R. R. Co.*, 18 B. Monroe (Ky.), 218. 1857.

21. Drains. Where land was granted to a railroad company, and, after the usual covenants, the deed contained this clause, "said corporation to make us a culvert or pass for cattle to pass under said road;" held, that such a grant and provision did not justify the company in digging a ditch in the adjoining land of the grantor to drain the passway. *Hills v. Boston and Maine R. R. Co.*, 18 N. H., 179. 1846.

22. Fences. Where a party granted the right of way across his land, by deed, upon condition that the company should fence the road within a reasonable time, which it neglected to do; held, that an action on the case will lie to recover damages sustained by the failure to build the fence. *Conger v. Chicago and Rock Island R. R. Co.*, 15 Ill., 366. 1854.

23. — A railroad company, in consideration of an amicable settlement of his damages by the owner of land, agreed with him to fence the land taken; and, failing to do so within a reasonable time, was sued by him for breach of the agreement. It was held, that a subsequent erection of the fences by the company without the plaintiff's consent or approval did not affect his right to recover; and that the measure of his damages was the sum which it would fairly cost to erect the fences according to the agreement. *Lawton v. Fitchburg R. R. Co.*, 8 Cushing (Mass.), 230. 1851.

24. — Where the land owner, by a written contract, agreed to give to a railroad company the perpetual right of way through the same, at a stipulated price which was paid to him, with a provision in the contract that when the road should be completed, the company should fence the same, held, that after the road is completed, the owner of the land cannot, upon failure to put up the fence, eject the company from the land. *Hornback v. Cincinnati and Zanesville R. R. Co.*, 20 Ohio St., 81. 1870.

25. — Neither a railway company, nor the

Harbors — Release.

owner of land adjacent to the railway, is required by law to fence the line between them. Each is left by the law to fence or not, as the interest of each shall require. *Oregon Central R. R. Co. v. Wait*, 3 Or., 91. 1869.

26. Harbors. In Connecticut, the owners of land bounded on a harbor own only to high water mark, and whatever rights such owners have of reclaiming the shore are mere franchises. *Lockwood v. New York and New Haven R. R. Co.*, 37 Conn., 387. 1870.

27. — When, however, such reclamations are made, the reclaimed portions in general become integral parts of the owner's adjoining lands. *Ib.*

28. — The principles governing the case are the same as those which prevail where the sea recedes gradually through accession of soil to the land. *Ib.*

29. — Where there is a right of way to and from a harbor, such right continues over all accessions of soil which accrue between high and low water mark, whether the line of high water mark is changed by natural or artificial causes. *Ib.*

30. — Where a right of way, granted by a deed to a railroad company across certain land bounded upon a harbor, was described in the deed as "being in length about 22 chains, and extending from said harbor on the west to the land of N. on the east, and four rods in width," with a reference to the survey of the road for a more particular description, it was held, that the right of way extended across the mud flats lying between the west line of the land at high water mark and low water mark. *Ib.*

31. Incumbrance. A right of way for a railroad is an incumbrance for which a grantee may recover under a covenant against incumbrances, though he had full knowledge of such incumbrance at the time he accepted the deed. The case of *Van Wagner v. Van Nostrand*, 19 Ia., 422, followed. *Barlow v. McKinley*, 24 Ia., 69. 1867.

32. License. Whether the proceedings of the railroad company were sufficient to divest the title of the owner of the land upon which the road was located, or whether he thereby had any notice of an intention on the part of the company to take any portion of his land, is immaterial, if for a number of years after the initiatory steps taken for the location and construction of the road, there was no attempt

on his part to prevent the execution of the work. In such case, it must be assumed that the occupation of his land by the company for the purpose to which it was applied was assented to by him. Being thus permitted to occupy the land, the law would protect the company in the enjoyment of any property used in connection with such occupation, and if compelled to leave the premises by proper proceedings, would permit such property to be removed. *Dietrich v. Murdock*, 42 Mo., 279, 1868.

33. Release. A mere release, if founded upon a consideration, may be valid without a seal. *Leviston v. Junction R. R. Co.*, 7 Ind., 597. 1856.

34. — But a release intended to operate as a grant of an easement in land must be executed under seal. *Ib.*

35. — A release of all damages on account of the laying out or construction of a railroad through and over the land of the releasor, does not cover damages occasioned to the remaining land of the releasor by the construction of the railroad over the land of other persons. *Eaton v. Boston, Concord and Montreal R. R. Co.*, 51 N. H., 504. 1872.

36. — The delivery by the releasor of an otherwise perfectly executed deed of release, to a known agent of a railway company is, in law, a delivery to the company, and it will be operative, according to its terms, from the time of such delivery, no matter what verbal stipulations or conditions may have accompanied its delivery in respect to the operation of the deed after delivery. *Cincinnati, Wilmington and Zanesville R. R. Co. v. Iliff*, 18 Ohio St., 235. 1862.

37. — In a suit brought against a railway company to recover damages done to the plaintiff by the construction of the railway through his farm, to which the company answered, setting up a release of such damages, and the plaintiff replied, alleging that the release was obtained from him by fraudulent representations in regard to the location of the road through his lands, mere oral testimony of witnesses in regard to what their opinion had been in reference to the permanent location of the road, previous to the execution of the release, is only matter of opinion, and is not sufficient to establish fraud in its procurement. *Ohio and Mississippi R. R. Co. v. Bath*, 11 Ind., 538. 1858.

Specific Performance — Verbal Consent — Boundaries.

38. Specific performance. The owner of land, through which a railroad company was authorized to make its road, gave it a bond to convey to it by a certain day, on payment of a specified sum of money, so much of his land as should be taken by the company by authority of law; and the company, within the time allowed by law, entered upon and took the land for the purposes of its road; but, on the owner's tendering, on the day named in the bond, a deed of the land so taken, refused to pay him the stipulated price. It was *held*, that the agreement, not having been signed by the company, could not be specifically enforced against it in equity. *Jacobs v. Peterborough and Shirley R. R. Co.*, 8 Cushing (Mass.), 223. 1851.

39. Subsequent grantee. Where a railway was built in 1852, and thereby a pond was formed on certain land, and, in 1853, the owner of the land granted to the company the right of way over it, and in 1854 conveyed the same land to A., excepting the right of way; *held*, that A. could not recover for loss of land covered by the pond, it being an injury to the former owner, and not to A. *Illinois Central R. R. Co. v. Allen*, 39 Ill., 205. 1866.

40. Title of railway company. Where a land owner has granted a right of way to a railway company organized under a charter in perpetuity, and the grant contains no limit as to time, the easement will be perpetual, unless terminated by release or abandonment. *Junction R. R. Co. v. Ruggles*, 7 Ohio St., 1. 1857.

41. — Where such railroad, with its appurtenances, is subsequently pledged to the state in security for a loan, and, the pledge being forfeited, is sold by the state, the easement passes by the sale, and is vested in the purchaser. *Ib.*

42. — Where a grant of the right of way was made with the proviso that "if said road shall hereafter be abandoned, said ground to revert to my heirs again;" it was *held*, that no reversion takes place until a forfeiture is declared by a judicial decision. *Harrison v. Lexington and Ohio R. R. Co.*, 9 B. Monroe (Ky.), 470. 1849.

43. — Such right of way may be transferred to another company for the same uses, and as long as the land is used for railway purposes, it cannot be considered "abandoned," within

the meaning of the proviso in such conveyance. *Ib.*

44. — A right of way conveyed by deed is an interest in land, and not a mere chose in action, and will pass by a conveyance of all the rights, titles, interests and franchises of the company owning the same. *Barlow v. Chicago, Rock Island and Pacific R. R. Co.*, 29 Ia., 276. 1870.

45. — When the owner of real estate voluntarily conveys it, without restrictions, the purchaser can use it for the purpose of a railroad, without subjecting himself to damages to his grantor. *Utica, Chenango and Susquehanna R. R. Co., in matter of*, 56 Barbour (N. Y.), 456. 1868.

46. Verbal consent. Where the charter of a railway company gives power to take lands for the purposes of its road, and to take possession of and hold the lands with the consent of the owner, or without consent, upon payment or tender of damages, if no particular mode of consent is prescribed by the charter, it is not necessary to have the consent in writing; a verbal consent is sufficient. *Central R. R. Co. v. Hetfield*, 5 Dutcher (N. J.), 206. 1861.

47. — A land owner said to the president of a railway company, when endeavoring to settle for damages, that if they would run the road "further over" from his house and spring he would give the right of way for nothing. The president said that "he would try to accommodate." *Held*, that this was too slight to prove the grant of a right of way, or release of damages, for there was no designation of the land. The promise, to try to accommodate, was not an acceptance of the offer. *East Pennsylvania R. R. Co. v. Schollenberger* 54 Penn. St., 144. 1867.

RIPARIAN RIGHTS.

See EMINENT DOMAIN; WATERCOURSES.

1. Boundaries. Riparian owners on navigable streams only own to the stream, and not to the middle thereof. 1 St. at Lar., 446; 2 ib., 73; *Railroad Co. v. Schurmeir*, 7 Wallace 272. 1868.

2. — The rights of riparian owners extend to low water mark. *Philadelphia and Reading*

 Approach to Buildings and Bridges—Charter.

R. R. Co. v. Morris, 7 Philadelphia Rep. (Penn.), 286. 1869.

8. **Public lands.** The meander lines, run in surveying public lands along the margin of streams, are intended for the purpose of computing the quantity of land, and not as boundaries. The stream is the true boundary. A grant of land in Minnesota of 9.28 acres was therefore held to include a small tract of 2.78 acres of low land separated from the former tract by a channel twenty-eight feet wide, which at a medium stage of water made an island of the tract. *Railroad Co. v. Schurmeir*, 7 Wallace, 272. 1868.

RIP RAP.

See CONTRACT.

RIVERS.

See BRIDGES; RIPARIAN RIGHTS; WATERCOURSES.

ROADS.

See HIGHWAYS.

ROLLING STOCK.

See MORTGAGE.

ROUTE.

See CHARTER; CORPORATE POWERS; RIGHT OF WAY; STREET RAILWAYS; SUBSCRIPTIONS BY INDIVIDUALS.

1. **Approach to buildings and bridges.** There being in the charter of a railroad company no precise limit of approach towards buildings and bridges, the company may locate its road and stations on such route and at such points as will be beneficial to the company's and the public interest. *Frankford and Bristol Turnpike Co. v. Philadelphia and Trenton R. R. Co.*, 54 Penn. St., 345. 1867.

2. **Change of route.** A railroad company may, at least before actual construction of the road, in accordance with its discretion, change its line or route after the same has been fixed by it. *Mahaska County R. R. Co. v. Des Moines Valley R. R. Co.*, 28 Ia., 437. 1870.

3. **Charter.** The charter of the W. R. R. Co. authorized the construction of the road "beginning at any point on the C. R. R. between S. river and the junction of said C. R. R. and the N. and L. R. R.; thence running to Amherst Village and through Milford to some point in East Wilton, or any point on the N. and L. R. R. in the village of Nashville; thence to some point in East Wilton; thence to Greenfield, or to the centre village of Peterborough, and thence to Marlow; or, beginning at any point on the south line of the state within one mile of N. river, thence running to some point in East Wilton, thence to Greenfield or to the centre village of Peterborough, and thence to Marlow as aforesaid." The company applied to the railroad commissioners who reported that the public good would be promoted by laying out the road on the following route: "Commencing at the village of East Wilton, thence passing through the village in Milford to Amherst Plain, and thence through the southwesterly part of the town of Merrimack to the depot of the N. and L. R. R. in Nashville." *Held*, that the report was authorized by the charter; that any route with one terminus in the village of Nashville and the other at East Wilton, having no intermediate bound, might or might not go to the Amherst village. *State v. Wilton R. R. Co.*, 19 N. H., 521. 1849.

4.—The charters of the Baltimore and Ohio R. R. Co. and Chesapeake and Ohio Canal Co.—construed. *Held*, that the Canal Co. has the priority of right in the selection of its route in the valley of the Potomac. *Chesapeake and Ohio Canal Co. v. Baltimore and Ohio R. R. Co.*, 4 Gill & Johnson (Md.), 1. 1832.

5.—The words, from a town or city, used in a charter granted to a railroad company, are to be taken inclusively; and in the construction of its road, it has the right to enter the corporate limits of such town or city. *Tennessee and Alabama R. R. Co. v. Adams*, 3 Head (Tenn.), 596. 1859.

6. **Choice of routes.** A railway company,

Miscellaneous.

by its charter, having a right to one railroad only, but the choice of three routes, cannot complain that one of those routes, which it did not adopt, was used by another company. *Louisville and Portland R. R. Co. v. Louisville City R. R. Co.*, 2 Duvall (Ky.), 175. 1865.

7. Conflict of the locations of two railways. Two railway companies were incorporated to complete two independent lines of road across the state. The *termini* were designated but no route was prescribed. *Held*, that the prior right attached to the company that first surveyed and adopted a line, and filed the survey in the office of the secretary of state. *Morris and Essex R. R. Co. v. Blair*, 1 Stockton's Ch. (N. J.), 635. 1854.

8. Constitutional law. By the act of March 26, 1860, and the act of congress of June 2, 1864, and an amendment of its articles of incorporation, the Cedar Rapids and Missouri River R. R. Co. is authorized to build a railroad from Lyons to a point of intersection with the Chicago, Iowa and Nebraska Railroad within the corporate limits of the city of Clinton. The act of the legislature of March 26, 1860, authorizing the building of said railroad from Lyons to Clinton, is not one of the cases where the law must be general and uniform in its operation as contemplated by the constitution. *Clinton City v. Cedar Rapids and Missouri River R. R. Co.*, 24 Ia., 455. 1868.

9. Contract. An agreement by a railway company, to cross a stream north of a certain street, requires it to cross the stream where a northerly line from such street would intersect it. *New Albany and Salem R. R. Co. v. McCormick*, 10 Ind., 499. 1858.

10. Filing survey. The mere filing in the office of the secretary of state, of the survey of a railroad, is no notice to parties purchasing lands included in the survey. Such filing gives the railroad company neither title nor possession. *Central R. R. Co. v. Hetfield*, 3 C. E. Green's Ch. (N. J.), 323. 1867.

RULES.

See DEPOT; INJURIES TO PASSENGERS; PASSENGERS; TICKETS.

1. Passengers. Passengers must take notice of and conform to established usage and

custom, and such regulations as are necessary for the convenience of both parties, and the proper government of the business of the carrier, not contrary to law and the contract of the parties. *Southern R. R. Co. v. Kendrick*, 40 Miss., 374. 1866.

2. Reasonableness. It is error for a court to submit to the jury the question, whether a rule adopted by a railroad company for the government of its business is a reasonable one or not. Such question is one purely of law, and must be determined by the court. *Illinois Central R. R. Co. v. Whittemore*, 43 Ill., 420. 1867.

3. Usage. In an action brought against a railway company, where it relies upon a rule established by it for the regulation of business, which the court instructs a jury is a legal and valid rule, the rejection of evidence, that the uniform usage of other companies is the same, is not error. *Tracy v. New York and Harlem R. R. Co.*, 9 Bosworth (N. Y.), 396. 1862.

RUNNING SWITCH.

See INJURIES TO PERSONS ON THE TRACK.

SALARY.

See COMPENSATION; DIRECTORS.

SALES.

See EMINENT DOMAIN, page 201; EVIDENCE; FRAUD.

1. Sale of personal property—acceptance. To constitute an acceptance of goods, there must be some act amounting to a change of possession, so that the seller no longer retains a lien for the price. *Edwards v. Grand Trunk R. R. Co.*, 54 Me., 105. 1866.

2. — appraisement; award. An action on an award, although on a parol submission, is not within the statute of limitations. *Green and Coates Streets R. R. Co. v. Moore*, 64 Penn. St., 79. 1870.

3. — A railway company accepted a charter

Sale of Personal Property.

on the condition that it should purchase at the option of the owners, the horses, etc., of an omnibus line, at a price to be assessed by appraisers. *Held*, that the valuation of the appraisers was not an award. *Ib*.

4. — Where parties agree to buy or sell at a sum fixed by appraisement, the cause of action is on the contract, not on the appraisement. *Ib*.

5. — The statute of limitations is a good plea to such appraisement. *Ib*.

6. — The appraisers need not decide on evidence heard in the presence of the parties; they would be expected to decide on their own knowledge, but may seek information elsewhere. *Ib*.

7. — An appraisement was made by two of three appraisers; under proceedings in equity to restrain the company from exercising its franchise before paying the appraisement, the court ordered the company, among other things, forthwith to enter an amicable action at law to try the legal and binding effect of the finding. *Held*, that this was not an issue of fact sent by the chancellor to a jury to inform his conscience, but a remission of the plaintiffs to a court of law, to decide contested facts and also to establish the legal and binding effect of the finding in all respects. *Ib*.

8. — In the action at law, the defendants pleaded the Statutes of Limitations, which was decided in its favor, on the ground that the finding was not an award but an appraisement. *Held*, that this was a judgment on the effect of the appraisement, and final in this action. *Ib*.

9. — cars. A railroad being a public highway, every owner of cars on it is in possession of his own cars on what part soever of the track they may be; such cars are not in the possession of the company. *Trunick v. Smith*, 63 Penn. St., 18. 1869.

10. — McCormick owned a car, which was on a siding in charge of an agent of the company; he sold it to Trunick, who requested the agent to take charge of it for him, which the agent did, the car remaining on the siding as before. *Held*, not to be such a change of possession as to protect the car from McCormick's creditors. *Ib*.

11. — The agent of the company did not become the bailee of Trunick. *Ib*.

12. — conditional sales. Railroad iron to

the value of upwards of \$60,000 was purchased by S. for the use of a railroad company, with its note, secured by its mortgage bonds for \$30,000 and the personal guaranty of eight of the friends of the road, including S., to the amount of \$5,000 each, and was by S. loaned to the company to be laid down and used on its track; the title not to pass until the company had paid for the same; and, in default of payment, S. to have the right to take up the iron and hold the same for the indemnity, amongst other things, of the guarantors. Under this contract, S. delivered the iron to the railroad company, and it was laid down on its track in Massachusetts. Upon garnishee process served in Rhode Island upon S. by the creditors of two of the guarantors, for the purpose of attaching the iron as in his hands, for their use, it was *held*, notwithstanding the company was in default to the injury of the defendants, that S. was not chargeable as garnishee for the iron, because it was not in his possession, and because the defendants had no attachable interest in it. *Clarke v. Farnum*, 7 R. I., 174. 1862.

13. — A sale and delivery of goods, on condition that the title shall not vest in the vendee until payment of the price, passes no title until the condition is performed. *Coggill v. Hartford and New Haven R. R. Co.*, 3 Gray (Mass.), 545. 1855.

14. — delivery. In a suit brought to recover the price of goods sold and delivered on credit, there was no evidence introduced to show any agreement about the delivery of the property by the vendors to the purchaser, or as to the manner or the time of delivery, or that the purchaser ever received the goods, or that he knew that they had been, or were to be, delivered to a railroad company for him. *Held*, that in the absence of some order or agreement on the part of the purchaser to have the property sent to him by railroad, or of some evidence in regard to usage, or the course of trade, from which an agreement to have it so sent might be inferred, a delivery to the railroad company was no delivery to the purchaser. *Everett v. Parks*, 62 Barbour (N. Y.), 9. 1872.

15. — H. bought ten tons of railroad iron upon a siding of the old Portage road, from the vendees of the state, for which he paid, and received a written order on the state agent for the delivery of the iron, but never present-

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ed it, and, in consequence, the iron purchased was not separated and set apart from a larger quantity of railroad iron with which it was mixed. The Pennsylvania R. R. Co. afterwards bought and removed the whole amount of the iron. H. brought an action of trover against the company. *Held*, that the failure of H. to present the order, and have the iron separated, left the sale incomplete, and no title passed to him. Where he failed to show title in himself, it is immaterial what notice the company had of his claim. *Pennsylvania R. R. Co. v. Hughes*, 39 Penn. St., 521. 1861.

16. — A quantity of pig iron, lying in piles at a furnace and on the road, was sold, and the parcels constituting the whole were pointed out and shown by the agent of the vendor to the agent of the vendees, and the whole was charged in the books of the vendor to the vendees by their agent, under the direction of the vendor. *Held*, that these acts being done with the intent and for the purpose of making delivery, constituted such a constructive delivery as would pass the title to the vendees. *Thompson v. Baltimore and Ohio R. R. Co.*, 28 Md., 396. 1867.

17. — Where A. shipped goods to B., and mailed B. an invoice containing this language, "We deliver you this load on our indebtedness," it was *held*, that the title vested in B. as against the attaching creditors of A. *Wessel v. Weber*, 2 Cincinnati Superior Ct. Rep., 183. 1872.

18. — *evidence*. In an action for the price of personal property alleged to have been sold and delivered to the defendant, proof of an agreement to sell and deliver, without further evidence of an actual sale and delivery, will not entitle the plaintiff to recover. *Brink v. Chicago and Northwestern R. R. Co.*, 23 Ia., 473. 1867.

19. — *executory contract*. If, pursuant to an executory contract of sale, the owners of goods send a quantity of them to the place named for the delivery, and notify the purchaser thereof, and furnish him with an order entitling him to obtain them of the carrier, and receive pay therefor, this is sufficient to vest the title in the purchaser. *Claphin v. Boston and Lowell R. R. Co.*, 7 Allen (Mass.), 341. 1863.

20. — *property not in existence*. In the case of an executory contract for the sale of

an article not in existence, but to be manufactured, and where the contract price is paid in advance, no title passes until the thing is completely finished, and is either delivered to the orderer, or is appropriated to his benefit or set apart for him, or is accepted by him. *West Jersey R. R. Co. v. Trenton Car Works Co.*, 3 Vroom (N. J.), 517. 1866.

21. *Sale of a railroad*. The proposal of the president of the Upson County Railroad to sell the road either as a whole or the iron separately, was *held* to be a violation of the charter of the company, and such sale was properly enjoined. *Upson County R. R. Co. v. Sharman*, 37 Ga., 644. 1868.

22. — A majority of the stockholders of a prosperous corporation cannot at their own caprice sell out the whole source of their emoluments and invest their capital in other enterprises, where the minority desire to continue in the original business. The business must, unless in cases of clear loss, be continued until the end of the charter. *Kean v. Johnson*, 1 Stockton's Ch. (N. J.), 401. 1853.

SALVAGE.

1. *Barges*. A railway company agreed to carry goods from New York City into New Jersey, the shipper agreeing to assume the risk of transportation across East River. The barge upon which the freight was being carried across the river became endangered by the ice and was saved by a steam tug. *Held*, that the railway company was liable for the salvage. *Seaman v. Erie R. R. Co.*, 2 Benedict (U. S. D. C.), 128. 1868.

SCIRE FACIAS.

See MORTGAGE.

SEAL.

See CONVEYANCE; EVIDENCE.

1. *Adoption*. A corporation may adopt any seal it chooses for the time being, as well

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as an individual. *Bank of Middlebury v. Rutland and Washington R. R. Co.*, 30 Vt., 159. 1858.

2. Commissioner's seal. The seal of a commissioner of Iowa residing out of the state should have engraved upon it the name of the state, and it is not sufficient if the name of the state is written with a pen. *Gage, Dater and Sloan v. Dubuque and Pacific R. R. Co.*, 11 Ia., 310. 1860.

3. Evidence. Though it may be shown that at the time of the sealing of an indenture, it was agreed that the instrument should not be the deed of a corporation until a condition should be complied with, such an understanding prior to the sealing, and in no way connected with that act, cannot be shown. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Howard*, 13 Howard, 307. 1851.

4. Presumption. A seal will be presumed to have been affixed by authority, although it is not referred to in the usual way in the instrument. *Covine v. Junction and Breakwater R. R. Co.*, 3 Houston (Del.), 288. 1866.

5. Printed seal. A fac-simile of the seal of a corporation, printed upon blank forms of obligations prepared to be executed by the corporation at the same time when the blank is printed, and by the same agency, is not a seal, at common law. *Bates v. Boston and New York Central R. R. Co.*, 10 Allen (Mass.), 251. 1865.

6. — The St. of 1855, ch. 223, providing that the mere impression of the seal of a corporation upon any legal instrument executed by such corporation shall thenceforth be valid, is not retrospective in its operation. *Ib.*

7. — At common law, "the impression of a seal is not a seal," but under the statutes of Maine, a printed seal is a sufficient seal, and covenant may be maintained upon an instrument thus sealed. *Woodman v. York and Cumberland R. R. Co.*, 50 Me., 549. 1861.

SECURITY FOR COSTS.

See COSTS.

1. Appeal. On appeal from a justice, appellant asked that respondent be ruled to give security for costs, on the ground that he had,

pending the appeal, become a nonresident; rule not granted. *Wagn. St.*, 342-3. *Button v. Hannibal and St. Joseph R. R. Co.*, 51 Mo., 153. 1872.

SEQUESTRATION.

1. Appointment of sequestrator. In a sequestration suit where the preservation of the property sequestered is provided for by the defendant giving a bond, the appointment of a judicial sequestrator is illegal, and the order appointing a sequestrator in such a case, with the order homologating his account, will be annulled and set aside on appeal. *Young v. Magazine Street R. R. Co.*, 24 La. An., 40. 1872.

2. Statute. In awarding a writ of sequestration under § 73 of the act of June 16, 1836, the court will not declare what are the powers of the sequestrator until it becomes necessary. *Betts v. Harrisburg R. R. Co.*, 2 Penn. Law Jour. Rep., 524. 1845.

3. — A writ of sequestration under act of June 16, 1836, may issue on a judgment transferred to another county under act of April 16, 1840. Such writ, under the act of 1836, is process of execution, and may issue without previous notice. *Reid v. Northwestern R. R. Co.*, 32 Penn. St., 257. 1858.

4. — The return of the previous execution unsatisfied is sufficient to warrant the issuing of a sequestration. *Ib.*

5. — The act of April 22, 1858, providing that a sequestration shall not issue against an unfinished railroad, is not retroactive in its operation. *Ib.*

6. — It is no ground for refusing the writ that the corporation may have no assets that are subject to such writ. *Ib.*

7. Tolls received on a railway after a judgment rendered against the company, and after the appointment of a sequestrator, are not bound by such judgment so as to give it a preference of payment out of them. *Leedom v. Plymouth R. R. Co.*, 5 Watts & Sergeant (Penn.), 265. 1843.

SERVICE.

See PROCESS.

Assignment—Municipal Corporations.

SETOFF.

See BONDS OF RAILWAY COMPANIES; CARRIAGE OF MERCHANDISE; GARNISHMENT; PLEADING.

1. Assignment. R. being indebted, upon an open account, to a railway company, the latter assigned the debt to one S., to whom the company was largely indebted, and by whom suit was brought against R., in the name of the company, and a judgment obtained thereon. Pending the suit against him, R. paid for the company a large debt, as its surety, which debt existed previous to the assignment, by the company, to S. *Held*, that as the company was insolvent, at the time of the assignment to S. of the debt of R., the latter could set off in equity, the money he had paid for the company, against the judgment obtained by S. *Tuscumbia, Courtland and Decatur R. R. Co. v. Rhodes*, 8 Ala. N. S., 206. 1845.

2. Drafts. The defendant, in an action upon a draft, cannot set off damages in a different transaction sustained by a firm of which he was a member, such damages arising out of the tort of plaintiff's agents in the shipment of live stock for such firm. *Central Ohio R. R. Co. v. Thompson*, 2 Bond, (U. S. C. C.), 296. 1869.

3. Joint contracts. In an action on a joint contract under the code of practice, the individual debt of one joint contractor may be pleaded in compensation of his share in the joint contract. *Langfitt v. Clinton and Port Hudson R. R. Co.*, 2 Robinson (La.), 217. 1842.

4. Mortgage. In an action upon a mortgage in favor of the state, the defendant corporation set up that it had sustained damages by reason of the destruction of certain of its bridges, by the mayor and police commissioners of the city of Baltimore, under the sanction of the governor. *Held*, that there is no principle of setoff or recouper by which the court could recognize such a claim. *State v. Northern Central R. R. Co.*, 18 Md., 193. 1861.

5. — Where a mortgage was given by a railway company to trustees for the bondholders, and these trustees purchased, on the foreclosure of a prior mortgage, a parcel of land which had been conveyed to the company, and the purchase was made by them in their own right, and not as trustees, it was *held*, that the

purchase could not be treated as a payment of the mortgage by them as trustee mortgagees, so as to entitle the amount to be set off against a mortgage given by the railway company for the purchase price of the land. *Griggs v. Detroit and Milwaukee R. R. Co.*, 10 Mich., 117. 1862.

6. Mutuality. Where G. & W. each subscribed for four shares of the stock of the V. C. R. R. Co., and the same sum was due from each, as a separate and individual debt, it was *held*, that there was an entire want of that mutuality that renders this a proper item for adjustment, in an action on book account, between G. & W. and the railway company. *Gleason and Whipple v. Vermont Central R. R. Co.*, 25 Vt., 37. 1852.

7. Stock Subscriptions. The defendant, who was sued for his subscription toward making the Louisville and Nashville railroad, alleged that it was agreed by the agent of the company, when defendant subscribed, that any damage that might accrue to the defendant should be set off against and extinguish so much of his subscription; that the road was located through his land greatly to his damage, etc.; on demurrer to the plea, it was *held*, that the claim for damages was a valid counterclaim under the § 126 of the Civil Code. *Louisville and Nashville R. R. Co. v. Thompson*, 18 B. Monroe, (Ky.), 735. 1857.

8. Unliquidated damages. The defendant cannot set up a claim against the adverse party for unliquidated damages, as against a liquidated demand. *Hoffman v. Pontchartrain R. R. Co.*, 9 La., (O. S.), 20. 1835.

9. Where plaintiff has no cause of action. Where there is a finding by the jury that the plaintiff has no cause of action, there can be no setoff allowed the defendant. *East Tennessee and Virginia R. R. Co. v. Galbraith*, 1 Heiskell, (Tenn.), 482, 1870; *Brasletton v. Nashville and Chattanooga R. R. Co.*, 3 Head, (Tenn.), 570. 1859.

SEWERS.

See WATERCOURSES.

1. Municipal corporations. While a city will not be liable for injury resulting from defective sewers constructed for the exclusive

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use of a railroad company, still such city cannot delegate its general power and adopt the work of the company as part of its own general system, without responsibility for defects in the work. *Indianapolis v. Lawyer*, 38 Ind., 848. 1871.

SHERIFF.

See GARNISHMENT.

1. A sheriff's deputy or bailiff, may empower another to do a particular act which he may himself do; and if the act be performed pursuant to the authority, it is valid. *New Albany and Salem R. R. Co. v. Grooms*, 9 Ind., 248. 1857.

2. — Thus an infant may be deputed to serve a particular writ, though he cannot act as a general deputy. *Id.*

SHERIFF'S SALE.

See JUDICIAL SALE; MORTGAGE.

SHORTAGE.

See CARRIAGE OF MERCHANDISE.

SIDE TRACK.

See CONTRACTS; EMINENT DOMAIN; STREETS.

1. Right to lay side tracks. If no public or private interest is affected, a railway company may lay side tracks over any lands that it may own, or over the lands of individuals with their consent. *Bangor, Oldtown and Milford R. R. Co. v. Smith*, 47 Maine, 84. 1859.

SIGNALS.

See INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYEES; INJURIES TO PERSONS CROSSING THE TRACK; INJURIES TO PASSENGERS; PENALTIES.

1. Frightened teams. In the trial of an action for a personal injury to the plaintiff,

caused by being thrown from his carriage in consequence of his horse becoming frightened at the sound of a locomotive whistle at a railroad crossing near a station, it is competent for the plaintiff to show that the sound of the whistle produced a similar effect upon other horses at the same time and place. *Hill v. Portland and Rochester R. R. Co.*, 54 Maine, 438. 1867.

2. Right to use signals. A railway company has the right to establish reasonable signals to be given for the starting of trains from its stations. *Hill v. Portland and Rochester R. R. Co.*, 55 Me., 438. 1867.

3. — Whether the use of a steam whistle as a signal for such purpose is proper and reasonable, is a question for the jury, taking into consideration all the circumstances of the case. *Id.*

4. — It is not proper to ask a witness who has had charge of another railroad for sixteen years, if the signals in question were reasonable or not. *Id.*

SLAVES.

See FRAUD; INJURIES TO PERSONS ON THE TRACK.

1. Bailment. The bailee of a slave is bound to use the ordinary care of a humane master. *Tallahassee R. R. Co. v. Macon*, 8 Fla., 299. 1859.

2. — The borrower of a slave, who had him in possession for ten years, using him as his own, let him to hire for his own benefit, without the owner's knowledge, to the defendant, and the slave was killed while in defendant's service. *Held*, that if the owner permitted the borrower to deal with the slave so as to induce others to believe he had authority to let him for hire, the defendant, if misled by such show of authority, was not liable. *James v. Wilmington and Manchester R. R. Co.*, 9 Richardson's Law (So. Car.), 416. 1856.

3. Conversion. Taking a slave upon a railway where such slave has only a general pass, is a conversion of the slave, and the carrier becomes liable for any injury resulting to such slave without regard to the question of negligence. *Macon and Western R. R. Co. v. Holt*, 8 Ga., 157. 1850.

4. — A railway company is liable in trover for transporting a slave under a false pass.

Emancipation — Hire of Slaves.

Western and Atlantic R. R. Co. v. Fulton, 4 Smeed (Tenn.), 589. 1857.

5. **Emancipation.** The emancipation proclamation of President Lincoln was operative alone in that portion of the seceded states which the armies of the United States had occupied, or might occupy, after the proclamation should by its terms go into effect. *Vicksburg and Meridian R. R. Co. v. Green*, 42 Miss., 436. 1869.

6. — In an action for the hire of slaves, under a plea of the general issue, evidence that the slaves were freed by the president's proclamation is admissible. *Ib.*

7. — One who hired from their owner, between July 1, 1864, and April 30, 1865, certain persons claimed to be slaves, and received the benefit of their services, must pay to the owner the hire agreed upon; and this whether the slaves were emancipated by the proclamation of 1863 or not. *Bailey v. Greenville and Columbia R. R. Co.*, 2 South Carolina (N. S.), 312. 1870.

8. **Escape of slaves.** A ticket agent of a railway company in Pennsylvania having knowingly sold a ticket to a runaway slave, by which the escape of the slave was facilitated, the company was held liable for the value of the slave. *Northern Central R. R. Co. v. Scholl*, 16 Md., 331. 1860.

9. — A railroad company was responsible for the wanton and negligent transportation of slaves so that they thereby escaped from, and were lost to the owner, and was liable to the owner for the value of slaves so escaping. But if the slave returned again to his home, the company was only liable to his owner for the value of his services while gone. *Louisville and Nashville R. R. Co. v. Yonng*, 1 Bush. (Ky.), 401. 1866.

10. — Although a high degree of caution is required in dealing with slaves, yet to make a railway company liable to the owner for the loss of a slave carried as a passenger on its cars, there must be evidence of actual negligence on the part of the company, unless intentional wrong is shown. *Sill v. South Carolina R. R. Co.*, 4 Richardson's Law (So. Car.), 154. 1850.

11. **Hire of slaves.** The hirer of a slave is responsible only for ordinary care, and if he rehires the slave to another, he is equally responsible for the same degree of care on the

part of his bailee. *Alabama and Tennessee Rivers R. R. Co. v. Burke*, 27 Ala. N. S., 535. 1855.

12. — **personal injuries.** Whilst a slave was in the employment of a railway company as a section hand, he was directed by an agent of the company, to sleep in a certain house, which had (unknown to the company and to himself) an open keg of powder standing under one of the beds, placed there a day or two before, for temporary purposes, by a servant of a bridge contractor with such company; the slave was killed by an explosion of the powder, caused as was supposed, by fire from a torch whilst he was searching for his hat; *held*, that the company was chargeable with the negligence of the person who placed, and left the powder in such a position. *Allison v. Western R. R. Co.*, 64 N. C., 382. 1870.

13. — A contract for hiring a slave to a railway company provided that he should not be employed on the cars, but might be carried on the cars from place to place where his services were required. He went upon the cars without the knowledge of the conductor, and jumped off and was killed. *Held*, that the company was liable for the loss. *Duncan v. South Carolina R. R. Co.*, 2 Richardson's Law (So. Car.), 613. 1846.

14. — Railway companies are legally responsible for injuries to slaves hired to aid in conducting trains where the injury is the result of the carelessness of their agents. *Louisville and Nashville R. R. Co. v. Yandell*, 17 B. Monroe (Ky.), 586. 1856.

15. — Such companies, by their agents, are bound to exercise the same care and prudence to preserve from injury, slaves hired to aid in conducting trains, as an ordinarily careful man would observe in regard to his own property. *Ib.*

16. — A contract for hiring slaves to a railroad company provided that no liability for accidents, etc., should exist against the company. *Held*, that this contract did not excuse the company from liability for injuries resulting from willful wrong or gross negligence. *Memphis and Charleston R. R. Co. v. Jones*, 2 Head (Tenn.), 517. 1859.

17. — A railway company, having hired a slave for one purpose, has no right to use him for another purpose, and will be held liable in case of his death while engaged in such

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unauthorized employment. *Lewis v. McAfee*, 32 Ga., 465. 1861.

18. — Where a slave was injured in the act of performing the improper order of the hirer, or his agents, the hirer is liable for the damages. *Pensacola and Georgia R. R. Co. v. Nash*, 12 Fla., 497. 1868.

19. — The liability of the hirer of a slave for injuries to the slave — considered. *Knox v. North Carolina R. R. Co.*, 6 Jones' Law (N. C.), 415. 1858.

20. — pleadings. In an action for damages for want of care in the treatment of a hired slave, during the sickness of such slave, the defendant will only be required to meet the allegation made in the pleadings. *Southern Pacific R. R. Co. v. Dial*, 25 Tex., 681. 1860.

21. — title. The remainderman of an estate in a slave is not entitled to sue on a contract made by the tenant for life, with a hirer, for the protection of the slave's life, he not being privy thereto, and no part of the consideration having moved from him. *Bogle v. North Carolina R. R. Co.*, 6 Jones' Law (N. C.), 419. 1859.

22. Illinois constitution. The constitution of Illinois prohibits slavery; therefore, negroes within its jurisdiction are presumed to be free. *Rodney v. Illinois Central R. R. Co.*, 19 Ill., 42. 1857.

23. Loss in transportation. In an action on the case against defendant for negligence in transporting plaintiff's slave, so that he escaped, the jury is not bound, as in cases where property has been destroyed, to give damages for the full value of the slave. *O'Neill and Chambers v. South Carolina R. R. Co.*, 9 Richardson's Law (So. Car.), 465. 1856.

24. Negligent treatment of a slave considered. *Haden v. North Carolina R. R. Co.*, 8 Jones' Law (N. C.), 362. 1861.

25. Passes. To give a slave a pass to travel by a railroad, as an indulgence, does not amount to a breach of an agreement to work the slave only as a turpentine hand. *George v. Smith*, 6 Jones' Law (N. C.), 273. 1859.

26. Slaves asleep on the track. In an action on the case brought against a railway company for the negligence of its agent in running over and killing a slave where it appeared that the slave was asleep on the track, that the cars were going at their usual speed, and at the usual hour, and the engineer, when

a short distance of the slave, attempted to stop the engine by letting off the steam and reversing the wheels, it was held, that the company was not liable. *Herring v. Wilmington and Raleigh R. R. Co.*, 10 Iredell's Law (N. C.), 402. 1849.

See INJURIES TO PERSONS ON THE TRACK.

27. Statute. The act of 1846, making railway companies liable for killing stock, etc., does not apply to slaves. *Seaggs v. Baltimore and Washington R. R. Co.*, 10 Md., 268. 1856.

28. — In a suit brought against a railway company for the transportation of a slave without the consent of his owner, it must be averred in the petition that the defendant is a railroad corporation in this state. Local Acts, 1855, p. 169. *Welton v. Pacific R. R. Co.*, 34 Mo., 358, 1864; *McClure v. Same*, 35 ib., 189, 1864.

29. — The repeal of the act of February 27, 1855 (Sess. Acts 1855, p. 169), concerning the transportation of slaves, etc., by the act of February 4, 1864 (Sess. Acts 1864, p. 41), did not affect actions already commenced (R. C. 1855, p. 1021-2, § 1). *Rogers v. Pacific R. R. Co.*, 35 Mo., 153. 1864.

30. — If a railway company allows a slave to go off on its cars without a ticket or permit from the master, overseer or person controlling the slave, the company is liable under the statute to the owner for damages. *South Western R. R. Co. v. Pickett*, 36 Ga., 85, 1867; see *Brown v. South Western R. R. Co.*, ib., 377, 1867.

31. — In case against a railway company for carrying off the plaintiff's slave without his knowledge or consent, mere proof of transportation is itself sufficient evidence of negligence to throw the onus on the defendant. *Josey v. Wilmington and Manchester R. R. Co.*, 11 Richardson's Law (So. Car.), 399. 1858.

32. — The value of the slave is the highest measure of damages in such a case. *Id.*

SLEEPING CARS.

1. Contract for exclusive right. Three railway companies, of which one owned and operated a road extending from Cleveland to Columbus, and the other two owned and operated roads extending from Columbus to Cin.

Contract to Build Railroad — Forfeiture.

cinnati, made running arrangements by which the same cars and trains might pass over the whole line from Cleveland to Cincinnati. Afterward, the three companies, by joint contract, granted to A., for a limited term, the exclusive right to run sleeping cars over their roads "for the purpose of accommodating passengers traveling on said roads, which said cars may be run each way, every night over the line of said roads, between Cleveland and Cincinnati, in connection with the night passenger express through trains between said cities." *Held*, that the exclusive right thus granted to A. is limited to the through transportation upon both sections of the line, and does not prevent the companies owning the southern section of the line from furnishing and running other sleeping cars for the accommodation of passengers carried over their section only, and not over any part of the northern section. *Stanley v. Cleveland, Columbus and Cincinnati R. R. Co.*, 18 Ohio St., 552. 1869.

SPECIE.

See BAGGAGE.

SPECIFIC PERFORMANCE.

See CONVEYANCE; RIGHT OF WAY.

1. A contract to build a railroad will not be enforced in equity. *Ross v. Union Pacific R. R. Co.*, 1 Woolworth (U. S. C. C.), 26. 1863.

2. Carriage of goods. A court of equity will not enforce a specific performance of a contract with a railway company to take freights, from a certain platform. There is an adequate law remedy in an action for damages. *Atlanta and West Point R. R. Co. v. Speer*, 32 Ga., 550. 1861.

3. Contract by letters. The C. Co., in February 1853, proposed by letter to grant certain lands and right of way to the S. R. R. Co. To this proposition, in August 1853, the president of the latter company replied. "By resolution, etc. * * * passed yesterday I am instructed to accept your proposition,

etc. * * *. I beg therefore to state my readiness to concur with you in such steps as may be necessary to give effect to the arrangement. If you will have the kindness to have prepared the proper conveyance, etc., and proper obligation on the part of this company I will submit them to the counsel of the company for his approval, and then execute them so far as to me may belong." *Held*, that these two letters did not constitute such a defined mutual contract as to justify a court of equity in decreeing a specific performance. *Canton Co. v. Northern Central R. R. Co.*, 21 Md., 383. 1863.

4. Contract for purchase of land. The defendant having contracted to sell the B. and M. R. R. Co., "the land they take on the northerly side of the M. turnpike, adjoining T's. land, at twenty cents per square foot, for each and every foot so taken by said company," and the plaintiff having brought a bill in equity for a specific performance; it was *held*, that the agreement was not for a sale of the land generally, but for the sale of such a part of the land described, as the plaintiff might take, in the exercise of the authority conferred on it by law. *Boston and Maine R. R. Co. v. Babcock*, 3 Cushing, (Mass.), 228. 1849.

5. Contract for purchase of gravel land. A railway company may maintain a bill in equity for the specific performance of a contract to purchase of it land which it has purchased for the purpose of having gravel dug therefrom, and transported at a certain freight over its road, to be delivered to and used by a third party. *Old Colony R. R. Co. v. Evans*, 6 Gray, (Mass.), 25. 1856.

6. Forfeiture. A bill for specific performance of a contract is an appeal to the chancellor's conscience, on which he exercises a sound discretion, under all the circumstances, for the most part untrammelled by rule or precedent. *Oil Creek R. R. Co. v. Atlantic and Great Western R. R. Co.*, 57 Penn. St., 65. 1868.

7. — He will not interfere if the bargain is hard or unconscionable, or the complainant is seeking an undue advantage. *Id.*

8. — Equity will not generally relieve against a forfeiture, but never aids in enforcing one, especially when the contract has been substantially carried out, but its literal fulfill-

Lease of Railway — Time — Appeals.

ment prevented by uncontrollable circumstances. *Id.*

9. Lease of railway — operation. If it would be competent for a court to decree the specific performance of a contract to operate a railroad, requiring, as it would, personal acts, involving the continuous exercise of skill and judgment under varying circumstances and emergencies, it would only be in a case where the demand for the exercise of such a power was stringent, and the circumstances such as to authorize the court in making an order to limit its duration as to time, and to define, to some proper and reasonable extent, the mode and manner in which it should be obeyed. *Port Clinton R. R. Co. v. Cleveland and Toledo R. R. Co.*, 13 Ohio St., 544. 1862.

10. — The P. C. R. R. Co. leased its franchises and road for the term of ninety-nine years, renewable forever, to the C. & T. R. R. Co., which was a company created by the consolidation of the T. N. and C. R. R. Co., and the Junction R. R. Co. The consideration was in the form of covenants to pay taxes, to assume debts, to finish the road and operate and manage it in such a manner as would not forfeit or endanger the franchise and corporate rights of the lessor. It appeared that only a small sum of money had ever been paid in by the stockholders of the P. C. Company, which had never been expended; that the cost of any work on the road previous to the lease had been defrayed by the Junction Company, and that this work had been done, and the organization of the P. C. Company made under the general law of the state, to enable the Junction Company to extend its line in a manner its charter did not permit. *Held*, that the P. C. Company was not entitled to a specific performance of the covenant in the lease, to operate the road. *Id.*

11. Pleading. An action was brought against a railway company upon a contract by which the company agreed, in consideration of the right of way, to fence the road through the lands of plaintiff, to pay him fifty dollars in freight bonds, and to release him from a subscription to the stock of the company. The complaint alleged a failure to perform on the part of the company, and that a judgment for damages would be unavailing, by reason of the insolvency of the company, and prayed for specific performance and other

proper relief. *Held*, that the complaint made a case for damages, but not for specific performance. *Cincinnati and Chicago R. R. Co. v. Washburn*, 25 Ind., 259. 1865.

12. Public works — pledge. The judiciary have no authority to enforce a pledge by the legislature, of the public faith, and of the public works and their income, to secure the payment of money borrowed to construct the works. *Sunbury and Erie R. R. Co. v. Cooper*, 33 Penn. St., 278. 1859.

13. Railway bonds. A bill in equity will not be sustained to enforce the specific performance of a contract for the purchase of the bonds of a corporation. *Id.*

14. — But if the court in which the suit is brought have jurisdiction of the cause of action, both at law and equity, it may proceed to grant relief, unless the bill be demurred to, on the ground that the proper remedy is at law. *Id.*

15. Time. Specific performance of an agreement to convey land to a railway company will not be decreed on a bill in equity filed by it more than three years after the other party has refused to perform it, and after it has located its road over other land including a small portion of this, and after this land has greatly increased in value, without any steps taken by the corporation meantime to enforce the agreement. *Boston and Maine R. R. Co. v. Bartlett*, 10 Gray (Mass.), 384. 1858.

SPRINGS OF WATER.

See EMINENT DOMAIN; INJUNCTION.

STAGE COACHES.

See INJURIES TO PASSENGERS; INJURIES TO PERSONS CROSSING THE TRACK.

STAMPS.

1. Appeals. The act of congress does not require that a stamp shall be affixed to the certificate of a justice of the peace certifying

Connecting Lines—Jurisdiction.

an appeal to the circuit court. The appeal is not an original process under our statute. *Norris v. Hannibal and St. Joseph R. R. Co.*, 37 Mo., 286. 1866.

2. Subscriptions by individuals. Where several persons have entered subscriptions on the same page of a subscription book, and the company was authorized to stamp the same, it was *held*, that the affixing and cancelling of one stamp in the aggregate sufficient to cover all the subscriptions was sufficient. *St. Louis and Cedar Rapids R. R. Co. v. Eakins*, 30 Ia., 279. 1870.

3. Unstamped instruments. Where the party offering in evidence an instrument required by act of congress to be stamped, upon objection made for want of a stamp, offers then to affix the requisite stamp, it is error to refuse permission to stamp it and read it in evidence. *New Orleans, Jackson and Great Northern R. R. Co. v. Pressley*, 45 Miss., 66. 1871.

STATE AID.

See GRANTS; SUBSCRIPTIONS BY STATES.

STATE BOUNDARIES.

1. New York and New Jersey. The boundary line between the states of New York and New Jersey, and the jurisdiction of each of those states — discussed and determined. *People v. Central R. R. Co. of New Jersey*, 42 N. Y. 283, 1870; reversing *Same v. Same*, 48 Barbour (N. Y.), 479, 1867; and 33 Howard's Pr. (N. Y.), 407, 1867.

STATES.

1. Statutes. Where general rights are declared, or remedies given, by law, the commonwealth is included therein, though not named. *Commonwealth v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 25. 1849.

STATE RAILWAYS.

See INJURIES TO PASSENGERS; INJURIES TO PERSONS GENERALLY; INJURIES TO PERSONS ON THE TRACK.

1. Connecting lines. The right of the Western and Atlantic R. R. Co. to make a contract for the carriage of goods beyond its terminus — doubted. *Baugh v. McDaniel*, 42 Ga., 642. 1871.

2. — The Pennsylvania R. R. Co. by its act of incorporation has no rights upon the state works. The act of March 13, 1847, authorizes any company to run cars over another road connected with its own. The Pennsylvania Railroad, not being so connected with the state road, cannot run its cars over the latter road. *Pennsylvania R. R. Co. v. Canal Commissioners*, 21 Penn. St., 9. 1852.

3. — Though the word "individuals," in the act of April 15, 1834, authorizing individuals to place cars upon the Columbia road, may include corporations, yet as such privilege is withheld in the act of incorporation of the Pennsylvania R. R. Co., it is not authorized by that act to use the said state road. *Ib.*

4. — But an individual cannot run a car thereon which has been condemned and was at the time unfit for service. *Miller v. Canal Commissioners*, *ib.*, 23.

5. — The Pennsylvania R. R. Co., having no right in itself to place cars thereon, cannot do so in connection with an individual. *Ib.*

6. Injuries to employes. In July, 1862, an engineer, while employed on the Western and Atlantic Railroad, was killed by a collision of two trains. In March, 1863, his widow brought suit for the injury. *Held*, that under the provisions of the declaratory act of April, 1863, the action was maintainable. *Cannon v. Rowland*, 34 Ga., 422, 1866; see *Lewis v. Turner*, 40 Ga., 416, 1869.

7. — The act of March 5, 1856, does not apply to a railway operated by the state, and hence an action for the killing of an employé cannot be maintained against the superintendent of such railway. *Walker v. Spullock*, 23 Ga., 436, 1857; but see contra, *Cannon v. Rowland*, 34 *ib.*, 422, 1866.

8. Jurisdiction. A suit against the Western and Atlantic R. R. Co., for the loss of goods shipped on such road should be brought against the superintendent in Fulton county,

Liability of States—Abandonment.

where the office of the road is located, and not in the county where the goods were received. *Wallace v. Thomas*, 34 Ga., 543 1866.

9. Liability of states. When the state engaged in the business of carrying on the Western and Atlantic railroad, it assumed the obligations of an individual engaged in such business. *Western and Atlantic R. R. Co. v. Carlton*, 28 Ga., 180. 1859.

10. Precedence of debts. The Western and Atlantic railroad is the property of the state of Georgia, and its incomes are a part of the revenue of the state. A debt due the road is a debt due the public, and is to be paid before "any other debt, lien or claim whatsoever," except funeral expenses, etc., as specified by the code. *State v. Dickson*, 38 Ga., 171. 1868.

11. Sale by governor; rescission. Where, pending a bill in equity for rescission of the sale of a railway by the governor, and also for an account and for damages, an act was passed by the legislature confirming the sale, although the act is a complete bar to that part of the petition which demanded rescission, yet the court is not thereby deprived of all jurisdiction of the cause, but jurisdiction will be retained and justice administered as to the remaining portion of the petition. *State v. McKay*, 43 Mo., 594. 1869.

12. — After sale of a railway by the governor, under an act of the legislature, his seizure of the same, under and by virtue of a clause of forfeiture contained in the act and deed of conveyance, was not an admission by the state that the sale and transfer were legal, nor did the seizure amount to a ratification of the sale. In the sale, the governor was not acting in his political or executive capacity but merely as a special agent; and the duty might have devolved upon any other person as well. And if he proceeded beside the law or outside the law, the state would not be bound by his tortious acts or trespasses. *Id.*

13. — Where, after the sale of a railroad by the governor, seizure was made on account of a noncompliance with the terms of the contract, for the purpose of foreclosing the state's lien or mortgage, the clause of forfeiture was not distinguishable in principle from one of reentry by a landlord for condition broken; and such seizure, even if in all respects legal and regular, did not deprive the state of any previous existing right. *Id.*

14. — If commissioners for the sale of a railroad combined and confederated with other persons in the purchase of the property, the state will be entitled to whatever speculations they made out of the sale; and the other persons, by entering into the league with the full knowledge of the facts, will also be amenable. *Id.*

STATION AGENT.

See GARNISHMENT.

STATION GROUNDS AND BUILDINGS.

See DEPOT; EMINENT DOMAIN.

1. Abandonment. The act of 1866 provides that no railway company shall abandon any depot or station on its road, after such depot or station has been established for twelve months, except by approval of the railway commissioners after public notice and a hearing had. The New Haven and Northampton Co., in 1848, constructed a railway which, in 1849, it leased for twenty years to the New York and New Haven R. R. Co. The latter company, soon after taking possession of the road, built a platform for the accommodation of passengers at a place on the road which was thereafter called "Brooks' Station," and placed upon it an old baggage car which served as a shelter for passengers waiting at the station. No agent was ever placed at the station and no tickets were sold there, nor was freight waybilled to or from that station, but to and from another station in the same town. But tickets were sold at other stations to passengers for that station, and trains were stopped to take up passengers, and trains carrying the mail stopped regularly. *Held*, I. That Brooks' Station was a "depot or station" within the meaning of the statute. II. That upon the expiration of the lease to the New York and New Haven R. R. Co., the road reverted to the New Haven and Northampton Co. in the condition in which it then was, and that the lessor was concluded by the establishment by the lessee of the station in question during the term of the lease. III. That a

General Principles.

mandamus would lie at the instance of the attorney for the state to compel the New Haven and Northampton Co. to reestablish the station, it having been abandoned without the consent of the railroad commissioners. *State v. New Haven and Northampton R. R. Co.*, 37 Conn., 153. 1870.

2.—Where land is granted in fee simple to be occupied for railway purposes only, and to revert to the grantor or his heirs if used for any other purposes, or no longer needed for such uses, the reversion does not take effect until actual abandonment; hence until that time, the company may remove the machinery in its shops erected on the land granted. *Pennsylvania R. R. Co. v. Parke*, 42 Penn. St., 31. 1862.

3.—A notice of the intention to abandon is not equivalent to abandonment. *Ib.*

4. Rights of the public to use station houses. A railroad company, by erecting station houses and opening them to the public, impliedly licenses everybody to enter them. But this license is revocable as to all persons who have no legitimate business there, growing out of the operation of the road, or with the officers or employés of the company. The corporation has the right to direct all other persons to depart therefrom, and, on their refusal to do so, may remove them. *Harris v. Stevens*, 31 Vt., 79. 1858.

5.—One who desires to go on the cars must exercise his right to enter the station house in conformity with the due and reasonable regulations of the company as to his conduct while there; and he cannot exercise it until a reasonable time next prior to the departure of the train on which he intends to go. *Ib.*

6.—Therefore, where, in an action for trespass to the person, the defendant pleaded that he was station agent of a railway company, and that the alleged assault was necessarily committed in removing the plaintiff from the station house, where he persisted in remaining after the defendant had requested him to leave, and the plaintiff replied, setting forth the obligation of the railway company as a common carrier, and alleging that the plaintiff went to the station house and there purchased a ticket to another station, and that while he was waiting for the train on which he was intending to go by virtue of such ticket, the defendant

committed the assault. *Held*, on special demurrer, that this replication was bad because it did not allege that the train was expected soon to leave. *Ib.*

7. Water stations. Where a railway was constructed as a horse road only, and so used for five years, and no land taken for engine or water stations, ground cannot thereafter be appropriated for such purpose, where the charter required that the road should be finished in five years. *Plymouth R. R. Co. v. Colwell*, 39 Penn. St., 337. 1861.

STATUTE OF LIMITATIONS.

See LIMITATIONS.

STATUTES.

[The various statutes in relation to railways will be found construed under different titles throughout this book.]

I. GENERAL PRINCIPLES.

II. CONSTRUCTION.

I. GENERAL PRINCIPLES.

1. Authentication. Courts can never receive oral proof that a law has been passed, or that any act essential to its validity has been performed. *Wabash R. R. Co. v. Hughes*, 38 Ill., 174. 1865.

2.—Where it is claimed that a bill has become a law by reason of not having been returned in proper time by the governor, it must be authenticated in the mode prescribed by the statute, or it will not be regarded by the courts. *Ib.*

3.—The laws duly certified by the secretary of state, and published under the authority of the state, should be received as having passed the legislature in the manner required by the constitution, unless the contrary appears. *Illinois Central R. R. Co. v. Wren*, 43 Ill., 77. 1867.

4. Evidence. The governor of the state cannot be examined as to his reasons for not signing an act of the legislature, nor as to his action in any respect regarding it. But he is

Construction.

bound to appear and testify as to the time an act was delivered to him. *Thompson v. German Valley R. R. Co.*, 7 C. E. Green's Ch. (N. J.), 111. 1871.

5. Judicial notice. The courts of one state do not take judicial notice of the statutes of another state. *Carey v. Cincinnati and Chicago R. R. Co.*, 5 Ia., 357. 1857.

6.—Such statutes must be pleaded as any other facts, and it will not do to refer to them by their title and date of approval, nor by stating their general provisions. *Ib.*

7. Promulgation of law. Where it is clearly the purpose of the legislature to give a company time in which it would have an opportunity to accept certain conditions imposed by that body, it cannot be contended that official negligence in promulgating the law should make it impossible for such time to transpire, and thus deprive the company of the right and opportunity to accept; it would enable such official negligence to defeat the legislator's will. *State v. North Louisiana and Texas R. R. Co.*, 25 La. An., 65. 1873.

8. Time of taking effect. Where an act of the legislature was silent as to the time it should take effect (the constitution in such case requiring the lapse of sixty days), but a supplementary act passed at the same session provided that the supplement should take effect from the time of its passage; *held*, to relate back so as to embrace the time of the operation of the original act. *West Feliciana R. R. Co. v. Johnson*, 5 Howard (Miss.), 273. 1840.

9. Title of act. Since the amendments to constitution in 1864, the title to an act is a part of it. *Pennsylvania R. R. Co. v. Riblet*, 66 Penn. St., 164. 1870.

II. CONSTRUCTION.

10. Amendments. When two acts are *in pari materia*, or one is an amendment to another, it will be presumed that a word used in a certain sense in the first act was used in the same sense in the subsequent one. *Robbins v. Omnibus R. R. Co.*, 32 Cal., 472. 1867.

11. Conflict of statutes. If two statutes are inconsistent, the latest must prevail. *Commonwealth v. Cross Cut R. R. Co.*, 53 Penn. St., 62. 1866.

12. Construction of railways. Ch. 86,

laws of 1855, provided that railway companies shall be liable for work performed by laborers on the construction of their roads, upon the laborer giving thirty days' notice, etc. This act was afterwards repealed. A right of action having accrued under it, it was *held*, that such right was not affected by the repeal, although the suit was not actually commenced at the time of the repeal. *Streubel v. Milwaukee and Mississippi R. R. Co.*, 12 Wis., 67. 1860.

13. Federal courts. In construing state laws, the federal courts will follow the construction put upon such laws by the supreme court of such state. *Paine et al. v. Wright and the Indianapolis and Bellefontaine R. R. Co.*, 6 McLean, (U. S. C. C.), 395. 1855.

14. Municipal corporations. It is a well settled rule in the construction of statutes, that a subsequent statute, treating a subject in general terms, and not expressly contradicting the provisions of a prior act, shall not be considered as intended to affect more particular and positive provisions of the prior act, unless it be absolutely necessary to do so in order to give its words any meaning. *State ex rel. v. Perrysburg*, 14 Ohio St., 472. 1863.

15.—The general act of May 3, 1852, did not annihilate and recreate the preëxisting municipal corporations of the state, but reorganized and continued them, leaving their corporate identity unaffected. *Ib.*

16. Reënactment of statute. In general the studied omission of a word in the reënactment or revision of a statute indicates an intent to restrict or change its operation. But this rule loses its force when the act is wholly recast with a studied regard for brevity, and the language of the new act is susceptible of the same interpretation as the fuller language of the old. *Mundt v. Sheboygan and Fond du Lac R. R. Co.*, 31 Wis., 451. 1872.

17. Rules of construction. The main object is to ascertain the true meaning of the legislature, and where, upon due consideration of the subject matter of the statute, and the object intended to be accomplished by its enactment, such intention is manifest, courts will give it effect, although it be not sanctioned by the literal interpretation; but courts will not abandon the literal interpretation to carry out the alleged intention of the legislature, if such construction is doubtful. *Neer*

Contract for keeping Live Stock — Promise to pay the debt of another.

Orleans, Jackson and Great Northern R. R. Co. v. Hemphill, 35 Miss., 17. 1858.

18. — It is only where a statute is capable of two or more meanings, that interpretations or any latitude of construction is allowable. *Mundt v. Sheboygan and Fond du Lac R. R. Co.*, 31 Wis., 451. 1872.

19. — And where the construction of a statute is doubtful, the title may be considered. *Ib.*

20. — In construing a statute, the courts will not inquire into the motives of its authors. *Stockton and Visalia R. R. Co. v. Stockton*, 41 Cal., 147. 1871.

21. — A statute must receive such construction as will, if possible, make all its parts harmonize with each other, and render them consistent with its general scope and object. *Ellison v. Mobile and Ohio R. R. Co.*, 36 Miss., 572. 1858.

22. — The courts will construe statutes as all written instruments are construed, by the surrounding circumstances, the condition of things, the evils to be remedied, and the objects to be attained. *Clark v. City of Jonesville*, 10 Wis., 136. 1859.

23. — common law rules. In construing acts of congress, the rules of interpretation furnished by the common law are the true guides, and have been uniformly followed. *Rice v. Minnesota and Northwestern R. R. Co.*, 1 Black, 358. 1861.

24. — The same rules are held to apply to the construction of a state statute unless otherwise determined by the state courts. *Ib.*

25 — word "may." The word "may," in a statute, is to be construed "must" or "shall" where the public interest or rights are concerned, and the public or third persons have a claim *de jure* that the power should be exercised. *Blake v. Portsmouth and Concord R. R. Co.*, 39 N. H., 485. 1859.

26. — Where power is given to public officers, in permissive language, — as where "they may, if they deem advisable," do a certain thing — the language used will be regarded as peremptory where public interest and individual rights require that it should be. *Supervisors v. United States ex rel.*, 4 Wallace, 485. 1866.

27. — word "person." Under the Kansas law (compiled L., 837), the word "person" extends to corporations. *North Missouri R. R. Co. v. Akers*, 4 Kans., 453. 1868.

STATUTE OF FRAUDS.

1. Contract for keeping live stock. The plaintiff conveyed to the defendant a certain tract of land, with right of ingress and egress to and from plaintiff's land. In consideration thereof, defendant agreed by parol to deliver to plaintiff, for temporary keeping, all the stock transported on its road eastward from the N. river. Defendant performed its agreement for a little more than a year, and then repudiated it. In an action to recover the value of the land conveyed, *held*, that plaintiff was entitled to recover the value, deducting therefrom the profits realized by him from the business during the time of the performance of the agreement on the part of defendant. *Day v. New York Central R. R. Co.*, 51 N. Y., 583. 1873.

2. Delivery. A delivery of a part of the property sold takes the contract out of the operation of the statute of frauds. *Van Woert v. Albany and Susquehanna R. R. Co.*, 1 N. Y. Sup. Ct., 256. 1873.

3. — What delivery will take a case out of the statute of frauds — determined. *Wade v. New York and Oswego R. R. Co.*, 52 N. Y., 627. 1873.

4. Executory contracts of sale are within the statute of frauds. *Edwards v. Grand Trunk R. R. Co.*, 48 Me., 379. 1860.

5. Partnership debt. The firm of K., S. & Co., being indebted to the plaintiffs in the sum of \$8,207.75, K., one of the firm, orally agreed with the plaintiffs, that in consideration that the latter would receive \$10,000 of the bonds of a railway company, in payment of such indebtedness of the firm, he, K., would at a future day, at the plaintiff's request, purchase the same bonds of them, and pay them therefor the said sum of \$8,207.75. *Held*, that the agreement was within the statute of frauds. *Hagar v. King*, 38 Barbour (N. Y.), 200. 1362.

6. Promise to pay the debt of another. An oral promise by the defendant to pay the plaintiff a debt due him from a railroad company, if he would procure the passage of a resolution by said company requesting such payment, not being founded upon any new consideration of benefit to the promisor, is void by the statute of frauds. *Osborne v. Farmers' Loan and Trust Co.*, 16 Wis., 35. 1862.

Miscellaneous.

7. **Sale of lands.** A parol contract by which A. was to grant a certain strip of land to a railway company, and in consideration of which the company was to grant certain privileges on its road to A., was *held* to be within the statute of frauds, and therefore void. *Day v. New York Central R. R. Co.*, 31 Barbour (N. Y.), 548, 1860; see *Same v. Same*, 53 ib., 250, 1867.

8. — But upon the refusal of the company to grant such privileges as were agreed upon, plaintiff would be entitled to recover the value of the lands conveyed by him to the company. *Id.*

9. — Where the charter of a railway company provides that the company may obtain land by consent of the owner, it means a legal consent; and it can only obtain it in such manner as existing laws provide for acquiring title to or the right to occupy real estate. Such a clause in a railroad charter does not affect the statute of frauds. *Hetfield v. Central R. R. Co.*, 5 Dutcher (N. J.), 571. 1862.

10. **Sale of wood.** A contract for the sale and delivery of a quantity of wood, though the same be at the time in standing trees, is not a contract for work and labor, so as to take the transaction out of the statute of frauds. *Smith v. New York Central R. R. Co.*, 4 Keyes (N. Y.), 180. 1868.

11. — A parol agreement by a railway company to take all the wood the plaintiff would put on that season, at the same price paid him for that purchased before, and more, if the wood was better, is within the statute of frauds. *Edwards v. Grand Trunk R. R. Co.*, 54 Me., 105. 1866.

12. — The wood must be accepted to take the case out of the statute. *Id.*

13. — Where, under the contract, the wood was to be measured and inspected, such measuring and inspecting are essential to acceptance. *Id.*

STATUTE OF LIMITATIONS.

See LIMITATIONS; SALES.

STATUTORY REGULATIONS.

[For statutory requirements, see the various other titles.]

1. **Control of the courts.** Under a statute

requiring the owners of a railway to run a certain number of trains daily "so as to furnish reasonable accommodation to the public generally, and the business along the line of said road," and declaring that this court "upon application of any person interested in the transportation of freight or passengers" may appoint commissioners to settle any disagreement as to what may be considered such reasonable accommodation, and that "said court is hereby invested with full equity powers to enforce the provisions of this act," the court has no jurisdiction in equity, upon the petition of such persons, to compel the running of such trains. *Shackley v. Eastern R. R. Co.*, 98 Mass., 98. 1867.

STEAMBOATS.

See CARRIAGE OF MERCHANDISE; MANDAMUS.

1. **Connecting lines.** Where a steamboat carried freights from the terminus of a railway and delivered them to the different consignees thereof, under a contract with the railroad company, and the officers of the boat under the direction of the company collected from the consignees of such freight the charges due thereon for transportation over the railway, it was *held*, that the amount thus collected could be recovered in an action against the boat, under § 2116 of the Code of 1851. *Chicago, Burlington and Quincy R. R. Co. v. Woodsides*, 10 Ia., 465. 1860.

2. **Lookout.** The rules of law for the government of steamers in respect to a lookout are well settled, and are of stern necessity. *Reed v. New York and Erie R. R. Co.*, 18 Howard's Pr. (N. Y.), 482. 1859.

3. **Steamboat lines — corporate powers.** A corporation, chartered with power to build a railway from one point to another, and to transport passengers and freight, has no authority to run a line of steamboats in connection with the road, and all contracts beyond the authority given in the charter are void. *Hoagland v. Hannibal and St. Joseph R. R. Co.*, 39 Mo., 451. 1867.

STEAMSHIPS AND STEAMSHIP LINES.

See CONSTITUTIONAL LAW.

General Matters — Rights of Stockholders.

STOCK AND STOCKHOLDERS.

See CONSOLIDATION; CONSTRUCTION OF RAILWAYS; CONTRACTS; DIVIDENDS; ELECTION OF CORPORATE OFFICERS; ESTOPPEL; EVIDENCE; EXECUTIONS; FRAUD; GUARDIAN AND WARD; INSOLVENCY; MANDAMUS; SETOFF; STOCKHOLDERS; SUBSCRIPTIONS BY CITIES AND TOWNS; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY INDIVIDUALS.

I. GENERAL MATTERS.

II. RIGHTS OF STOCKHOLDERS.

III. CONTRACTS.

IV. TRANSFERS AND ASSIGNMENTS.

V. DIVIDENDS AND INTEREST.

1. *Dividends*.2. *Interest*.

VI. PERSONAL LIABILITY OF STOCKHOLDERS AND ASSESSMENTS.

1. *Assessments*.2. *Personal liability*.

VII. PREFERRED STOCK.

VIII. ILLEGAL AND SPURIOUS STOCK. OVER-ISSUES.

IX. INCREASE OF STOCK.

X. ACTIONS BY STOCKHOLDERS.

I. GENERAL MATTERS.

1. **Consolidation of stock.** A contract between the officers of a corporation and a stockholder, to consolidate his stock, will not affect the rights of creditors of the corporation, or of the stockholders who were not parties to the arrangement. *Mann v. Currie*, 2 Barbour (N. Y.), 294. 1848.

2. **Conversion.** The measure of damages, in case of a conversion of stock, is the value of the stock at the time of the conversion, with interest from that date until the time of the trial. *Sturges v. Keith*, 57 Ill., 451. 1870.

3. **Convertible bonds.** The directors of a railway company, acting in good faith, have power to issue convertible bonds in the name of the corporation, for the amounts they may borrow to complete and finish, or to operate the road, with the right to authorize their conversion into stock; although it increases the amount of capital stock beyond that fixed by the charter. *Belmont v. Erie R. R. Co.*, 52 Barbour (N. Y.), 637. 1869.

4. — If the court were satisfied, however, that bonds were about to be issued as a part of a fraudulent device to increase the stock,

the issuing of them will be restrained by injunction. *Id.*

5. **Dower.** Shares in railroad companies are personal property, whether the companies are, or are not, subject to the provisions of the "act regulating railroad companies," passed February 11, 1848. *Johns v. Johns*, 1 Ohio St., 350. 1853.

6. — Shares of railway stock are real estate of the class called incorporeal hereditaments, and of which a widow may be endowed. They will descend as realty. *Price v. Price's Heirs*, 6 Dana (Ky.), 107. 1838.

7. **Issue of certificates.** To issue certificates of stock to the appointees of the purchasers of a railway is an issue to the purchasers themselves. *Commonwealth v. Central Passenger R. R. Co.*, 52 Penn. St., 506. 1866.

8. **Liability of corporation to stockholder.** Stockholders cannot call the corporation to account for an error in judgment in the choice between remedies deemed equally effective. *Newby v. Oregon Central R. R. Co.*, 1 Sawyer (9 U. S. C. C.), 63. 1870.

9. **Stock in hands of court.** The prayer of the petition of Jay Gould, for the delivery of certain certificates for shares of railway stock in the hands of the court, disallowed under the facts of the case. *Erie R. R. Co. v. Heath*, 9 Blatchford (U. S. C. C.), 226. 1871.

10. **Stock may be exchanged for land by corporation.** In the absence of any express statute, an organized corporation has the same power of disposition over its unsubscribed capital stock, as any ordinary owner; and it may be exchanged for land, to be sold again when it has general power to purchase real estate. If it be an abuse of its corporate power, it furnishes no ground on which the vendor of the land can object. *Dayton and Cincinnati R. R. Co. v. Hatch*, 1 Disney (Ohio), 84. 1855.

11. **What is included in the term, stock.** Stock in a railroad company is embraced in the term property. *Adams v. Jones*, 6 Jones' Eq. (N. C.), 221. 1861.

12. — Railroad stock is personal assets under the laws of Georgia. *Southwestern R. R. Co. v. Thomason*, 40 Ga., 408. 1869.

II. RIGHTS OF STOCKHOLDERS.

13. **Distribution of stock.** Where an act

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of incorporation of a railroad company appoints a certain number of commissioners to open books to receive subscriptions to the capital stock of the corporation, and to distribute the stock among the several subscribers in such manner as they shall deem most conducive to the interests of the corporation, making no provision that a majority shall constitute a quorum for the discharge of the duties entrusted to them, all must be present to hear and consult when they come to distribute the stock. *Crocker v. Crane*, 21 Wendell (N. Y.), 211. 1839.

14. Rights of subscriber to take stock. Defendant negotiated a loan upon its bonds with a privilege to the bondholders to subscribe to the capital stock of the company, to an amount equal to one-half of the bonds. The plaintiff subscribed for bonds, and received provisional certificates, entitling him, after a certain date, to certificates of the capital stock. Below the signatures of the officers to the certificate was the following: "N. B. The exchange of the provisional certificates for scrip certificates is limited to the 1st of January, 185— By subsequent resolution of the directors, the memorandum was filled out, 1855." *Held*, that, upon paying all the installments on his subscription to the bonds, the plaintiff's right of the shares to the capital stock was absolute, and could not be limited to an election to take the stock on or before a specified date. *Van Allen v. Illinois Central R. R. Co.*, 2 Keyes (N. Y.), 673, 1866; *Same v. Same*, 7 Bosworth (N. Y.), 515, 1861.

15. Elections. The right to vote, at meetings of the stockholders of a corporation, on shares in its capital stock held on a trust "to hold for the benefit of the corporation," is suspended while they are so held. *American Railway Frog Co. v. Haven*, 101 Mass., 398, 1869.

III. CONTRACTS.

16. Contract payable in stock. Where persons contracting with a railway company to perform certain work, agreed to receive a portion of their compensation in railway stock at its par value, to be paid at a time fixed in the contract, it was *held*, that the company was not bound to seek the contractors and tender the stock, on that day. *Moore v.*

Hudson River R. R. Co., 12 Barbour (N. Y.), 156, 1851; see *Pusey v. New Jersey West Line R. R. Co.*, 14 Abbott's Pr. N. S. (N. Y.), 434, 1873.

17.— Such a contract is an agreement to receive payment in depreciated currency, and not an agreement to pay a certain sum in specific articles. Hence the rule requiring a tender does not apply. *Ib.*

18.— It is no excuse for refusing to receive such stock, that the railroad company has, since the making of the contract, procured from the legislature an alteration of its charter by which the stock and debt of the company is increased; where it appears that the right to alter the charter was reserved by the legislature, in the act of incorporation, and there is nothing to show that such alteration depreciated the value of the stock. *Ib.*

19.— A contract to pay a specified amount in the capital stock of a corporation, without naming any price, per share, or otherwise, is an agreement to pay stock to that amount in value, according to its market price, at the time. *Hart v. Lauman*, 29 Barbour (N. Y.), 410. 1859.

20.— The defendants having agreed to pay ten per cent. of the contract price for certain work in the stock of a railroad company, and having failed to tender such stock until after it had become depreciated and utterly valueless; it was *held*, that they had forfeited their right to pay the ten per cent. in stock. *Ib.*

21. Guaranty. Where it appeared that a party sold land to a railway company, the price of which was paid in the stock of the company, guarantied by certain persons to be worth par after a certain time, and suit was brought on this contract, *held*, that the plaintiff was entitled to recover. *Hill v. Smith*, 21 Howard, 283. 1858.

22. Liability of purchaser. Where property, encumbered by a mortgage to secure the subscription of a shareholder to the capital stock of a corporation, was sold, together with shares of the stock, without warranty against the mortgage, but subject thereto, and the company collected the subscription off of the original stockholder, no transfer having been made of the stock on the books of the company; it was *held*, that the purchaser was liable to the original stockholder for the amount collected from him by the company.

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Clinton and Port Hudson R. R. Co. v. Eason, 14 La. An., 818. 1859.

23. Sale of stock. The defendant executed the following contract: "For value received, the bearer may call on me for one thousand shares of the stock of the Cleveland and Pittsburgh R. R. Co., at 117 per cent, any time in six months from date, without interest. The bearer is entitled to all the dividends, or surplus dividends declared during the time, to half past one p. m. each day." *Held*, that the holder of the contract was not entitled to a dividend which had been declared and announced previous to the date of the contract; although at the time of its execution, the stock was selling "dividend on." *Lombardo v. Case*, 45 Barbour (N. Y.), 95. 1865.

24. — A contract, upon the sale of a certain number of shares of railroad stock, for the transfer by the vendee to the vendor of the same number of shares, at a future day, for a specified price, does not, without a stipulation to that effect, require the vendee to keep and transfer the same identical stock which was conveyed to him. Nor will such a contract be affected by the new issue of additional stock at a lower nominal price. *Noyes v. Spaulding*, 27 Vt., 420. 1855.

25. — delivery. Upon a contract to deliver stock, the damages for the failure to deliver it is the value of the stock at the time it ought to be delivered. *Orange and Alexandria R. R. Co. v. Fulvey*, 17 Grattan (Va.), 366. 1867.

26. — A court of law cannot render a judgment that defendant shall deliver to plaintiff so many shares of stock. Upon a contract to deliver stock in payment of a debt or otherwise, a court can only award damages for the failure to deliver it. *Ib.*

27. — sale by administrator. When an administrator sells railroad stock, the property of the estate which he represents, at private sale, and his vendee sells to a *bona fide* purchaser without notice, the title of such person will be protected against the heirs of said estate. *Nutting v. Thomason*, 46 Ga. 34. 1872.

28. Wagering contract. The contract to sell and transfer at a future day, and for a specified price, a given number of shares of railway stock, which the vendor actually has at the time the contract is made, is not a stock jobbing or wagering contract. *Noyes v. Spaulding*, 27 Vt., 420. 1855.

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29. Attorney in fact. A person who holds certificates of stock issued to other persons, with letters of attorney authorizing the transfer of such shares to him, is not a stockholder. *Heath v. Erie R. R. Co.*, 8 Blatchford (U. S. C. C.), 347. 1871.

30. Judicial sale. Where, upon the sale on execution of shares in a corporation, a certificate is demanded of the corporation by the purchaser, and a suit is brought for refusing to give such certificate, the measure of damages is the value of the stock at the time of the demand, with interest, and not the value at the time of the trial, or at any intermediate period. *Pinkerton v. Manchester and Lawrence R. R. Co.*, 42 N. H., 424. 1861.

31. Transfer. Where the stock of a corporation is, by the terms of its charter or by-laws, transferable only on its books, the purchaser receiving certificate with power of attorney, etc., gets the entire interest of the seller with all his rights. *New York and New Haven R. R. Co. v. Schuyler*, 34 N. Y., 30, 1865; *Same v. Ketchum*, 3 Keyes (N. Y.), 363, 1867; see *Same v. Same*, 38 Barbour (N. Y.), 534, 1860; see *Underwood v. New York and New Haven R. R. Co.*, 17 Howard's Pr. (N. Y.), 537, 1859.

32. — Such purchaser, neglecting to have the transfer made on the books of the corporation until after such stock is transferred to a *bona fide* holder without notice, loses his right to a transfer. *Ib.*

33. — The corporation, however, would be liable to the holder of such certificate, for permitting the stock to which he was entitled to be transferred to another, it having constructive notice of these outstanding certificates. *Ib.*

34. — The transfer of stock from the assignor, though not made on the books of the company, is sufficient to pass the title to the assignee. *Baltimore, etc., R. R. Co. v. Sewell*, 35 Md., 238. 1871.

35. — The transfer of a certificate of railway stock in a Massachusetts corporation, with an assignment upon its back, of the stock thereby represented, and a power to the transferee to effect a transfer of the same on the books of the company, is a valid transfer of the stock itself, and vests the title to it in the transferee; and the tender of such a certifi-

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cate, assignment and power is a sufficient compliance with a contract to furnish, or cause to be furnished, the number of shares indicated. *Noyes v. Spaulding*, 27 Vt., 420. 1855.

36. — The plaintiff was the equitable owner of forty shares of the capital stock of the defendant. Certificates of stock for those shares were outstanding in the name and possession of a third person, who claimed to be the absolute owner thereof. The books of the company showed the certificates to be in the name of such third person. The plaintiff, without returning the certificates, made demand of the defendant for the transfer and delivery to it of the stock, and, upon defendant's refusal, brought its action against the defendant for the value of the stock, making the holder of the certificates a party defendant. *Held*, that the plaintiff was not entitled to a judgment for the value of the stock. *National Bank of New London v. Lake Shore and Michigan Southern R. R. Co.*, 21 Ohio St., 221. 1871.

37. — The holder of certificates of stock either for value paid or as collateral security, has the equitable title to the stock, and on surrendering the same to the corporation in which the stock is held, may compel the company to issue new certificates to him, in his own name. *Haldeman v. Hillsborough and Cincinnati R. Co.*, 2 Handy (Ohio), 101. 1855.

38. — attachment. Upon a pledge of railway stock in New Hampshire, there should be such a delivery as the nature of the thing is capable of; and, to be good against a subsequent attaching creditor, the pledgee must be clothed with all the usual muniments and indicia of ownership. *Pinkerton v. Manchester and Lawrence R. R. Co.*, 42 N. H., 424. 1861.

39. — On the transfer of stock, the delivery will not be complete until an entry of such transfer is made upon the stock record, or it be sent to the office for that purpose; and the omission thus to perfect the delivery will be *prima facie*, and, if unexplained, conclusive evidence of a secret trust, and therefore fraudulent and void as to creditors. *Ib.*

40. — Where the transfer was made at a distance from the office, and the old certificates surrendered and new ones given by a transfer agent appointed for that purpose and residing in a neighboring state, proof that the evidence of the transfer had been forwarded for record

by the earliest mail communication, although not received until an attachment had intervened, would be a sufficient explanation of the want of delivery, and such transfer would be good against creditors. *Ib.*

41. — But where there was a delay from July 8th until in August following, before taking any measures to have the transfer recorded, the transfer was *held* invalid as against a subsequent attaching creditor. *Ib.*

42. — Whether by the by-laws of a corporation, authorized by the charter, which require transfers of its stock to be made on the books of the company, a separate written assignment of stock conveys the legal title or only an equitable one: *quare?* *Colt v. Ives*, 31 Conn., 25. 1862.

43. — Even if it conveys an equitable title only, yet this title is good in equity against an attachment subsequently made by a creditor of the vendor, where the assignment is made in good faith, and the parties have done what they could under the circumstances to perfect the title of the vendee. *Ib.*

44. — Where stock of the vendor had been attached by a prior attaching creditor, and the secretary of the company refused, on the application of the vendor, to allow a transfer on the books of the company of the stock so attached, and the vendor thereupon, in good faith, made a written assignment of the stock by a separate instrument, and lodged it with the secretary, it was *held*, that the title of the vendee was good against later attachments of the stock by the creditors of the vendor. *Ib.*

45. — Where the by-laws of a corporation required that all transfers of shares should be made in a book to be kept by the treasurer, it was *held*, that an assignment of shares by the deed of the vendor, accompanied by a delivery of the certificates to the vendee, was valid without any transfer on the books of the corporation, not only between the vendor and vendee, but against a creditor of the former, who attached the shares before any notice of the sale had been given to himself or to the treasurer of the corporation. *Sargent v. Essex Marine R. R. Co.*, 9 Pickering (Mass.), 201. 1829.

46. — fraud. The plaintiff, in May, 1849, received from R. & G. L. Schuyler, as collateral security, 90 shares in the N. Y. and N. H. R. R. Co., of which R. Schuyler was transfer agent. The certificates had shortly before been

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issued by R. Schuyler to the firm. In 1854, it was discovered that Schuyler had fraudulently issued to the firm certificates of stock to a large amount beyond the capital limited by the company's charter. The firm owned at the time of the delivery of the certificates to plaintiffs 160 shares of genuine stock. The certificates were assigned in blank by Schuyler, under seal, in the name of the firm. Of the 480 shares overissued at the time, the plaintiff took its certificates, the certificates of over 350 were, within the next two years, surrendered by the firm, and the stock which they purported to represent was transferred on the books of the company to other parties. The plaintiff held its certificates without calling for a transfer of the stock, and without giving notice to the company until the discovery of Schuyler's fraud in 1854, when plaintiff made a demand for the transfer of the stock, and the defendant refused. Plaintiff then brought an action on the case for damages. *Held*, that the 90 shares would be presumed to be a part of the 160 genuine shares, in the absence of proof to the contrary. If the shares were genuine, plaintiff was entitled to have the transfer made, notwithstanding more than 160 of the Schuyler's shares had already been transferred upon the company's books. That, however, at the time of the demand, the company's books were in such confusion, growing out of said frauds, that the company was justified in refusing to allow the transfer at that time. *Bridgeport Bank v. New York and New Haven R. R. Co.*, 30 Conn., 231. 1861.

47. — Where another demand was made, five years afterwards, by B., an attorney, who had made an agreement with the plaintiff to bring and conduct this suit for the plaintiff at his own expense and risk, for a certain share of the sum recovered; *held*, that the unlawfulness of the agreement between the attorney and plaintiff did not make the demand insufficient. *Id.*

48. — refusal to transfer. A railroad company cannot refuse to enter a transfer of stock upon its books, on the ground that the assignor of the stock is indebted to the company, unless the company had a lien upon the stock at the date of the transfer. A by-law passed by the company two days after the transfer, providing that no transfer should be made in such cases until the debt to the company was

paid, would not, in this case, give a lien or right to refuse to enter the transfer. *People ex rel. v. Crockett*, 9 Cal., 112. 1858.

49. — Where the stock of a corporation was usually transferred on two distinct books, to the stock transferred on one of which share-brokers attached a greater value than to that on the other; and a creditor agreed to exchange his debt for stock, on the officers stating that such stock could be transferred on the former; and after completing such an exchange, the officers refused to allow a transfer of it to be entered on such book; it was *held*, the creditor could not for that cause rescind the exchange, but that his remedy was in an action for damages. *Lohman v. New York and Erie R. R. Co.*, 2 Sandford (N. Y.), 39. 1848.

50. — In an action at law, brought against a corporation for refusing to issue or transfer stock, the plaintiff may claim in the same suit the value of the stock together with the dividends due thereon, and in such case, the measure of damages is the value of the stock at the time of the demand, together with the dividends accrued thereon at that time, with interest to the day of trial. *Baltimore City R. R. Co. v. Sewell*, 35 Md., 238. 1871.

51. — liability of assignee. Where a person becomes a stockholder in a corporation, by the transfer to him of the stock of an original subscriber, he adopts the contract of the assignor with the company, and becomes substituted in his place, as regards his rights and his liabilities. *Mann v. Currie*, 2 Barbour (N. Y.), 294. 1848.

V. DIVIDENDS AND INTEREST.

1. Dividends.

52. Action for dividends. An action cannot be brought against a corporation for a dividend declared without first making a demand. *State v. Baltimore and Ohio R. R. Co.*, 6 Gill (Md.), 363. 1847.

53. — In an action brought by a stockholder against a corporation, to recover a dividend declared by resolution of the directors, in general terms, of so much money per share, evidence that the earnings of the corporation were received in property is incompetent, as it alters the legal effect of the resolution. *Scott*

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v. Central R. R. Co. of Georgia, 52 Barbour (N. Y.), 45. 1868.

54. Consolidation of railways. By an act of consolidation, between certain railway companies, it was agreed that the preferred stock should be entitled first to seven per cent. from the income of the consolidated road; then the common stock was to have seven per cent.; then the preferred stock was to have three per cent. further; and afterwards the common stock could share in the balance. A dividend was afterwards declared by which ten per cent. on the amount of the capital was awarded to both classes of the stock, but such dividend was made payable in preferred stock to the holders of preferred stock, and in common stock to the holders of stock in that class. The holder of a share of preferred stock received stock to the market value of about \$8, and the holder of a share of common stock received stock to the value of about \$7. *Held*, that this gave to the holder of the common stock all he had a right to claim, and all that he was entitled to until the dividend of the preferred stock amounted to ten per cent. *Howell v. Chicago and Northwestern R. R. Co.*, 51 Barbour (N. Y.), 378. 1868.

55. Dividends payable in future. Unless the charter gives to the directors the power to discriminate between the stockholders at different periods, in the distribution of profits, they are all entitled to share therein. *Jones v. Terre Haute and Richmond R. R. Co.*, 29 Barbour (N. Y.), 353, 1859; see *Same v. Same*, 17 Howard's Pr. (N. Y.), 529, 1859.

56. — Where a dividend was declared to the persons then holding stock, without any discrimination, out of the surplus earnings of the corporation for a given period, payable at a future day, it was *held* that all who were stockholders on the books of the company, at the time the dividend was declared, were entitled to share therein. *Ib.*

57. Failure of agent to pay dividend. When a dividend is declared, it becomes a debt due from the corporation to the individual stockholder. If a dividend is declared payable elsewhere than at the office of the corporation, the party through whom it is paid becomes the agent of the corporation, and if such agent fail to pay the dividend to the stockholder, the loss must fall on the corporation. *King v. Paterson and Hudson*

River R. R. Co., 5 Dutcher (N. J.), 504, 1861; overruling *Same v. Same*, *ib.*, 82, 1860.

58. Failure to declare dividends. No action can be maintained by a stockholder to compel a corporation to declare and pay a dividend, from funds on hand. *Karnes v. Rochester and Genesee Valley R. R. Co.*, 4 Abbott's Pr. N. S. (N. Y.), 107. 1867.

59. — guarantee. A certificate of shares of the guaranteed capital stock of a corporation contained the following provision: "Said stock is entitled to dividends at the rate of ten per cent. per annum, payable semi-annually in New York, on the first days of June and December in each year, out of the net earnings of said company, and is also entitled to share *pro rata* with the other stock of the company in any excess of earnings over ten per cent. per annum; and the payment of dividends as aforesaid is hereby guaranteed." *Held*, that the holder of such certificate could not maintain an action at law against the corporation for a failure to declare and pay dividends as therein mentioned. *Williston v. Michigan Southern R. R. Co.*, 15 Allen (Mass.), 400. 1866.

60. Foreign corporations. The court will not enjoin the directors of a foreign corporation from paying a dividend, where no debt is due to the plaintiff, and his only ground for the injunction is a supposed error on the part of the directors in making the dividend. *Howell v. Chicago and Northwestern R. R. Co.*, 51 Barbour (N. Y.), 378. 1868.

61. Forfeited stock. Capital stock paid in for the purpose of carrying into effect the object of the company does not, on becoming forfeited, become profit and liable to distribution before the object of its payment has been accomplished. *Gratz v. Redd*, 4 B. Monroe (Ky.), 178. 1843.

62. Misapplication; injunction. An action may be maintained by a stockholder to enjoin the payment of a dividend, where the directors are about to misapply the funds of the corporation in paying such dividend, there being in fact no money earned for such purpose. *Carpenter v. New York and New Haven R. R. Co.*, 5 Abbott's Pr. (N. Y.), 277. 1857.

63. — After a dividend has been declared, the right of each shareholder in the dividend payable to him is separate and independent of that coming to other shareholders, and he

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cannot file a bill in behalf of such others to restrain the payment of the dividend. *Ib.*

64. Notice of place of payment. Advertisements, in a newspaper circulating daily in the vicinity of men of business, are presumptive evidence of notice, but may be overcome by positive proof by the stockholder that such notice did not come to his knowledge. *King v. Paterson and Hudson R. R. Co.*, 5 Dutcher (N. J.), 82. 1860.

65. Rights of stockholders to declared dividends. The dividends which are divisible among the shareholders of a corporation must be considered as their own property, and cannot be applied by the directors to any purpose not included in their charter or fundamental contract, without the consent of such shareholders. *March v. Eastern R. R. Co.*, 43 N. H., 515. 1862.

66. — Where a corporation makes dividends, payable in money, no inquiry can be made into the means out of which it determined to make the dividends. The corporation is concluded by the declaration of the dividend. *Scott v. Central R. R. Co. of Georgia*, 52 Barbour (N. Y.), 45, 1868; see *Ehle v. Chittanooga Bank*, 24 N. Y., 548.

67. Sale of stock. A sale of shares of stock in a railway company carries with it the dividends declared by the company, when they are to be paid at a day subsequent to the transfer of the stock. *Burroughs v. North Carolina R. R. Co.*, 67 N. C., 376. 1872.

68. Stock dividends. Although the issue of stock dividends may appear to be objectionable, such considerations are more properly addressed to the board of directors than to the court, on a motion to continue an injunction. *Howell v. Chicago and Northwestern R. R. Co.*, 51 Barbour (N. Y.), 378. 1868.

69. — If a corporation has the power to increase its capital stock, it is immaterial whether such increase is made by awarding the stock to the stockholders as dividends, or by paying the stockholders the dividends in cash from the earnings of the company and selling the stock in the market, to raise money for the use of the corporation. *Ib.*

70. Who are entitled to dividends. The funds of a corporation, whenever they accrued, are to be distributed among such as are its stockholders when the dividend is declared. *Goodwin v. Hardy*, 57 Me., 143. 1869.

2. Interest.

71. Certificates. A certificate issued by a corporation in the ordinary form of certificates of stock, but containing a promise on the part of the corporation to pay interest thereon until the happening of a certain event, constitutes the person to whom it is issued a stockholder and member of the company. *McLaughlin v. Detroit and Milwaukee R. R. Co.*, 8 Mich., 100. 1860.

72. — Nor can the corporation, without the consent of such stockholder, oblige him to receive its bond, instead of money, for the interest upon such certificate. *Ib.*

73. — If the corporation can issue such a certificate, it can ratify one already issued without authority. A resolution to pay the interest on such certificate in bonds, is sufficient evidence of ratification. *Ib.*

74. Interest declared payable in stock. Where the directors of a railway company, under the authority of the act "regulating railroad companies," pass and enter on their journal a resolution "that the treasurer is directed to allow interest on installments as paid, payable in stock, and carry to the account of each stockholder the interest annually, and, when the amount is sufficient, to issue stock certificates in payment;" and actually do pay such interest to persons making payment of their stock subscriptions subsequent to the passage of the resolution, such resolution accrues to the benefit of parties who had paid their stock subscriptions prior to the passage of the resolution, and constitutes a binding obligation to pay such interest. *City of Ohio v. Cleveland and Toledo R. R. Co.*, 6 Ohio St., 489. 1856.

75. — Interest follows the principal as an incident to it, so long as it remains an incident; but where it is separated and set apart from the principal by actual payment, or by being carried, when due, to the credit of the owner of the principal, in his account with the debtor, and this in pursuance of a provision in the contract creating and defining the principal debt, it is so separated and disjoined from the principal as to cease to be an incident to, and does not follow it. *Ib.*

76. — Where a stockholder assigns his stock in such a case, after two years' interest

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has accrued under such resolution, the interest does not pass to the assignee. *Ib.*

77. Particular case. Under the particular facts of this case, it was *held*, that plaintiff could not recover interest upon shares of stock held by him. *Wright v. Vermont and Massachusetts R. R. Co.*, 12 Cushing (Mass.), 68. 1853.

78. Scrip. The stockholders of a railway company voted to pay interest on subscriptions for stock until the completion of the road; and after payment of such interest for some time, and the completion of the road, passed another vote authorizing the issue of certificates therefor, payable at a future day named, "with the express understanding and agreement that if there is not sufficient money in the treasury on the day that it falls due," the holders of such scrip should recover *pro rata* so much as the treasurer should be able to pay, and that as soon afterwards as he should be able to pay it, he should give notice by advertisement. *Held*, that so long as the treasurer had no funds, the holders of scrip could maintain no action. *Cunningham v. Vermont and Massachusetts R. R. Co.*, 12 Gray (Mass.), 411. 1859.

79. Vote of stockholders. If the stockholders of a corporation have passed a vote instructing the directors to adjust an interest dividend by issuing certificates therefor, payable at a future time named, with a condition that, if there should not then be money enough in the treasury to pay the whole amount, the holders of the certificates should receive as much *pro rata* as the treasurer should be able to pay, and the directors have accordingly issued such certificates, the holder of one of them, if under any circumstances, he can maintain an action upon it, can only do so by proof that the company was able to pay the full amount of interest covered by the vote, either at the specified time, or at the commencement of the action. *Barnard v. Vermont and Massachusetts R. R. Co.*, 7 Allen (Mass.), 512. 1863.

VI. PERSONAL LIABILITY OF STOCKHOLDERS, AND ASSESSMENTS.

See SUBSCRIPTIONS BY INDIVIDUALS.

1. Assessments.

80. Amount of assessments. Where the

conditions of the subscription provided, that not more than five dollars on a share should be assessed at one time, and the directors laid more than that amount at the same time, but required not more than five dollars per share at one payment, it was *held* that the assessments were binding. *Penobscot and Kennebec R. R. Co. v. Dunn*, 39 Me., 587, 1855; *Penobscot R. R. Co. v. Dummer*, 40 ib., 172, 1855.

81. By-laws. An agreement to subscribe shares of stock is not a promise to pay them, and a railway company cannot, in the absence of such a provision in its charter, recover assessments upon stock from the stockholder by an action. *Kennebec, etc., R. R. Co. v. Kendall*, 31 Me., 470. 1850.

82. — In the absence of a legislative enactment or contract, a personal liability cannot be created against a shareholder by a by-law of the company. *Ib.*

83. — A by-law, therefore, providing for the sale of the delinquent stockholder's shares, and holding him personally liable for any deficiency, was held insufficient to sustain an action at law for the deficiency. *Ib.*

84. Demand. No demand of assessments is necessary other than that prescribed in the by-laws of the corporation. *Penobscot R. R. Co. v. Dummer*, 40 Me., 172. 1855.

85. Forfeiture. The power given to a corporation to declare stock forfeited must be strictly pursued. Equity will not relieve against a forfeiture, if regular. A stockholder is presumed to know the terms of his subscription. *Germantown Passenger R. R. Co. v. Fittler*, 60 Penn. St., 124. 1869.

86. — As a forfeiture extinguishes the liability of a stockholder, the creditors of the corporation can invoke the aid of equity to prevent it, or set it aside. *Ib.*

87. — To maintain an action under special statute authority, its terms must have been strictly complied with. *York and Cumberland R. R. Co. v. Ritchie*, 40 Maine, 425. 1855.

88. — Thus, the sale of the stock of shareholders to pay assessments, where the statute required the same to be done under an order from the directors to the treasurer, cannot be made on an order of a committee appointed by the directors. *Ib.*

89. — An alternative order is insufficient. It must be absolute. *Ib.*

Personal Liability of Stockholders, and Assessments.

90. Number of shares fixed by charter.

Where the number of shares are not fixed in the charter the stockholders or directors may fix the number. But the number must be determined before an assessment is made. *Somerseset and Kennebec R. R. Co. v. Cushing*, 45 Maine, 524. 1858.

91. — The number may be afterwards changed, but the assessment must be on all the shares. An assessment upon a part is void. *Ib.*

92. — Where the charter of a railway company provides that the capital stock shall consist of not more than a certain number of shares, "the number of which shall be determined from time to time by the directors thereof," the directors have no power to levy assessments upon subscribers for stock before determining the whole number of shares. *Worcester and Nashua R. R. Co. v. Hinds*, 8 Cushing, (Mass.), 110. 1851.

93. Responsibility of subscribers. Where according to the by-laws of the company, no assessment is to be made until the estimated cost of the road is subscribed by responsible parties; and it appeared that the estimated cost had been subscribed; and the directors in good faith decided that the estimated cost had been subscribed by responsible parties, and proceeded to make assessments; it was held, that the assessments were valid and could not be defeated by showing that, as a matter of fact, some of the subscribers were not responsible. *Belfast and Moosehead Lake R. R. Co. v. Brooks*, 60 Me., 568. 1872.

2. Personal liability.

94. Change of laws. The legislature has the right to modify and change existing laws so as to affect the liabilities of stockholders for the debts of the corporation, having a due regard to existing contracts, and making such modifications prospective. *Hathorn v. Calef*, 53 Maine, 471. 1866.

95. — The legislature may change and restrict this remedy as to preëxisting debts. *Cummings v. Maxwell*, 45 Me., 190. 1858.

96. — There is no privity of contract between the creditors and stockholders, and the repeal of the statute making the stockholders liable does not impair the obligation of any

contract. *Coffin v. Rich*, 45 Maine, 507, 1858; *Carroll v. Hinkley*, 46 ib., 81. 1858.

97. — The creditor has no vested rights against the stockholder till after judgment. *Ib.*

98. Demand. No demand of a stockholder is necessary before bringing suit against him, further than the demand of the officer holding an execution against the company, on the stockholder to show property of the corporation to satisfy the debt. *Ingalls v. Cole*, 47 Me., 530. 1860.

99. Double liability. A stockholder, who becomes such, after the repeal of the double liability clause in the state constitution of 1865 (see Art. VIII, § 6), is not liable in double the amount of his stock, for debts owing by the corporation prior to the repeal. *Ochiltree v. Iowa R. R. Contracting Co.*, 54 Mo., 118. 1873.

100. Equitable proceedings. Since the passage of ch. 1962, Pamphlet Laws, assumpsit, debt or other action at law, cannot be maintained against an individual stockholder in a railway corporation, for a debt of the company, even though demand has been legally made upon the corporation, and proper notice given to such individual stockholder. *Hadley v. Russell*, 40 N. H., 109. 1860.

101. — And where there were other stockholders, at the time the debt was contracted, a bill in chancery cannot be maintained against such individual stockholder alone, but those against whom the stockholder would have a remedy for contribution must be made parties with him. *Ib.*

102. Execution — usury. An execution against a railway company may be levied upon the property of an owner of shares, to the amount of his stock, for debts contracted during his ownership. To establish the validity of the levy, it must appear: 1. That he was a shareholder to the amount levied. 2. That the levying officer, forty-eight hours before the levy, gave him notice of the amount of the debt, and of the intention to make the levy. 3. That there was no attachable property of the corporation. *Chaffin v. Cummings*, 37 Me., 76. 1853.

103. — In such case, the return of the officer, that he can find no property of the corporation, is conclusive evidence that there was none. *Ib.*

Preferred Stock.

104. — In a controversy as to the validity of such levy, the question of usury, as between the creditor and the corporation, cannot be raised. *Ib.*

105. Foreign corporation. Where the act of another state in the Union makes the private property of stockholders in a corporation liable for the fulfillment of the contracts of the company, but points out no mode in which this liability may be made available, if the courts of other states are bound to notice and give effect to this remedial provision, the course of proceeding must be regulated by the law of the state where the contract is sought to be enforced. *Drinkwater v. Portland Marine Railway*, 18 Me., 35. 1841.

106. — Under act of Feb. 16, 1836, the creditor must obtain judgment against the corporation before he can have his remedy against the stockholders. *Ib.*

107. Judgment. On the trial of a motion for an execution against a railway company, with a clause directing its levy upon the private property of one of the stockholders, the judgment against the company is conclusive as to the indebtedness of the company to the plaintiff at the time at which it was rendered, but it is competent for the defendant to show that it has been paid or discharged. *Corse Brothers v. Sanford*, 14 Ia., 235. 1862.

108. Laborer's claims. Where a laborer, who has done work for a contractor upon a railroad, has given notice of his claim under the § 12 of the general railroad act, and has sued and recovered judgment against the company, and issued execution thereon, and the same has been returned unsatisfied, a stockholder of the company, who has paid for his stock in full, cannot be compelled to pay the amount of such judgment under § 10 of said act. *Galagher v. Ashby*, 26 Barbour (N. Y.), 143. 1857.

109. Priority of claims. The first person proceeding against a stockholder for a corporate debt has the prior right, and his right cannot be defeated by the stockholder or other creditor who may first obtain execution. *Ingalls v. Cole*, 47 Maine, 530. 1860.

110. — But the stockholder cannot plead in defense that there is another proceeding already pending against him, without evidence that his liability has already been established to a sufficient amount to exhaust it. *Ib.*

111. Statutes. The liability of the stock-

holders of a railway company, for the debts of the company, under § 10 of the general railroad act of 1850, was an original responsibility, and was that of general partners. *Conant v. Van Schaick*, 24 Barbour (N. Y.), 87. 1857.

112. But it was the intention of the legislature, by the act of April 15, 1854, to repeal the provisions providing for such liability. *Ib.*

113. — Under R. S., ch. 46, § 26, assumpsit may be maintained by a creditor of a corporation against a stockholder. *Hathorn v. Calef*, 53 Me., 471. 1866.

114. — The return of the officer that he cannot find corporate property is all that is required to maintain such an action. *Ib.*

115. — Demand and notice, both made at the same time, forty-eight hours before suit, are sufficient to satisfy the requirement of the statute. *Ib.*

116. — By ch. 46, § 26, R. S. of 1857, the remedy of a creditor of a corporation against the individual stockholders was, by an action, to be commenced within six months after the rendition of judgment against the corporation. *Cummings v. Maxwell*, 45 Me., 190. 1858.

117. — This act is remedial only, and therefore not unconstitutional. *Ib.*

118. — Under the provisions of the statute of New Hampshire, making stockholders liable for the debts of private corporations, stockholders are, in general, liable only for debts of the corporations contracted while they were stockholders. *Chesley v. Pierce*, 32 N. H., 389. 1855.

VII. PREFERRED STOCK.

119. Action; parties. In an action brought by preferred stockholders against a corporation to compel the payment of a dividend alleged to be due, and charging that the funds applicable thereto have been diverted to the permanent improvements and additions of the road, the common stockholders may be proper, but are not necessary parties. *Thompson v. Erie R. R. Co.*, 45 N. Y., 468. 1871.

120. Condition. A railway company issued preferred stock on the following condition: "So much of the net earnings of the road as may be necessary, after paying interest to the bondholders, shall be applied to the payment of twelve per cent., in semi-annual divi-

Illegal and Spurious Stock; Overissues.

dends of six per cent., each, to the holders of stock hereby created, until the net earnings shall be sufficient to pay an interest of six per cent., on the stock and all the bonds issued on the first and second loans." *Held*, That these payments depended on no contingency, except that the net earnings of the road, after paying the interest on the bonded debt, should be sufficient for paying them. That in estimating the time when the earnings had reached that amount, an entire year should be considered, and not six months. That the plaintiff could not recover any part of such dividends accruing after he has transferred his stock, although the transfer was not recorded. *Bates v. Androscoggin and Kennebec R. R. Co.*, 49 Me., 491. 1860.

121. Earnings only to be applied. The holder of "preferred and guaranteed stock," being entitled to "preferred and guaranteed dividends, at the rate of ten per cent. per annum, payable semi-annually, before any dividend shall be paid on other stock of said company," is entitled to that sum, payable only out of the earnings of the company which are legally applicable to the payment of dividends. *Taft v. Hartford, Providence and Fishkill R. R. Co.*, 8 R. I., 310. 1866.

122. — net earnings. The meaning of the words, "net earnings," defined. *St. John v. Erie R. R. Co.*, 10 Blatchford (U. S. C. C.), 271. 1872.

123. Hannibal and St. Joseph R. R. Co. Preferred stock certificates of the H. and St. J. R. R. Co. are held to give the holders a preferable right to the first seven per cent. of the net earnings each year, after which the holders of common stock are entitled to the next seven per cent., and if there be a surplus, it is to go to holders of the common stock and preferred stock equally. *Bailey v. Hannibal and St. Joseph R. R. Co.*, 1 Dillon (8 U. S. Cir. Ct.), 174. 1871.

124. — An agreement for preferred stock of the Hannibal and St. Joseph R. R. Co., construed. *Bailey v. Railroad Co.*, 17 Wallace, 96. 1872.

125. Power to issue such stock. It is not *ultra vires* for a railroad company to contract to issue to contractors for the completion of the road preferred stock; provided, the whole number of shares does not exceed the amount authorized by the charter. *Hazlehurst v. Savannah, &c. R. R. Co.*, 43 Ga., 13. 1871.

VIII. ILLLEGAL AND SPURIOUS STOCK ; OVER-ISSUES.

126. False certificates; legalizing act. The act of the directors in issuing false certificates of stock of a railway company incorporated by two states, cannot be ratified by a subsequent statute, passed by one of the states from which the corporation derives its existence, alone; neither state having exclusive jurisdiction over the corporation. *Fisk v. Chicago, Rock Island and Pacific R. R. Co.*, 53 Barbour (N. Y.), 513, 1868; see *O'Brien v. Same*, *ib.*, 568; *Fisk v. Same*, 36 Howard's Pr. (N. Y.), 20, 1868; 4 Abbott's Pr. N. S. (N. Y.), 378, 1868; see *O'Brien v. Same*, 36 Howard's Pr. (N. Y.), 24, 1868; 4 Abbott's Pr. N. S. (N. Y.), 381, 1868.

127. — Schuyler fraud. Spurious stock, attempted to be created in excess of the legal capital of an incorporated company, forms no part of the capital stock, and is void. *New York and New Haven R. R. Co. v. Schuyler*, 34 N. Y., 30, 1865; see *Same v. Same*, 17 Howard's Pr. (N. Y.), 464, 1859; see *Same v. Same*, 17 N. Y., 592, 1858; *Same v. Ketchum*, 3 Keyes (N. Y.), 363, 1867; see *Same v. Same*, 38 Barbour (N. Y.), 534, 1860; see *New York and New Haven R. R. Co. v. Schuyler*, 28 Howard's Pr. (N. Y.), 187, 1855; 29 *ib.*, 89, 1865; *Same v. Ketchum*, 34 *ib.*, 302, 1867; *Same v. Schuyler*, 1 Abbott's Pr. (N. Y.), 417, 1855; 7 *ib.*, 41, 1858; 8 *ib.*, 239, 1859.

128. — Spurious certificates of stock in a railroad corporation, issued by the officer having apparent authority to do so, undistinguishable upon their face from the certificates of genuine stock, and outstanding in the hands of numerous holders as evidences of interests in the property of the corporation, are clouds upon the title of the genuine stockholders which a court of equity will remove. *New York and New Haven R. R. Co. v. Schuyler*, 17 N. Y., 592. 1858.

129. — The corporation may institute a suit for this purpose, as the representative of the genuine stockholders and in their behalf. *ib.*

130. Illegal issues. The supreme court has jurisdiction, in actions brought by citizens of New York as holders of stock of a railroad company created by the states of Illinois and Iowa, for the purpose of restraining, by injunction, the use of the proceeds of an issue of

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stock alleged to be illegal and void, and appointing a receiver of such proceeds. *Fisk v. Chicago, Rock Island and Pacific R. R. Co.*, 53 Barbour (N. Y.), 513, 1868; *Same v. Same*, 36 Howard's Pr. (N. Y.), 20, 1868; 4 Abbott's Pr. N. S. (N. Y.), 378, 1868.

131. Overissues. The assignee of stock illegally issued is in no better situation than the party to whom such stock was originally issued. *Mechanic's Bank v. New York and New Haven R. R. Co.*, 13 N. Y., 599. 1856.

132. — A corporation whose capital is limited by law cannot issue shares in amount beyond such limit; reversing *Mechanic's Bank v. New York, etc., R. R. Co.*, 4 Duer (N. Y.), 480. 1855. *Mechanic's Bank v. New York and New Haven R. R. Co.*, 13 N. Y., 599, 1856; see *Woodruff v. New York and New Haven R. R. Co.*, 18 Howard's Pr. (N. Y.), 419, 1860.

IX. INCREASE OF STOCK.

133. Boston and Maine R. R. Co. The increase of the stock of the Boston and Maine R. R. Co. held valid. The statutes of Maine and Massachusetts in relation to said corporation — construed. *Attorney General v. Boston and Maine R. R. Co.*, 109 Mass., 99. 1871.

134. Contract. A contract for the purchase of railway stock construed with reference to the rights of the purchaser to take new stock subsequently issued. *Miller v. Illinois Central R. R. Co.*, 24 Barbour (N. Y.), 812. 1857.

135. Hudson River R. R. Co. The act authorizing an increase of the capital stock of the Hudson River R. R. Co. — construed. Act of May 12, 1846. *Manice v. Hudson River R. R. Co.*, 3 Duer (N. Y.), 426. 1854.

136. Payment of indebtedness in stock. A corporation having power to issue further capital stock may issue the same for an equal amount of indebtedness. *Lohman v. New York and Erie R. R. Co.*, 2 Sandford (N. Y.), 39. 1848.

137. Subscriptions. The Act of March 24, 1865, authorized any railway company to issue such additional shares of stock as might be necessary to equip its road, etc., the stock to be the same as the original stock and stand on the same footing. By the Act of April 10, 1867, the directors of any railroad company authorized to increase its stock, when the increase shall have been authorized by the

stockholders, may determine in what manner the same may be subscribed and sold, the amounts of the installments and the manner of their payment. The stockholders of a certain road resolved that the directors should have power to increase the stock, and dispose of the same as they may deem advisable. The directors accepted a subscription for the purpose of extending their road to the Delaware, and stipulated that interest at the rate of six per cent. upon the installments on the stock should be paid until the completion of the extension, with a proviso that the new stockholders should not participate in any of the profits theretofore made. Held, that such subscription was unauthorized by the aforesaid acts and the resolution of the stockholders. *McMannus v. Philadelphia and Reading R. R. Co.*, 58 Penn. St., 330. 1868.

X. ACTIONS BY STOCKHOLDERS.

138. Action against corporation by stockholder. In an action brought by one claiming to be a stockholder and creditor of a corporation, suing on his own behalf and that of others similarly situated, to compel its officers to account, etc., proof that he is not a creditor, or of a tender of his demand, is not ground for a perpetual stay of proceedings. *Ramsey v. Erie R. R. Co.*, 8 Abbott's Pr. N. S. (N. Y.), 174. 1870.

139. — Neither is the fact that the demand which he claims to constitute him a creditor, and the stock which constitutes him a stockholder, were purchased with the intent of bringing suit thereon. *Id.*

140. — The cases reviewed, on the question as to when a stockholder will be allowed to file a bill in his own name, on behalf of himself and all others standing in the same situation, making the corporation a party defendant, to compel the ministerial officers of the corporation to account for breach of official duty or misapplication of corporate funds. *Heath v. Erie R. R. Co.*, 8 Blatchford (U. S. C.), 347. 1871.

141. Bondholders. The owner of corporation bonds secured by a lien upon lands has the same right as a stockholder to maintain a suit to prevent another corporation from obtaining such lands, by the wrongful use of the name of his corporation. *Newby v. Oregon*

Miscellaneous.

Central R. R. Co., 1 Sawyer (U. S. C. C.), 63. 1870.

142. Redress of injury to corporate rights. A stockholder cannot maintain a suit for an injury to corporate rights, unless it appears from the bill that the corporation refused to take proper measures to protect or redress the same. *Ib.*

STOCK—LIVE.

See CARRIAGE OF LIVE STOCK; INJURIES TO DOMESTIC ANIMALS.

STOPPAGE IN TRANSITU.

1. Right of stoppage. It is not necessary for the party stopping goods *in transitu*, to show that the consignee failed after the contract. It is sufficient if his failure *becomes known* after the sale. *Reynolds v. Boston and Maine R. R. Co.*, 43 N. H., 530. 1862.

2. — Any agent, authorized to act for the consignor, either generally or in relation to the consignment in question, may stop goods *in transitu*, without any authority to adopt that particular measure. *Ib.*

3. — The right of stoppage only terminates with an actual delivery, unless the carrier consents to hold the goods for the consignee, or wrongfully refuses to deliver them. *Ib.*

4. — A notice to the carrier not to deliver the goods is enough; a demand of delivery is not necessary. *Ib.*

5. — Direct proof of insolvency is not necessary; it may be proved by circumstances. *Ib.*

6. — A. sold to B. in Boston, a lot of whisky, then in a government bonded warehouse in Indiana. B. gave his acceptance for the price, and a certificate for the whisky was obtained for B. in his name from the government storekeeper. The seller was to ship the whisky from time to time, and was to pay the storehouse charges, etc., drawing on B. therefor. The seller at various times made shipments, and when the last lot was on the way, B. became insolvent. *Held*, that the seller still had the right of stoppage *in transitu*. *Mohr v. Boston and Albany R. R. Co.*, 106 Mass., 67. 1870.

STREETS.

See EMINENT DOMAIN; HIGHWAYS; INJURIES TO DOMESTIC ANIMALS; INJUNCTION; STREET RAILWAYS.

1. Bridges over track of railway. Where a railway company is required by statute to erect and maintain a bridge over its track upon a certain street, it will not be relieved from such duty by the subsequent order of the county commissioners requiring certain towns to perform it. *Cambridge, Inhabitants of v. Charlestown Branch R. R. Co.*, 7 Metcalf (Mass.), 70. 1843.

2. — The defendant was a corporation, with a charter subject to amendment or repeal, and which empowered it to construct and use a railroad terminating in the city of New Haven, and provided that the construction and use of that part of the road within the limits of the city should be subject to such regulation as the common council of the city should prescribe. After the defendant had constructed its road and built bridges over the same within the city to the acceptance of the city, an act was passed empowering the common council to order them widened in such manner as public convenience might require, and to enforce the order. *Held*, that the act was not unconstitutional as impairing the obligation of the contract of the state with the defendant, or as taking its property without compensation. *English v. New Haven and Northampton R. R. Co.*, 32 Conn., 240. 1864.

3. — The entire duty of erecting and maintaining the bridges having been imposed by the charter, and, by the act in question upon the defendant, the common council in determining when and in what manner the bridges should be altered, would not be an interested tribunal, even if regarded as acting as the agents of the city. *Ib.*

4. — But the common council were acting as the agents of the law and not of the city. *Ib.*

5. Conveyance. As between grantor and grantee, the conveyance of a lot bounded upon a street in a city conveys the land to the center of the street. There is no distinction, in his respect, between the streets of a city and country highways. *Bissell v. New York Central R. R. Co.*, 23 N. Y., 61. 1861.

6. Crossing. Where a dedicated street is

Culverts — Easements and Servitudes.

opened over a railroad obliquely, the court will not interfere with the discretion of the common council in accepting the same, and ordering work to be done thereon, where they are acting within the city charter, and it does not appear that the crossing is unnecessary, and a dangerous obstruction to the company's right to travel. *State v. City of Elizabeth*, 6 Vroom (N. J.), 359. 1872.

7. Culverts. The city of Philadelphia has, by statute, the right to build a culvert over Cohocksink creek. A subsequent act authorizing the North Penn. R. R. Co. to build a railroad from any point north of Vine St., etc., gave no exclusive right to the street, and the city may remove the railway in order to build the culvert. *North Pennsylvania R. R. Co. v. Stone*, 3 Philadelphia Rep. (Penn.), 421. 1859.

8. Dedication; conveyance. As between the grantor and the grantees of certain lots in a city, it is immaterial whether the dedication of the streets along said lots has been accepted by the public or not. *Bissell v. New York Central R. R. Co.*, 23 N. Y., 61, 1861; reversing *Same v. Same*, 26 Barbour (N. Y.), 630, 1858.

9. — One who grants land as bounding on a street, and owns the strip of land so described as a street, cannot be compelled in equity, at the suit of the grantee, to open and maintain the strip as a street fit for travel. *Hennessey v. Old Colony and Newport R. R. Co.*, 101 Mass., 540. 1869.

10. — Under the Spanish Law, servitudes were divided into two classes, *urban*, or those which one house enjoys on another, and *rustic*, or those which one estate enjoys on another. The servitude of view is exclusively *urban* and cannot be acquired by unimproved lands. Where a proprietor of lands dedicates to public use two streets, reserving a strip of land between them, the use made by him of the land so reserved, at the time of the dedication, will not deprive him or his assigns of the right of applying it afterwards to other uses. *French v. New Orleans and Carrollton R. R. Co.*, 2 La. An., 80. 1847.

11. — If the owners of urban property lay off a street through the same, and set it apart as a highway, and it is so used by the public, it is a dedication of the street for the public use. *New Orleans, Jackson and Great Northern R. R. Co. v. Moye*, 39 Miss., 374. 1860.

12. — A dedication will not be presumed from use, for a period of less than ten years, but the jury may say, under proper instructions by the court, whether there has been a dedication or not. *Id.*

13. — A dedication may be inferred from the acts of the owner, but in such cases, the intention of the owner must clearly appear. But it is not proof of dedication that a piece of ground was left open by the owner for a specific purpose, and used by him in the usual course of his business, and that other persons were not excluded from passing through it, or that he has represented it as unenclosed upon a plat on which he has sold other town lots not necessarily connected with that open space. *New Orleans and Carrollton R. R. Co. v. Carrollton*, 3 La. An., 282. 1848.

14. — plat. Upon a village plat, there was a small, triangular space between three streets, not platted as a lot or block, and the court held upon an inspection of the plat, that the whole space was dedicated as a highway, and the supreme court refused to disturb the ruling of the court below. *Sanborn v. Chicago and Northwestern R. R. Co.*, 16 Wis., 19. 1862.

15. — The plat of M.'s addition to a city showed a street on the east side, 40 feet wide. The plat of C.'s addition, afterwards recorded, showed a street on the west side, 40 feet wide. The two together were represented as making one street, 80 feet wide. There was nothing on the plat and no monument on the land to indicate that there was any space between the two, but there was in fact a space of 27 feet between them, belonging to M. The whole space had been used as a street, and lots had been sold with reference to the plats. The additions were platted in 1847 and 1848. Held, that M. and his grantees were estopped from setting up title beyond the actual centre of the street, as against persons who purchased lots on the opposite side of the street, after the recording of the plats, without actual notice of M.'s title to the strip. *Weisbrod v. Chicago and Northwestern R. R. Co.*, 18 Wis., 35, 1864; 20 ib., 419, 1866; 21 ib., 602, 1867.

16. — The owners of a farm, along the edge of which a railroad company owns a strip of said farm fifty feet wide, holding title to it as a right of way, occupying it with its track, cannot dedicate to the public as a street any portion of such strip by any plat that they

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make, nor can they in any way affect the right of such company by any attempted dedication. *Detroit v. Detroit and Milwaukee R. R. Co.*, 23 Mich., 173. 1871.

17. — A plat which purports to have been made for the administratrix upon the estate of the deceased owner of a farm, which lays out no streets, and does not subdivide the property into blocks or city lots, but only into parcels of several acres each, and which was never acknowledged at all, and was apparently made with reference to a contemplated administrator's sale, cannot be a basis of a statutory dedication. (Sess. L. 1839, pp. 162 *et seq.*) *Ib.*

18. — When lands are laid out by the owner in blocks and lots, with streets, either upon a map or by opening and marking out streets upon the ground, purchasers of lots from such owner, by deeds bounding them upon such streets, acquire an easement or right in them, and are entitled to pass over them, and to have them kept open for passage to and from their lots, at least as far as the next open street on each side, and when the streets are taken for public highways, are entitled to have them taken for that purpose without compensation. *Attorney General v. Morris and Essex R. R. Co.*, 4 C. E. Green's Ch. (N. J.), 386, 1869; *ib.*, 575.

19. — The South Cove Corporation, by St. 1833, ch. 17, was not authorized by its charter to establish public highways across its land without the assent of the municipal authorities, by laying out streets not required for convenient access to then existing streets from the railroad stations authorized by that statute to be placed upon its land; and did not create a public street by merely marking it on a plan, and covenanting with owners of adjacent land to lay it out over a place which was covered with tide water until 1850. *Attorney General v. Old Colony and Newport R. R. Co.*, 12 Allen (Mass.), 404. 1866.

20. — The plaintiff, a railway company, incorporated with reservation to the legislature of the right to alter, modify or repeal its charter, laid its track upon lands in an incorporated village, which it had purchased, and for which it had taken a deed in fee simple absolute from the owners. After this, a map was made and filed in a partition suit between third parties, of lands in the village, laying

out, numbering and naming certain streets over the tracks. *Held*, that an act of the legislature which declared that such streets should be recognized as the streets of the village, without a provision for compensating the plaintiff, was not in conflict with the prohibition of the constitution as to taking private property for public use without just compensation. *Boston and Albany R. R. Co. v. Village of Greenbush*, 5 Lansing (N. Y.), 461. 1872.

21. — **condition; user.** Where a street was dedicated to the public with a condition that a certain railway company using the same should comply with all the stipulations of a certain article of agreement, "and that in the event of a breach thereof, said street should instantly revert to" said dedicator. *Held*, that this language clearly withdraws said street from the operation of the dedication intended to be effected as to other streets upon the same plat. *Detroit v. Detroit and Milwaukee R. R. Co.*, 23 Mich., 173. 1871.

22. — To render a dedication *in pais* effectual, there must be an intent to dedicate and an acceptance of the dedication. *Ib.*

23. — User of the street is evidence tending to prove acceptance, but does not constitute it of itself. *Ib.*

24. — User which would warrant the inference of the acceptance of a dedication so peculiar must be very extensive, continuous and general. *Ib.*

25. — Whether such condition had been violated by the company or not, it would have been competent for the grantor or his heirs or assigns, to put an end to the unaccepted dedication. *Ib.*

26. — The fact that the grantor and his assigns had sold lots according to the plat, has no effect upon the rights of the public to the street. *Ib.*

27. — Whatever rights the lot owners might have, were private rights and could not enure to the public. *Ib.*

28. — **prescription.** An open and notorious public use of land as a street for more than ten years, will give the public a right of way without any dedication. *New Orleans and Carrollton R. R. Co. v. Carrollton*, 3 La. An., 282. 1848.

29. **Depot building; adverse possession of street.** Where, for a period of twenty years, a railroad company had been permitted

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to occupy the street of a city in front of the complainant's premises, for a railroad track, under a claim of right without remonstrance or complaint by the complainants, or those under whom they claim, and the railroad company, by such acquiescence, was induced to enter into a lease with the city, binding itself to build a depot and platform, of a width that could add but little to the inconvenience to which the complainants were subjected by the occupation of the street by the track, and from which the company cannot be released, equity will not interfere to prevent the erection. *Higbee v. Camden and Amboy R. R. Co.*, 5 C. E. Green's Ch. (N. J.), 435. 1870.

30. Drainage. A railway was carried through a densely populated village by a deep cut running under the principal street, which crossed it by a bridge, the station being located on the side of the street and supported by the walls of the excavation. The town undertook to construct a drain, which was to discharge the water of the street into the cut under the bridge, to the injury of the wall and railroad. The railroad, in its location and construction, intercepted the natural course of the drainage of the locality, and it was indispensable that a drain be constructed for the street, but it appeared that, at a greater but not unreasonable expense, one could be constructed that would not injure the railroad company. *Held*, that the town ought to be enjoined against the construction of the drain in the manner proposed. *Danbury and Norwalk R. R. Co. v. Town of Norwalk*, 37 Conn., 109. 1870.

31. Grant to railway company. Streets and roads are public highways under the control of cities and towns, subject to the paramount authority of the commonwealth. *Southwark R. R. Co. v. Philadelphia*, 47 Penn. St., 314. 1864.

32. — A mere license, without consideration for the use of a portion of a street by a railway company, may be revoked and the track removed. *Ib.*

33. — The rights of the state under act of March 21, 1831, and the ordinance of the councils of Philadelphia of April 28, 1831, relative to the construction and continuance of a railway through certain streets in said city, were transferred to the Philadelphia and Reading R. R. Co. by the canal commission-

er's deed of Dec. 27, 1850, and the act of the assembly authorizing the sale; the rights of the company, therefore, cannot be defeated except by the exercise of the right of eminent domain accompanied by compensation. *Philadelphia and Reading R. R. Co. v. Philadelphia*, *ib.*, 325.

34. — The only limitation upon the legislative authority and control of the corporation of New York city over the streets within its limits is, that they shall not be appropriated to any use or purpose which is not alike free and common to all travelers. This power cannot be surrendered, either in whole or in part, into the hands of any person or persons, without previous legislative sanction. *New York and Harlem R. R. Co. v. Mayor, etc., of New York*, 1 Hilton (N. Y.), 562. 1858.

35. — A municipal corporation cannot make any valid contract which will interfere with its legislative control over the streets. Such corporations have the right to prohibit the use of steam power upon railways in the streets. *Ib.*

36. — The use of steam engines in the streets of Augusta upon the railway of the Augusta and Summerville R. R. Co. is authorized by the statutes. *Vason v. South Carolina R. R. Co.*, 42 Ga., 631. 1871.

37. — The legislature has power to authorize the building of a railroad within a town or city, or upon a street or other public highway. *Tennessee and Alabama R. R. Co. v. Adams*, 3 Head (Tenn.), 596. 1859.

38. Improvement of streets. Commissioners who have been appointed under the charter of the city of Hudson to make assessments for regulating and improving streets, etc., should ascertain the whole amount of lands benefited, and should report to the common council the amount that each lot assessed is benefited by the improvement. *State v. City of Hudson*, 2 Dutcher (N. J.), 214. 1858.

39. — A council of an incorporated city may, under a general power to cause the streets thereof to be "paved, graded or macadamized," cause sidewalks of plank or other material to be constructed. *Burlington and Missouri River R. R. Co. v. Mt. Pleasant*, 12 Ia., 112. 1861.

40. — A municipal claim cannot be supported against a railway company for paving a street running side by side with the defend-

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ant's railway. *Philadelphia v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 33 Penn. St., 41. 1859.

41. — Section 116 of the act for the organization of cities, etc. (Swan's R. Stat., 985), authorizing the city council to assess the expense of improving a street upon the lots or lands abutting thereon, in proportion to the feet front of said lots or lands, is not unconstitutional. *Northern Indiana R. R. Co. v. Connelly*, 10 Ohio St., 159, 1859; *Baltimore and Ohio R. R. Co. v. Comm'rs Belmont County*, 19 ib., 589. 1869.

42. — Lands appropriated by a railroad company for its track through a city, and crossing the improved street at right angles, and upon which the track was constructed after the work had been completed, is liable to such assessment. *Ib.*

43. — As between the railroad company and the person performing the work (whatever may be the rights of *bona fide* mortgagees of said railroad), the lands so appropriated may be sold to pay such assessment. *Ib.*

44. — By a supplement to the city charter, commissioners are authorized to assess such portion of the damages and expenses of altering or widening a street used by the track of any railroad company, upon the corporation owning or using such track, as to the said commissioners shall seem equitable and just. An assessment made, under this provision of the city charter, against the New Jersey R. R. Co., is a violation of the exemption from taxation contained in § 18 of its act of incorporation. *State v. Newark*, 3 Dutcher (N. J.), 185. 1858.

45. — But an assessment, made under this provision of the city charter, upon houses and lots owned by that company, is not a tax within the meaning of the exemption from taxation contained in the act of incorporation. *Ib.*

46. — The ordinance for improving Clark street, in the city of Chicago, is void, as it confers powers upon the board of public works which could only be exercised by the council. *Lake Shore and Michigan Southern R. R. Co. v. Chicago*, 56 Ill., 454. 1870.

47. — Special authority delegated by legislative enactment to particular persons, or summary proceedings without personal service, to take away a man's property and estate against his consent, must be strictly pursued.

Chicago v. Rock Island R. R. Co., 20 Ill., 286. 1858.

48. — Upon an appeal from the judgment of the county court, confirming the report of the commissioners apportioning expenses for widening a street among the lot owners and railroad corporations, unless the record shows a different state of facts, the presumption is that the expenses were apportioned according to the benefits received by each. *North Beach and Mission R. R. Co., appeal of*, 33 Cal., 499. 1867.

49. — In considering such appeal, it is unnecessary to consider questions arising upon the proceedings for collecting the assessment made for such expenses, or whether the amount assessed is properly made a lien on property, or whether the mode of enforcing payment of the assessment is unconstitutional. *Ib.*

50. — The act of April 4, 1864, giving power to the board of supervisors of San Francisco to widen streets, does not prescribe a rule for the apportionment of the expenses amongst the lot owners different from that prescribed for railroad corporations, and is not therefore, in this respect unconstitutional. *Ib.*

51. Lines of streets. Where, under an act of assembly and an ordinance of the city council of Pittsburgh, the footway or pavement of a street was surrendered to a railroad company, for a specific use, with a proviso for a reversion to the city when the use ceased; and the company conveyed a lot, described as bounded by the line of the street, the grantee covenanting in the deed to locate and erect a building twelve feet from the street line; on an application for an injunction to restrain the erection commenced at the distance of twelve feet from the curb line, *held*, that the line of the street had not been changed by the ordinance and act of assembly; that the house line and not the curb line was the boundary or line of the street; that the erection of the building as proposed could be restrained by injunction. *Pennsylvania R. R. Co. v. Pittsburgh Grain Elevator Co.*, 50 Penn. St., 499. 1865.

52. Obstructions. The remedy against an engineer or agent of a railway company for obstructing the crossings of a public street or road with its locomotives and cars, is exclusively under the act of March 20, 1845; he is

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not liable to indictment at common law. *Commonwealth v. Capp*, 48 Penn. St., 53. 1864.

53. — If a railway company unnecessarily obstructs the streets of a town with its cars, contrary to an ordinance of the town, it will be liable for the penalty prescribed for so doing. *Illinois Central R. R. Co. v. Galena*, 40 Ill., 344. 1866.

54. — The town of Chenoa has the right to prohibit the obstruction of its streets by standing railway trains. *Toledo, Peoria and Warsaw R. R. Co. v. Town of Chenoa*, 43 Ill., 209. 1867.

55. — A mandate will lie to require a railway company having its track upon, along, or across the streets and alleys of a city, to so build and erect the same, and level and grade the said streets and alleys, their full width, as to render their use and the crossing of the track convenient for the public. *Indianapolis and Cincinnati R. R. Co. v. The State*, 37 Ind., 489. 1871.

56. — An injunction to prevent the N. J. Midland R. R. Co. from constructing a railroad so as to obstruct Central Avenue in Hackensack, refused under the facts of the case. *Hackensack Commission v. New Jersey Midland R. R. Co.*, 7 C. E. Green's Ch. (N. J.), 94. 1871.

57. — Plaintiff filed a bill to compel defendant to open and not to obstruct certain streets alleged to have been dedicated by defendant's vendors. The alleged obstruction was in 1845, and the bill was filed in 1851: *Held*, that if plaintiff had a remedy, it was at law; and that if he was at one time entitled to equitable relief, he had been too tardy in presenting his claim. *Brooks v. South Carolina R. R. Co.*, 8 Richardson's Eq. (So. Car.), 30. 1855.

58. — The owner of a lot situated upon a public street may recover damages resulting to his property for the digging and obstructing of the street by a railway company. *New Orleans, Jackson and Great Northern R. R. Co. v. Moye*, 39 Miss., 374. 1860.

59. — To leave cars standing on each side of a public street, so that a space of only twelve feet was left for a passage way for teams, was *held* to be an obstruction of the street. *Great Western R. R. Co. v. City of Decatur*, 33 Ill., 381. 1864.

60. — The rules prescribed by the canal commissioners, the general railroad law and

public policy, are alike opposed to railway carriers using their roads so as to obstruct streets and highways. *Rauch v. Lloyd & Hill*, 31 Penn. St., 358. 1858.

61. — It is error to submit the question to the jury, as to whether an obstruction to the street was inevitable, when the evidence shows that it could have been avoided by the use of proper care. In such case, it is the duty of the court to tell the jury that the obstruction is illegal. *Ib.*

62. — The opening of a street, under the charter, is treated as a distinct proceeding from the laying out of the street. *State v. City of Bayonne*, 6 Vroom (N. J.), 332. 1872.

63. Proceedings for establishment. No petition by the property holders is required by the charter of the city of Hannibal, in order to authorize proceedings for the establishment of streets in that city. *Hannibal v. Hannibal and St. Joseph R. R. Co.*, 49 Mo., 480. 1872.

64. Turnout. In respect to the care, regulation and control of highways within its corporate limits, the city of Philadelphia exercises a portion of the power of eminent domain, subject only to the higher control of the state and the use of the public, and therefore a written license, granted by the city for a valuable consideration, authorizing the holder to connect his property with the city railroad by a turnout and track, is not such a contract as will prevent the city from abandoning or removing said railroad, whenever in the opinion of its authorized authorities such action will tend to benefit the public. *Branson v. Philadelphia*, 47 Penn. St., 329. 1864.

STREET RAILWAYS.

See BRIDGES; CHARTER; CONTRACTS; CORPORATE POWERS; DOLLS; EMINENT DOMAIN; EVIDENCE; INJUNCTION; INJURIES TO PERSONS ON THE TRACK; INJURIES TO PASSENGERS; INSOLVENCY; MECHANIC'S LIENS; PASSENGERS; SUNDAY LAWS; TAXATION.

I. CHARTER AND GRANTS.

II. EMINENT DOMAIN.

III. STREETS — REPAIRS AND IMPROVEMENTS.

IV. AS CARRIERS OF BAGGAGE OR FREIGHT

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- V. OMNIBUS LINES.
- VI. EVIDENCE.
- VII. COLLISIONS.
- VIII. INJURIES TO PERSONS ON THE TRACK.
- IX. INJURIES TO PASSENGERS.
- X. EXPULSION OF PASSENGERS.
- XI. RATES OF FARE.
- XII. MISCELLANEOUS.

1. CHARTER AND GRANTS.

1. **Assignment of a part of franchise.** If the grantee of a franchise to construct a street railway assigns a portion of his franchise, and the assignee enters into possession, the question whether the grantee can thus divide his franchise, is one which concerns the public alone. *Oakland R. R. Co. v. Oakland, Brooklyn, etc. R.R. Co.*, 45 Cal., 365. 1873.

2. **Charter.** A proviso in the charter of a city railway company that its railways shall not "affect the legal right of any other companies," only protects the latter in the use of their roads and the exclusive right to railroad profits, and does not prohibit the construction of a street railway. *Louisville and Portland R. R. Co. v. Louisville City R. R. Co.*, 2 Duvall (Ky.), 175. 1865.

3. — **route.** A provision in a railroad charter that no other *railroad* should be constructed between two named points in a city, cannot be construed as prohibiting the construction of street *railways* anywhere within the city for the convenience of its inhabitants. *Ib.*

4. — **definition.** In a technical sense, a street railway is not a railroad, and in such contradistinctive sense, the term railroad was used in the charter. *Ib.*

5. **Conflicting grants.** A grant of an optional circuit over another road, not having been exercised for eleven years, will be presumed to have been abandoned. *Girard College R. R. Co. v. Thirteenth St. etc. R. R. Co.*, 7 Philadelphia Rep. (Penn.), 620. 1869.

6. **Exclusive right.** A franchise or exclusive privilege must come from the legislature. A municipal corporation cannot, by contract, confer upon individuals the right of constructing and operating street railways for their own individual use or benefit. *Memphis City R. R. Co. v. Mayor of Memphis*, 4 Coldwell (Tenn.), 406. 1867.

7. — A street railway track is private property and cannot be used by persons other than the railroad company by adapting carriages to use upon such track. *Jersey City and Bergen R. R. Co. v. Jersey City and Hoboken R. R. Co.*, 5 C. E. Green's Ch. (N. J.), 61. 1869.

8. — A condition in a city ordinance, granting permission to a street car company to lay a track in a street, on condition that another company might also use the track, is not a contract with such other company. The city has power to release such a contract, and if it does so, the condition cannot again be reenacted without the consent of the company. *Ib.*

9. — If one street railway company, being duly authorized by law, has entered upon and used the tracks of another such corporation, commissioners appointed under St. 1864, ch. 229, to determine the rate of compensation to be paid therefor, to fix the manner and stated period of such use, and the mode of connection of the tracks, may prescribe a rate of compensation founded upon the amount of business of the first corporation over the tracks of the second corporation, and may require accounts to be kept so as to exhibit the amount of such business. *Metropolitan R. R. Co. v. Quincy R. R. Co.*, 12 Allen (Mass.), 262. 1866.

10. — The construction of another railroad through the same streets, embraced in a previous grant to another company, is not in itself an infringement of the franchise of the prior grantees, or an encroachment upon their rights. *Brooklyn City and Newtown R. R. Co. v. Coney Island R. R. Co.*, 35 Barbour (N. Y.), 364, 1861; see *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 *ib.*, 358. 1860.

11. — After a railway company has obtained permission from the common council of New York to lay a railroad through certain streets of the city, and such grant is subsequently confirmed by the legislature, the legislature has the power to grant similar privileges to another company, and to authorize the latter to run upon, intersect or use any portion of the tracks already laid, on condition of making compensation. *Sixth Avenue R. R. Co. v. Kerr*, 45 Barbour (N. Y.), 138, 1864; *Same v. Same*, 23 Howard's Pr. (N. Y.), 382, 1864.

12. — One street railway corporation has no right to use the track of another such cor

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poration for the transportation of passengers in cars, without the authority of such second corporation or of the legislature. *Metropolitan R. R. Co. v. Quincy R. R. Co.*, 12 Allen (Mass.), 262. 1866.

13. — When a railway has been laid down in a public street of a city pursuant to a grant from the legislature and the assent of the municipal authorities, it does not become a part of the street, so as to authorize the public at large, and other railroad corporations, with the consent of the common council, to use the road with the appropriate cars or carriages for the transit of passengers, in common with the owners, of the franchise. *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barbour (N. Y.), 358, 1860; see *Brooklyn City and Newtown R. R. Co. v. Coney Island R. R. Co.*, 35 ib., 364, 1861.

14. — The grant to the Brooklyn City R. R. Co., and its acceptance with the duties and obligations and large expenditures resulting therefrom, invested the company with the right of property in the franchise, of which it could not be deprived without its consent, or against its will. *Ib.*

15. — The Jersey City and Hoboken R. R. Co., under the ordinances of Jersey City, is authorized to use the track of the Jersey City and Bergen R. R. Co. through certain streets in Jersey City. *Jersey City and Hoboken R. R. Co. v. Jersey City and Bergen R. R. Co.*, 6 C. E. Green's Ch. (N. J.), 550. 1870.

16. — The act of 1870 (Stats. 1869-70, p. 786), granting to city councils the power to authorize street railways to be laid down in streets in a city, does not prohibit such councils, when there is one railway track in a street, from granting the right to construct another in the same street. *Oakland R. R. Co. v. Oakland, Brooklyn, etc., R. R. Co.*, 45 Cal., 365. 1873.

17. Extension. The common council of New York City has no power to authorize an extension of a city railroad, unless possibly where such extension is really necessary to the enjoyment of a previous valid grant. *People v. Third Avenue R. R. Co.*, 45 Barbour (N. Y.), 63, 1865; *Same v. Same*, 30 Howard's Pr. (N. Y.), 121, 1865; *Same v. Same*, 31 ib., 687, n.

18. — If it be claimed that such extension is a necessary incident to the principal subject of the grant, that is a question of fact, and

the burden of proving it rests upon the railroad company. *Ib.*

19. Forfeiture. If a franchise is granted by the legislature to construct a street railway within a certain time, with a condition that if the provisions of the act are not complied with, the franchise shall be forfeited, a failure to lay the track within the time limited works a forfeiture of the right to lay the same without a judgment at the suit of the state, declaring a forfeiture. *Oakland R. R. Co. v. Oakland, Brooklyn, etc., R. R. Co.*, 45 Cal., 365. 1873.

20. — A railway company was authorized, by grant from the legislature, to construct and operate a railway through the streets of a city; the common council of the city gave its assent to the construction of the road by the company, upon the route designated in its charter, on certain conditions; held, that the common council had no power to annul or impair the grant to the company on account of its failure to complete the road within the time limited by the conditions annexed to the assent of the common council. *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barbour (N. Y.), 358, 1860; see *Brooklyn City and Newtown R. R. Co. v. Coney Island R. R. Co.*, 35 ib., 364, 1861.

21. — The contract between the city of Jefferson and Joseph Kaiser in reference to street railways — construed. *Young v. Magazine Street R. R. Co.*, 24 La. An., 53. 1872.

22. License. A grant to a corporation to carry passengers in cars over the streets of a city does not necessarily involve exemption from liability to municipal regulation. The right is neither greater nor less than a natural person possesses. *Frankford and Philadelphia R. R. Co. v. Philadelphia*, 58 Penn. St., 119. 1868.

23. — An ordinance of Philadelphia requiring passenger cars to be numbered, and to be licensed on paying a stipulated sum for each car, is a police regulation. *Ib.*

24. — Such ordinance may be passed under an act authorizing the passage of an ordinance for the regulation of omnibuses, etc. *Ib.*

25. — Corporations chartered to do business in a city are to be regarded as inhabitants of the city and subject to its ordinances. *Ib.*

26. — Ordinances of the city of Hoboken, prescribing the manner and times of running horse cars through the streets of said city by

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any corporation which has laid rails for the purpose of running horse cars thereon, and also that a license shall be first taken out under certain penalties therein mentioned; *held*, invalid against the prosecutor holding under its charter, and also under anterior rights derived from the Bergen Turnpike Co., such company having the right to lay rails through the city without the consent of the city council. *State v. City of Hoboken*, 1 Vroom (N. J.), 225. 1863.

27. Municipal corporation. The board of aldermen of the year 1853 could not take up and pass a resolution of the board of assistants of the year 1852, authorizing the construction of a railroad in the streets of a city, and give it effect as a law, without consulting the newly elected body. *Wetmore v. Stury*, 22 Barbour (N. Y.), 414. 1856.

28. — A railroad, constructed in the streets of the city of New York under such a resolution, is unauthorized, and is a public nuisance. *Ib.*

29. — The corporation of New York city is not, by virtue of its general power over the streets of the city, authorized to grant to an association of persons the right to construct and maintain, for a term of years, a railway in one of the streets for the transportation of passengers for private gain; and a resolution of the common council granting such right is void. Overruling *Drake v. Hudson River R. R. Co.*, 7 Barbour (N. Y.), 508, 1849; *Davis v. Mayor, etc., of New York*, 14 N. Y., 506, 1856; and reversing *Same v. Same*, 2 Duer (N. Y.), 663, 1853; see *Same v. Same*, 1 Duer, 451; *Coleman v. Second Avenue R. R. Co.*, 38 N. Y., 201, 1868; *Same v. Same*, 48 Barbour (N. Y.), 371, 1867.

30. — An action does not lie in favor of a resident and taxpayer of the city who does not own real estate on the street where the railway is proposed to be laid, and to whom it will not be specially injurious, to prevent its construction. *Ib.*

31. — notice. Notice of the intention to occupy a street for a railway must be shown to have been given to the city council before the approval or disapproval of the city council can be inferred. *Hestonville, etc., R. R. Co. v. Schuylkill R. R. Co.*, 6 Phila. Rep. (Penn.), 141. 1866.

32. — consent of city. Where the charter of a railway company requires the consent of the city to be obtained before the road is con-

structed, such requirement will be enforced by an injunction. *Philadelphia v. Lombard and South Street R. R. Co.*, 5 Phila. Rep. (Penn.), 248. 1863.

33. — Where a charter was granted to a street railway company for the purpose of building and using a railway in certain streets, subject "to all the ordinances of the councils of the said city," the company, by accepting its charter in the terms in which it was granted, agree to obtain the consent of the councils to its work, agreeably to the ordinances of the city. *Philadelphia v. Lombard, etc., R. R. Co.*, 3 Grant's Cases (Penn.), 403. 1863.

34. — Where an act of the legislature incorporated a street railway company and gave it the power to use the streets, provided the consent of the city should first be obtained, and the city refused its consent, it was *held*, that no subsequent ordinance of the city could revive the privilege nullified by the ordinance of disapproval. *Musser v. Fairmount and Arch Street R. R. Co.*, 5 Penn. Law Jour. Rep., 466. 1858.

35. — A proviso in an act prohibited a company from using any railroad, turnpike or artificial road without obtaining the consent of the "parties owning the same." *Held*, that it could not use the paved streets of Philadelphia without the consent of the councils. Graded and paved streets are artificial roads. *Commonwealth v. Central Passenger R. R. Co.*, 52 Penn. St., 506. 1866.

36. — The charter of a street railway company authorized it to lay its track in the streets of a city, upon first obtaining the consent of the common council. By a supplement, it was positively authorized to construct several tracks specified in the supplement, without any condition or reference to the consent of the common council. *Held*, that as to such tracks, the consent of the council was not necessary. *Mayor of Jersey City v. Jersey City and Bergen R. R. Co.*, 5 C. E. Green's Ch. (N. J.), 360. 1869.

37. — villages. A village, incorporated for the special purpose of being a road district, is not one of the municipal corporations whose consent to the construction of a street railway is required by § 5 of the street railway act of April 10, 1861. 58 O. L., 66. *Cincinnati and Spring Grove Avenue R. R. Co. v. Cumminsville*, 14 Ohio St., 523. 1863.

II. EMINENT DOMAIN.

38. Bridges. If county commissioners are authorized by statute to determine the amount of compensation to be paid by a street railway company for extending its track over a bridge, without any provision whether they should fix upon an annual or gross sum, their determination fixing upon an annual sum will not be quashed, by a writ of *certiorari*; especially if it appears to this court to have been a just determination. *Salem and South Danvers R. R. Co., v. County Com'rs of Essex*, 9 Allen (Mass.), 563. 1865.

39. Compensation. The legislature possesses the power to confer upon a corporation the privilege of building and using a horse railroad in the streets of a city, without the consent of the owners of the soil over which the streets are laid out, and without compensation in damages to such owners. *Brooklyn City and Newtown R. R. Co. v. Coney Island R. R. Co.*, 35 Barbour (N. Y.), 364, 1861; see *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 ib., 358, 1860; *Same v. Same*, 33 ib., 420, 1861.

40. — The federal courts have followed the decisions of the state courts on this question in New York. *Van Bokelen v. Brooklyn City R. R. Co.*, 5 Blatchford (U. S. C. C.), 379. 1866.

41. — Such use, under proper restriction, is not the imposition of an additional easement upon the soil, and compensation need not be made to the adjoining lot owners. *Hinchman v. Paterson R. R. Co.*, 2 C. E. Green's Ch. (N. J.), 75, 1864; *Hogencamp v. Same*, ib., 83, 1864; *Paterson and Passaic R. R. Co. v. Paterson*, 9 ib., 158, 1873; *Elliott v. Fair Haven and Westville R. R. Co.*, 32 Conn., 579, 1860.

42. — The construction and operation of a street railway is no such additional burden upon the owners of the fee of the land as to entitle them to compensation therefor, except where some private right of such owner, as free access to his land or buildings, has been materially impaired thereby. *Hobart v. Milwaukee City R. R. Co.*, 27 Wis., 194. 1870.

43. — The owner of a store has no such a right to the use of the street in front thereof by leaving drays and wagons, with teams attached, standing transversely on the street while discharging goods, as will entitle him to damages against a street railway company for

so constructing its track as to interfere with such use. *Ib.*; see also *Cincinnati and Spring Grove Street Railway Co. v. Cumminsville*, 14 Ohio St., 523, 1863.

44. — This interest of adjoining lot owners is properly protected by the constitution, and subject to be taken or appropriated only upon the condition that compensation is made. *Crawford v. Delaware*, 7 Ohio St. Rep., 459, followed and approved. *Cincinnati and Spring Grove Street R. R. Co. v. Cumminsville*, 14 Ohio St., 523, 1863.

45. — When the public authorities have taken possession of a street or highway, and regularly defined the interests and improvements necessary for the use of the public, by establishing grades, etc., lot owners have the right to make their improvements in reference thereto, and no subsequent change, which obstructs or impairs access to such improvements, can be lawfully made without compensating for the injury. *Ib.*

46. Consent of adjoining owners. Where a city council grants permission to construct a street railway without the consent of the owners of property on the street being obtained as required by the statute, the construction of the railroad may be enjoined at the suit of the property owners on the streets in which it is about to be constructed. *Roberts v. Easton*, 19 Ohio St., 78. 1869.

47. — Where a single track railroad has been lawfully constructed with the requisite consent of the owners of property on the street, and it is afterwards proposed to construct another track on the same street, the consent of any of the property owners to the construction of the first track cannot be counted as an assent to the construction of the second, against those who remonstrate against the additional track. *Ib.*

48. — Where it is necessary that a majority of the property holders on the street shall consent to the construction of the road, it will not be presumed in an application for an injunction by a lot owner, that such consent had not been obtained. *Cincinnati College v. Nesmith*, 2 Cincinnati Superior Ct. Rep., 24. 1870.

49. Constitutional law. The act of April 14, 1860, to confirm a grant or resolution of the common council of the city of New York, passed in 1858, authorizing the construction of a railway in certain streets and avenues in said

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city, was a legal and constitutional exercise of legislative power. *Wetmore v. Law*, 34 Barbour (N. Y.), 515, 1860; see *Same v. Same*, 22 Howard's Pr. (N. Y.), 130, 1860.

50. Extent of rights acquired. The interest which a street railway company has, in the streets through which its track is laid, is a right of way. It has no rights in parts of the street not occupied by its own road, except that common to the rest of the community. *New York and Harlem R. R. Co. v. Forty-second Street R. R. Co.*, 50 Barbour (N. Y.), 285, 1864; see *Same v. Same*, ib., 309; see *Same v. Same*, 26 Howard's Pr. (N. Y.), 68, 1863.

51. Joint use of tracks. Where one street railway company uses the track of another, under a municipal regulation, the company owning the track has the right of way as against the other company. *Jersey City and Bergen R. R. Co. v. Jersey City and Hoboken R. R. Co.*, 5 C. E. Green's Ch. (N. J.), 61, 1869.

52. Nuisance. Laying rails upon a street is not a nuisance. *Peterson v. Navy Yard, etc., R. R. Co.*, 5 Philadelphia Rep. (Penn.), 199, 1863.

53. Turnpike. The construction of a track for a horse railway over a turnpike road, under an agreement with the turnpike company, by a corporation whose charter contains a restriction, making it "void so far as it relates to the right to construct the said road in any town until the act has been accepted by the selectmen," will not be restrained by injunction as a nuisance in a town traversed by the turnpike road, merely because the selectmen of the town have not accepted the charter. *District Attorney v. Lynn and Boston R. R. Co.*, 16 Gray (Mass.), 242, 1860.

III. STREETS — REPAIRS AND IMPROVEMENTS.

54. Control by cities. The city of Louisville can require the tram rail to be substituted for the crescent rail, used in the street railway tracks constructed by the Louisville City R. R. Co., under a contract with the city for the right of way, etc., in which it was stipulated that the most approved rail should be used. *Louisville City R. R. Co. v. Louisville*, 8 Bush. (Ky.), 415, 1871.

55. — The council could not by contract

deprive itself of the power to regulate the reconstruction of railways made necessary by the changes in the character of pavement used upon the streets of the city. *Id.*

56. — The city government has the general power to so regulate the use and enjoyment of private property in the city as to prevent its proving pernicious to the citizens generally. *Id.*

57. — A city, duly authorized to make ordinances for the purpose of regulating city railroad cars, prohibiting nuisances, and preventing and removing obstructions on the streets, is not thereby authorized to interfere, at a specific point, with the tracks or business of a railroad which is established and conducted under a legislative grant. *Brooklyn City R. R. Co. v. Furey*, 4 Abbott's Pr. N. S. (N. Y.), 364, 1867.

58. Gutters — obstructions. A street railway company accepts its charter with an implied condition that it will not injure others by its construction or maintenance, and if injury results therefrom, it must be held responsible for the damages. *Alton and Upper Alton R. R. Co. v. Deitz*, 50 Ill., 210, 1869.

59. Repairs. Street railway companies in San Francisco are only required to keep in repair that part of the street lying between the rails along which the cars run, and between which the horses travel. They are not required to repair that part of the public street lying between a double track. *Robbins v. Omnibus R. R. Co.*, 33 Cal., 472, 1867.

60. — bridges. A street railway company whose charter requires it to repair such portions of all bridges in a city as are occupied by its tracks, is bound to repair such a portion of a bridge which the owner of a canal has built over the canal, and which, as against the city, he is bound to repair; and if, on his refusal, the city makes such repairs, and recovers judgment against him for the expense thereof, and costs, he can recover from the company the amount of the damages recovered by the city against him, but not the costs, unless he defended the suit at the request of the company or for its benefit, or after notice to it to come in and defend. *Proprietors of Locks and Canals v. Lowell R. R. Co.*, 109 Mass., 221, 1872.

61. — contracts. Where one contracts with a city to keep a certain portion of its streets

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in repair in consideration of a license to use in them a street railway, and the streets are not kept in proper repair, and an injury ensues, the city may recover over from the contractor all damages that it may be compelled to pay through such neglect. *Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y., 475, 1872; *Same v. Same*, 8 Abbott's Pr., N. S. (N. Y.), 356, 1870.

62. — The condition of a bond, executed by a railroad company, to a city, in consideration of the privilege of laying its track upon certain specified streets, was that the company should keep the pavements of such streets in thorough repair within the tracks, and three feet on each side thereof. *Held*, that in such action, the proper measure of damages was the amount of a judgment recovered against the plaintiff, by an individual, for personal injuries sustained by him in consequence of the neglect of the company to keep a street in repair, and which judgment the city had been compelled to pay. That the city corporation having notified the company to defend the suit brought against the city, and the company having failed to do so, the expenses of defending such suit were also a proper item in the recovery upon the bond. *Same v. Same*, 57 Barbour (N. Y.), 497. 1870.

63. — By the charter of a passenger railway company, it was not to occupy any of certain streets without the consent of the city councils, and was required to keep so much of the streets as it should use in perpetual good repair. The borough of Birmingham, in an ordinance giving consent to lay the road, required that the street in which it was laid should be kept "in perpetual good order and repair from curb to curb its whole length." *Held*, that under the charter and ordinance, the railroad company was bound to keep the street cleansed from the dirt and filth necessarily or casually accumulating thereon from its ordinary use as a public thoroughfare. *Pittsburgh and Birmingham R. R. Co. v. Birmingham*, 51 Penn. St., 41. 1865.

64. **Pavements.** The city council of St. Louis cannot delegate, to the mayor their powers with reference to repaving the streets of the city. *St. Louis v. People's R. R. Co.*, 43 Mo., 379. 1869.

65. — The rails, sleepers, ties and spikes of a street railway so laid into and attached to the rail as to become a part of the realty, are

real estate, and become liable as other real estate, for an assessment made for the purposes of paying the expenses of paving streets. *New Haven v. Fair Haven and Westville R. R. Co.*, 38 Conn., 422. 1871.

66. — A street railway company occupying a portion of a street with its track and in the use thereof, under a charter, and a contract with the city authorities, has a franchise which is a property of a character to be substantially benefited by the paving of such street, and is liable to assessment therefor. *Chicago v. Baer*, 41 Ill., 306. 1866.

67. — A street railway company in the city of Mobile cannot be compelled to pay any sum as a contribution or assessment to defray the expenses of paving the streets on which its road is built, under § 2 of the act authorizing the construction of street railroads (Acts 1859-60, pp. 261, 262), unless said company has incurred fines to the amount of such assessment under such act. *Mayor of Mobile v. Royal Street R. R. Co.*, 45 Ala., N. S., 322. 1871.

68. — A clause in the ordinance of May 28, 1859, by which the city of Chicago granted to the North Chicago City R. R. Co. the right to construct a railway, the company agreeing to keep certain portions of the streets in good repair, does not make the company liable for an entirely new pavement. The obligation of the company extends to repairs only. *Chicago v. Sheldon*, 9 Wallace, 50. 1869.

69. — A statute directing that a street railway company shall repave the streets, etc., will not authorize a city to require that the pavement shall be made of wood. *City v. Empire Passenger Co.*, 7 Philadelphia Rep. (Penn.), 321, 1869; *City of Philadelphia v. Empire Pass. R. R. Co.*, 3 Brewster's Eq. (Penn.), 570, 1869.

70. **Sewers, etc.** The contract for the right of way, etc., between the city and the Louisville City R. R. Co. provided that the city shall not be liable for any damage "from any delay in the transportation of passengers that may be incurred by the laying of sewers, water or gas pipes," etc. The company refused to take up its track to enable the city to construct a sewer, and thereupon the city caused the track to be taken up and refused to replace it. For thus taking up and refusing to replace the track, the city did not become liable in damages to the railway company. *Louisville City R. R. Co. v. Louisville*, 8 Bush (Ky.), 415. 1871.

As Carriers of Baggage or Freight — Omnibus Lines.

71. — The city did not and could not surrender its right to construct sewers in such portions of its limits as might require them. *Ib.*

72. — The provision contained in plaintiff's charter, which prohibits the mayor, etc., of the city of New York from doing "any act to hinder, delay or obstruct the operation" of the railroad authorized by said act to be constructed, is to be so construed as to prohibit the city corporation from obstructing the operation of the railroad by any act, the sole purpose of which is thus to obstruct it; but not so as to prevent the city from completing a general plan for sewerage. *Dry Dock, etc., R. R. Co. v. Mayor, etc., of New York*, 55 Barbour (N. Y.), 298. 1869.

73. SNOW. The power of making regulations providing for the removal of snow from the tracks of street railways is given by law exclusively to the mayor and aldermen of the cities, and the selectmen of the towns, in which such tracks are located; and in the exercise of this power they may prohibit the removal of snow by the railway company at any and all times and places, when, in their judgment, the public interests involved may require it. *Union R. R. Co. v. Cambridge*, 11 Allen (Mass.), 287. 1865.

74. — Where a street railway company agreed to hold a city harmless from all damages arising from the neglect of the company to keep certain portions of the street in repair, and an action was brought against the city for damages arising from the neglect of the company to keep such portion of the streets clear of snow, and in such suit, the city notified the railway company to appear and defend; *held*, that the railway company was liable for the amount recovered against the city in such action. *Mayor, etc., v. Troy and Lansingburg R. R. Co.*, 3 Lansing (N. Y.), 270. 1870.

75. Two railways using the same street. Under § 3 of the act of March 3, 1869, regulating the amount of taxes to be paid by street railways of the city of St. Louis (Sess. Acts 1869, p. 207), corporations having parallel tracks on the same street are not liable for the expenses of repairing the street between the tracks. *St. Louis v. St. Louis R. R. Co.*, 50 Mo., 94. 1872.

76. Widening. The right of way of a street railway company is property, and is capable

of being enhanced in value by the widening of the street, and the company is liable for its just proportion of the expenses of such widening. *North Beach and Mission R. R. Co., Appeal of*, 32 Cal., 499. 1867.

IV. AS CARRIERS OF BAGGAGE OR FREIGHT.

77. Merchandise. In an action against a street railway company to recover for the loss of a box of merchandise delivered to it to be carried for hire, on the front platform of one of its cars, the plaintiff, for the purpose of showing it to be a common carrier of goods, may prove that other persons had paid money to its conductors, with the knowledge of its superintendent, for the carriage of merchandise. *Levi v. Lynn and Boston R. R. Co.*, 11 Allen (Mass.), 300. 1865.

78. Satchel. The plaintiff left her satchel in the defendant's street car, containing articles valued at \$100. The conductor's attention was called to the fact, and he took charge of it, and upon the return trip placed it in the care of the receiver of the road, by whom it was delivered to a person who had no right or claim to it. *Held*, that the defendant was a bailee for hire while the property remained in its custody. *Morris v. Third Avenue R. R. Co.*, 23 Howard's Pr. (N. Y.), 345, 1862; *Same v. Same*, 1 Daly (N. Y.), 202, 1862.

V. OMNIBUS LINES.

79. Compensation to owners of omnibus lines. The statute providing for compensation to the owners of omnibus lines by the purchase of their stock where the streets are to be occupied by street railways, construed to render the railway companies liable, without it first appearing that the entire line of streets had been occupied by such railways. *Deschamps v. Second and Third Street R. R. Co.*, 3 Philadelphia Rep. (Penn.), 279, 1858; see *Whitson v. Philadelphia, etc., R. R. Co.*, *ib.*, 284.

80. — On the refusal of a street railway company to purchase the property of an omnibus line, as required by statute, the owners of the omnibus line neither tendered the property or resorted to a resale within a reasonable time, but sued for damages, and refused to join in

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the appraisement. *Held*, that the damages should be strictly commensurate to the injury sustained. *Moore v. Green and Coates' Street R. R. Co.*, 4 Philadelphia Rep. (Penn.), 261. 1861.

81. — The award of a majority of the appraisers to assess such property is valid. *Moore v. Green and Coates Street R. R. Co.*, 3 Philadelphia Rep. (Penn.), 417. 1859.

VI. EVIDENCE.

82. **Construction of street railways; experts.** A question as to the usual method of constructing street railways, prefaced by an inquiry whether the witness had observed the manner of construction, is not one calling for the special knowledge or skill of an expert. *Carpenter v. Central Park, North and East River R. R. Co.*, 11 Abbott's Pr., N. S. (N. Y.), 416. 1872.

83. **Declarations.** In an action brought under the statute to recover damages for a willful injury inflicted by a driver of a street car, the declarations of the driver are not proper evidence against the defendant unless it appear affirmatively that they were made at the time the injury was inflicted. *Whitaker v. Eighth Avenue R. R. Co.*, 51 N. Y., 295. 1873.

84. — The statute in relation to such cases, R. S., 695, does not apply to street railways. *Id.*

VII. COLLISIONS.

85. **Collision with team.** Where the driver of a cart, driving along a track immediately in front of the horses attached to a car, suddenly turns off the track at a right angle, and the car collides with the cart, the owner of the cart cannot recover for the injury. *Adolph v. Central Park, etc., R. R. Co.*, 1 Jones and Spencer (N. Y.), 186. 1871.

86. — The liability of a street railway company for a collision with a team decided with reference to the facts of a particular case. *Cook v. Metropolitan R. R. Co.*, 98 Mass., 361. 1867.

87. — **presumption.** It being clearly evident that when a cartman's cart and a railway car are progressing side by side in the same direction, with a space of 16 or 24 inches between them, there can be no collision if each adheres to the track which the law assigns to

it, in case a collision does occur, the presumption of negligence is altogether against the driver of the cart. *Suydam v. Grand Street and Newtown R. R. Co.*, 41 Barbour (N. Y.), 375, 1864; *Same v. Same*, 17 Abbott's Pr. (N. Y.), 304, 1864.

88. **Rights of railway companies.** A street railway company has only an equal right with the traveling public to the use of the street where its track is laid, with a few exceptions, such as, that the cars run on a track, and when a vehicle meets a car it must give way. *Shea v. Potrero and Bay View R. R. Co.*, 44 Cal., 414. 1872.

VIII. INJURIES TO PERSONS ON THE TRACK.

89. **Accidental fall.** A person in crossing the track is not required to anticipate the possibility of an accidental fall at an ordinary crossing. *Mentz v. Second Avenue R. R. Co.*, 3 Abbott's Ct. of Ap. Dec. (N. Y.), 274. 1869.

90. — The plaintiff in the exercise of ordinary care was passing across a public street. She had sufficient time to cross defendant's railway before the cars would reach her, but by an accident slipped and fell upon the track and was run over by the horses and car. *Held*, that the company was liable for the damages. *Baxter v. Second Avenue R. R. Co.*, 30 Howard's Pr. (N. Y.), 219, 1865; *Same v. Same*, 3 Robertson (N. Y.), 510, 1865; see also *Aaron v. Second Avenue R. R. Co.*, 2 Daly (N. Y.), 127, 1867.

91. **Children.** In operating a street railway, care should be taken to avoid injury to children and those persons whose age and infirmities commend them to consideration and care. *Pendril v. Second Avenue R. R. Co.*, 43 Howard's Pr. (N. Y.), 399. 1872.

92. — To enable a party to recover for injuries inflicted by a street car to a child in the street, it must appear affirmatively that the injury was the result of the fault or negligence of the driver. *Klein v. Crescent City R. R. Co.*, 23 La. An., 729. 1871.

93. — A street railroad company is liable for damages, if through the negligence of the driver, a boy is run over and injured. The fact that the child failed to get out of the way will not be considered in mitigation of damages if the car was, at the time, being driven at an unlawful or unusual rate of speed.

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Barksdull v. New Orleans and Carrollton R. R. Co., 23 La. An., 180. 1871.

94. — It is no defense that the boy was in the streets alone, if the evidence shows that he was physically and mentally capable of taking care of himself. *Ib.*

95. — In an action for damages for a personal injury it is not an immaterial allegation that the defendant had no lawful right to run its cars on that portion of the street where the injury was done. *Schierhold v. North Beach and Mission R. R. Co.*, 40 Cal., 447. 1871.

96. — Evidence to prove that it was the custom of the inhabitants of the locality to allow boys to play in the street, does not tend to prove that such use of the street is lawful. *Ib.*

97. — Evidence that the cars of another company were driven down the same grade at a less rate of speed is inadmissible. *Ib.*

98. — It is not actionable negligence for those in charge of a street car to fail to prevent a child of tender years from approaching, unseen by them, the side of the car (after the horses and front part of the car had passed), and so to fall under the car and receive an injury. *Bulger v. Albany R. R. Co.*, 42 N. Y., 459. 1870.

99. — The escape of a child into the street, through an open window coming to within four feet of the floor, this being his only means of egress, the doors being locked, will not warrant the conclusion, as a matter of law, that the parent was guilty of negligence. *Mangam v. Brooklyn R. R. Co.*, 38 N. Y., 455, 1868; *Same v. Same*, 36 Barbour (N. Y.), 230, 1862.

100. — Whether it is negligence for parents to permit a child of seven years old to play in the streets unattended is a question to be properly left to the jury. *Schierhold v. North Beach and Mission R. R. Co.*, 40 Cal., 447. 1871.

101. — If such act be negligence, it does not relieve the defendant from liability for an injury occasioned by the gross negligence of its employé. *Ib.*

102. — The fact that a street is made for travel does not justify a trespass upon the person of one who is there for other purposes. *Ib.*

103. — The fact that a child of two years old is crossing a public street unattended in a city, traversed by a horse railway, is, in and of itself, necessarily, *prima facie* evidence of neglect in those who have it in charge.

Wright v. Malden and Melrose R. R. Co., 4 Allen (Mass.), 283. 1862.

104. — The negligence of a parent or other person who has the care of a child of tender years has the same effect in preventing the maintenance of an action by the child for an injury occasioned by the negligence of other, that his own want of due care would have if the plaintiff were an adult. *Ib.*

105. Contributory negligence. Though the driver be at fault, the party injured cannot recover if he failed to exercise a reasonable degree of prudence and caution. *Mercier v. New Orleans and Carrollton R. R. Co.*, 23 La. An., 264. 1871.

106. — Where an adult is injured by a street car while crossing the street, it is not incumbent on him to show the use of due care and caution. Contributory negligence is a defense to be proved by the company. *Railroad Co. v. Gladmon*, 15 Wallace, 401. 1872.

107. The caution required by the employés of the company depends upon the circumstances of each case; and a different degree of care on the other hand is required from an adult from what is required from a child. *Ib.*

108. — In an action brought to recover damages for personal injuries sustained by the plaintiff by reason of the negligence of the driver of a street car belonging to the defendant, held, that the judge was justified in refusing to charge that the failure of the plaintiff to look up and down the street before attempting to cross the track to see if a car was approaching, was negligence on his part, precluding his recovery. *Mentz v. Second Avenue R. R. Co.*, 2 Robertson (N. Y.), 356. 1864.

109. Crossing with teams. Although the public have the right to drive upon the track of a street railway, more care should be exercised in such a locality than in other portions of the street. *Wilbrand v. Eighth Avenue R. R. Co.*, 3 Bosworth (N. Y.), 314. 1858.

110. — The fact that a traveler upon a high way sees that an obstacle therein is dangerous to persons attempting to pass it, is not conclusive that he does not use due care in making the attempt. *Mahoney v. Metropolitan R. R. Co.*, 104 Mass., 73. 1870.

111. Defects in laying track. A street railway company is responsible for an accident which could not have occurred except from the improper laying of a rail, even

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though the municipal authorities were also negligent to the same extent in improperly paving the street. *Carpenter v. Central Park, etc., R. R. Co.*, 4 Daly (N. Y.), 550, 1872; *ib.*, 11 Abbott's Pr., N. S., 416.

112.—A street railway company is liable for injuries to persons or animals, caused by laying its track in a defective manner so as to leave holes or projecting spikes. *Fash v. Third Avenue R. R. Co.*, 1 Daly (N. Y.), 148, 1861; *Worster v. Forty-second Street R. R. Co.*, 3 *ib.*, 278, 1870.

113. Degree of care required. While the employes of a street railway company are bound to the highest degree of care and prudence, in the management of the teams attached to their cars, with a view to secure the safety of their passengers, a different rule prevails in respect to members of the general public, between whom and the company no relation arising out of contract, express or implied, exists. As to such persons, the employes of the company are only bound to exercise what amounts, under all the circumstances of the case, to ordinary care and prudence. *Pendleton Street R. R. Co. v. Shires*, 18 Ohio St., 255. 1868.

114. Driving on the track. The plaintiff's cart was struck by the car of the defendant, as the plaintiff was turning off from the track to the left. *Held*, that this of itself did not put him in the wrong; the statute requiring carriages, when meeting in the highway, to turn to the right, has no application to the meeting of railroad cars with common vehicles in the streets of a city. *Hegan v. Eighth Avenue R. R. Co.*, 15 N. Y., 380. 1857.

115. Particular case. Facts upon which a city railroad company was *held* liable for injuries to a passenger, in a collision with a car of another company at a crossing, the defendant's driver having quickened his speed, to get by first, when he had not the right of way. *Barrett v. Third Avenue R. R. Co.*, 8 Abbott's Pr. N. S. (N. Y.), 205, 1869; *Same v. Same*, 1 Sweney (N. Y.) 568, 1869.

116. Pleading. In an action against a street railway company, to recover damages for a personal injury, the plaintiff may set forth his case in different ways in different counts, charging the defendant with running upon him while he was in the highway, with committing an assault and battery upon him, and

with compelling him to leap from the car while it was in motion, whereby he was thrown down and injured. *Lovett v. Salem and South Danvers R. R. Co.*, 9 Allen (Mass.), 557. 1865.

117. Rate of speed — city ordinance. In such action, the plaintiff may introduce in evidence a city ordinance, regulating and limiting the speed of cars upon horse railroads, which has been served upon the defendants, with proof that, at the time of the injury complained of, the defendant's servant was driving at a greater rate of speed. *Wright v. Malden and Melrose R. R. Co.*, 4 Allen (Mass.), 283. 1862.

118. Runaway team. If a street railway company uses the method in general use, and which has been found usually adequate and safe, its duty is discharged. *Unger v. Forty-Second Street R. R. Co.*, 51 N. Y., 497. 1873.

119.—In an action brought against a railway company, to recover damages for injuries to the plaintiff, caused by a pair of horses belonging to the defendant, which had got detached from one of its cars, running away and knocking down and running over the plaintiff, through the alleged negligence of the defendant and its servants, the question is, not whether a particular attachment (if used) would have prevented the accident, but whether the attachment actually used was without apparent defect, and adequate, in the ordinary employment of the vehicle, considering the dispositions of horses used. *Unger v. Forty-Second Street, etc., R. R. Co.*, 6 Robertson (N. Y.), 237. 1868.

120. Walking on the track. A person is entitled to walk upon a street railway in a public street, using usual care and prudence to avoid injuries; but he is not required to abandon the track in order to avoid possible injuries which may result from the carelessness of the company, and if he is injured by the carelessness of the company while walking on the track, the fact that he might have walked by the side of the track is not contributory negligence on his part. *Shea v. Potrero and Bay View R. R. Co.*, 44 Cal., 414. 1872.

IX. INJURIES TO PASSENGERS.

121. Children. The facts with relation to injuries sustained by a child — considered. Less care is required of a child than an adult. *Mowrey v. Central City R. R. Co.*, 51 N. Y., 606. 1873.

Injuries to Passengers.

122.—The passenger being a boy of eight years, it is not, as matter of law, negligence in his parent to send him out without a protector. *Drew v. Sixth Avenue R. R. Co.*, 26 N. Y., 49. 1862.

123. Collision. In an action brought against a street railway company for injuries sustained by the plaintiff while a passenger upon one of its cars, it appeared that, on the arrival of the car at the crossing of a steam railroad, it stopped to allow a train of the latter company to pass by, and that, after said train had passed, the flagman of the latter company signaled the driver of the street car to go ahead, which he did, but before he had crossed with his car, the other train backed up, and a collision occurred, whereby plaintiff was injured. *Held*, that proof of the fact that the driver had been directed by his superiors to obey the signals of such flagman, did not convert the flagman into an agent of the defendant. *Chicago R. R. Co. v. Volk*, 45 Ill., 175. 1867.

124.—The tracks of two street railroad companies crossed each other at an acute angle; a car upon each track was approaching the intersection from opposite directions; and a collision occurred. *Held*, that if the acts of the defendant's servants contributed to the injury, the defendant was liable, although the negligent acts of the persons in charge of the other car also were contributory. *Barrett v. Third Avenue R. R. Co.*, 45 N. Y., 628. 1871.

125. Contributory negligence. In an action against a carrier, under the statute for the better security of life, etc. (1 R. C., 647), if the deceased was killed by reason of his taking voluntarily a dangerous and improper position, the carrier is not liable. *Huelsenkamp v. Citizens' R. R. Co.*, 34 Mo., 45. 1863.

126.—It is negligence on the part of a passenger to get upon a street car that is already too crowded to allow him to ride safely. *Tregear v. Dry Dock, etc., R. R. Co.*, 14 Abbott's Pr., N. S. (N. Y.), 49. 1872.

127. Defective construction. A street railway company is responsible for an accident which could not have occurred except for the improper laying of a rail, even though the municipal authorities were also negligent to the same extent in improperly paving the street. *Carpenter v. Central Park, North and*

East River R. R. Co., 11 Abbott's Pr., N. S. (N. Y.), 416, 1872; 4 Daly, 550.

128. Getting off the car. Where hoop skirts are worn by such passengers as a railway company is in the habit of conveying, the company is bound to provide for the safety of passengers wearing such garments. So *held* in a case where the plaintiff was injured by her hoops catching upon a nail projecting from the platform of the car as she was about to alight. *Poulin v. Broadway, etc., R. R. Co.*, 2 Jones & Spencer (N. Y.), 296. 1872.

129.—While passengers have no right to jump off the car while in motion, or to make an attempt to do so, yet they are authorized to prepare to leave, when there is evidence of an intention to stop the car. *Nichols v. Sixth Avenue R. R. Co.*, 38 N. Y., 131. 1868.

130.—A driver is acting in the line of his duty in helping a child or infirm person on or off the car, and the company is liable for the negligence of a driver in this respect. *Drew v. Sixth Avenue R. R. Co.*, 1 Abbott's Ct. of Ap. Dec. (N. Y.), 556. 1867.

131.—Crippled persons are entitled to more consideration on account of their infirmities, and should be given a reasonable time to alight from the cars. *Colt v. Sixth Avenue R. R. Co.*, 1 Jones and Spencer (N. Y.), 190. 1871.

132.—The effect and intention of the act concerning street railways, approved January 16, 1860, is that when the injury to the passenger is occasioned by his getting on or off the car at the forward platform, it shall be presumed as a matter of law that the negligence of the passenger himself contributed to produce the injury. *McKeon v. Citizen's R. R. Co.*, 42 Mo., 79. 1867.

133.—It is negligence on the part of a passenger to attempt to get off of a street car as the driver is about to start the car, without first attracting the driver's attention. *Dickson v. Broadway, etc., R. R. Co.*, 1 Jones and Spencer (N. Y.), 330. 1871.

134.—The refusal or neglect of the driver of a street car to stop the same, so as to enable a passenger to descend safely, will not justify the latter in incurring an extra hazard, by descending from the car while it is in rapid motion. *Ginnon v. New York and Harlem R. R. Co.*, 3 Robertson (N. Y.), 25, 1864; *Solomon*

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v. Central Park R. R. Co., 1 Sweeny (N. Y.), 298, 1869.

135. — Where the driver is notified by a passenger to stop the car, and does so partially, and then starts on again without notice, he is chargeable with negligence. *Nichols v. Sixth Avenue R. R. Co.*, 38 N. Y., 131, 1868; see *Same v. Same*, 10 Bosworth (N. Y.), 260, 1863.

136. — It cannot be stated as a general rule that a passenger who leaves a street car while in motion, and is thereby injured, is guilty of negligence as a matter of law. *Mettestadt v. Ninth Avenue R. R. Co.*, 32 Howard's Pr. (N. Y.), 428. 1866.

137. — Carriers are bound to carry those whom they take into their coaches with the utmost care and diligence of very cautious persons. *Maverick v. Eighth Avenue R. R. Co.*, 36 N. Y., 378. 1867.

138. — Persons running a street car are bound to know where, under the circumstances, it is prudent to stop the car, and to bring a passenger upon the platform to get off the same. *Ib.*

139. Getting on the car. The act of the driver or brakeman of a street car in assisting a passenger to get on board is in the course of his employment, and the principal is liable for negligence in its performance. *Drew v. Sixth Avenue R. R. Co.*, 26 N. Y., 49. 1862.

140. — The sufficiency of the pleadings determined in a particular case. *Winterson v. Eighth Avenue R. R. Co.*, 2 Hilton (N. Y.), 389. 1859.

141. Negligence. The question of negligence of a driver of a street railway car, discussed with reference to the circumstances of a particular case. *Mulhado v. Brooklyn City R. R. Co.*, 30 N. Y., 370. 1864.

142. Oversetting of car. Where a car, propelled by horse power on a street railway, was upset and thrown from the track over an embankment, whereby the plaintiff, who was one of the passengers, was injured — in an action against the company to recover damages for such injury, the burden of proof is on the defendant to show that the accident was not occasioned by its fault or the fault of its agent. *Louisville and Portland R. R. Co. v. Smith*, 2 Duvall (Ky.), 556. 1866.

143. Particular case. In this cause, the judgment was reversed and a new trial grant-

ed upon the facts of the case. *Dickson v. Broadway and Seventh Avenue R. R. Co.*, 41 Howard's Pr. (N. Y.), 151. 1870.

144. Passengers standing on the track. The fact that no one, without some previous knowledge, can be expected to provide against the contingency of a car, with the railway upon which it stands, coming upon him by a side movement, imposes upon a railway company great care in moving its cars from one track to another in that unusual manner. *Gordon v. Grand Street and Newtown R. R. Co.*, 40 Barbour (N. Y.), 546. 1863.

145. Persons riding free. If a person riding with due care on the platform of the horse-car of a street railway, not as a passenger for hire, but by invitation of the driver, and without collusion with him to defraud the corporation, is injured through his negligence in driving the car, the corporation is liable. *Wilton v. Middlesex R. R. Co.*, 107 Mass., 108. 1871.

146. Pushing a passenger off the car. To entitle a passenger to recover against the carrier for being pushed off the platform of a street car, it must appear that an employé of the railway company did the wrongful act. *Pixley v. Third Avenue R. R. Co.*, 1 Jones & Spencer (N. Y.), 406. 1871.

147. Rules and regulations. A regulation of a city passenger railway company, prohibiting passengers from getting on or off at the front end of any car, and requiring them to enter and descend by the rear platform only, is a reasonable regulation, and knowingly to violate it, without the compulsion of some existing necessity, is conclusive evidence of negligence on the part of the passenger; so that, should he sustain an injury in consequence thereof, he will have no right of action against the company, notwithstanding the driver may also have been negligent. The circumstance, that a driver or conductor may have given permission thus to use the front platform, is immaterial; for the company cannot be bound by the act of its servant in attempting to dispense with a known and positive regulation. *Baltimore City R. R. Co. v. Wilkinson*, 30 Md., 224. 1868.

148. Runaway team. Plaintiff, while riding in one of defendant's street cars, was injured in consequence of a runaway team of horses belonging to defendant, running into the rear of the car in which she was sitting.

Injuries to Passengers.

It was proved that the runaway horses had been worked together every day for more than six weeks previous to the accident, had given entire satisfaction, and were considered perfectly safe. It appeared that the driver of them was not in good health, but there was nothing to show that his disease was such a one as prevented him from performing his duties as driver. *Held*, that there was no evidence of negligence on the part of the defendant. *Quinlan v. Sixth Avenue R. R. Co.*, 4 Daly (N. Y.), 487. 1878.

149. Standing on the platform. When a passenger is received and his fare taken, it is not negligence *per se* for such person to stand upon the front platform of a street car, provided there is no room for him elsewhere. *Hadencamp v. Second Avenue R. R. Co.*, 1 Sweeny (N. Y.), 490. 1869.

150. — The court cannot say, on a bill of exceptions, that riding upon the outside platform of a street car is such a want of ordinary care as to prevent a recovery for an injury sustained by being thrown therefrom. *Meessel v. Lynn and Boston R. R. Co.*, 8 Allen (Mass.), 234. 1864.

151. — Where the deceased was compelled by the defendant's conductor to stand upon the platform of a crowded car, and, while there, was thrown from the car by the hasty and careless departure of another passenger; *held*, that the wrongful act of such passenger did not relieve the defendant from the consequences of the wrongful act of placing deceased upon the platform. *Sheridan v. Brooklyn City and Newtown R. R. Co.*, 36 N. Y., 39, 1867; *Same v. Same*, 34 Howard's Pr. (N. Y.), 217. 1867.

152. — A passenger stood upon the edge of the platform of a street car, without holding on to anything, and with knowledge of the bad condition of the street and track, and maintained such position after an opportunity had been given him to exchange it for a safer place, and was injured by being thrown off the car. *Held*, that the railway company was not liable for the injury. *Ward v. Central Park, etc., R. R. Co.*, 11 Abbott's Pr., N. S. (N. Y.), 411. 1871.

153. — It seems, that when it appears that a passenger is riding upon the platform of a car in a place of danger, his negligence is *prima facie* established. *Clark v. Eighth Ave-*

nue R. R. Co., 36 N. Y., 135, 1867; *Same v. Same*, 34 Howard's Pr. (N. Y.), 315, 1867; *Same v. Same*, 32 Barbour (N. Y.), 657, 1860.

154. — But upon showing that the car and platform were full of passengers, with no room for more, and that the conductor called for, and received the fare from such passenger, the presumption is rebutted. *Ib.*

155. — The front platform of a street car is a place of danger. The occupation of such platform by a passenger is *prima facie* evidence of negligence on his part, and the onus is on him to rebut the presumption. *Solomon v. Central Park, etc., R. R. Co.*, 1 Sweeny (N. Y.), 298. 1869.

156. — It is negligence for a passenger to stand on the edge of the platform of a street car, without holding on to anything, when the streets are icy. *Ward v. Same*, 1 Jones and Spencer (N. Y.), 392. 1871.

157. — Under the common law, the fact that a street railway passenger voluntarily puts himself on the front platform of the car, when there is room inside, will not absolve the company from liability for injuries there received by him. *Burns v. Bellefontaine R. R. Co.*, 50 Mo., 139. 1872.

158. Willful act of driver. A female passenger, desiring to alight, passed out upon the platform and requested the conductor to stop the car, and refused to get out until the car had come to a full stop; whereupon, and while the car was in motion, the conductor threw her from the car with great violence, whereby she was seriously injured. *Held*, that the act was a wanton and willful trespass, not in the performance of any duty to, or of any act authorized by defendant, and that defendant was not liable. *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y., 122. 1871.

159. — The conductor of a street car is not the driver of a "carriage," within the meaning of § 6, 1 R. S., 696, which makes the owners of carriages running upon the highway for the conveyance of passengers, liable for all injuries or damages done by a driver while driving such carriage, whether the act was willful or negligent. *Ib.*

160. — A boy riding on a street car was willfully and wantonly struck by the driver, and thereby thrown off the car, the car wheel passed over him. *Held*, that the company was not liable for the act of the driver in striking

Expulsion of Passengers.

the boy but it was liable for negligently driving over him. *Pittsburgh, Allegheny and Manchester R. R. Co. v. Donahue*, 70 Penn. St., 119. 1871.

161. — A master is liable for the willful conduct of his servant within the scope of his authority. *Ib.*

162. — Street railway companies are not responsible for the crimes of an employé; nor liable for his acts of willful and malicious trespass. They are only answerable for his negligence, or incapacity, or unskillfulness, in the performance of the duties assigned to him. *McKeon v. Citizens' R. R. Co.*, 42 Mo., 79. 1867.

163. — The driver of a street car having the right to put a person off the car, the company will be liable for his acts in doing so, even if his act should be malicious and willful. *Meyer v. Second Avenue R. R. Co.*, 8 Bosworth (N. Y.), 305. 1861.

X. EXPULSION OF PASSENGERS.

164. **Colored persons.** The plaintiff, a colored person, was ejected with some force from the car of defendant, but suffered no appreciable damage. Immediately after, she was conveyed upon another of defendant's cars to her place of destination. No evidence of ill will or malice was shown upon the part of the company, nor was there any proof that the defendant approved of the act of the conductor in advance, or afterwards. Plaintiff obtained a verdict of seven hundred and fifty dollars. *Held*, that the company was liable in any event for all actual damages sustained; that the company was not liable for the willful or malicious acts of the conductor, done without its authority or subsequent approval; that to recover punitive damages, it should appear that the act was authorized, or subsequently approved; that the damages were excessive. *Turner v. North Beach and M. R. R. Co.*, 84 Cal., 594. 1868.

165. — The plaintiff, a colored person, hailed the conductor of a street car, requesting him to take her on board. The conductor refused to admit her on account of her color. The plaintiff was ready and willing to pay her fare, and there was ample room in the car. There was no proof of special damage. The plaintiff

obtained a verdict for five hundred dollars. *Held*, that as there was no evidence of malice, ill will or wantonness, there was no ground for exemplary damages, and that the verdict was excessive; that the plaintiff was entitled to nominal damages in the absence of proof of actual damage. *Pleasants v. North Beach and M. R. R. Co.*, 84 Cal., 586. 1868.

166. **Children not paying fare.** If a boy ten years of age wrongfully gets upon a street car while it is in motion, without the intention or means of paying fare, and is not at once removed, but is wrongfully allowed by the servants of the railway company to remain there for a time, and the driver afterwards, while driving at such a rate of speed as to make it dangerous for the boy to leave the car, orders him to jump off, and the boy does so, using reasonable care, and is injured, he may maintain an action against the company to recover damages. *Lovett v. Salem and South Danvers R. R. Co.*, 9 Allen (Mass.), 557. 1865.

167. — This court cannot decide, on a bill of exceptions, that permitting a boy of ten years old to be in the street with other boys after dark is such negligence as to prevent him from recovering damages for a personal injury sustained by him from being wrongfully compelled to leave a street railway car while the same was in motion, although he had wrongfully got upon the same. *Ib.*

168. **Right of expulsion.** The conductor of a street car may exclude or expel therefrom a person who, by reason of intoxication or from other cause, is in such a condition as to render it reasonably certain that by act or speech he will become offensive or annoying to other passengers therein, although he has not committed any act of offense or annoyance. *Vinton v. Middlesex R. R. Co.*, 11 Allen (Mass.), 304. 1865.

169. **Wrongful expulsion.** A street railway company is liable for the wrongful act of one of its conductors in ejecting a passenger from its cars. *Passenger R. R. Co. v. Young*, 21 Ohio St., 518. 1871.

170. — Where a passenger on a street car, enters the car near one end of the route and pays full through fare, he is entitled to go through without any further payment of fare. *Hamilton v. Third Avenue R. R. Co.*, 44 Howard's Pr. (N. Y.), 294. 1872.

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XI. RATES OF FARE.

171. Charter. A provision in the charter of a street railway company that, at any time after the expiration of ten years from the opening of any part of the road for use, a city may purchase of the corporation so much of the corporate property as lies within its own limits, at a specified price, does not give to the city any such interest or right as to enable it to maintain a bill in equity to restrain the corporation from raising passenger fares upon its road, in violation of conditions expressly assented to by the corporation, although the value of the franchise and property will be thereby diminished. Nor can the mayor and aldermen of the city maintain such bill. *Cambridge v. Cambridge R. R. Co.*, 10 Allen (Mass.), 50. 1865.

172. The statute fixing the rates of fare for passengers and baggage does not apply to street railways. *Hoyt v. Sixth Avenue R. R. Co.*, 1 Daly (N. Y.), 528. 1866.

XII. MISCELLANEOUS.

173. Contributions in aid of; damages. Where contributions are made to secure the building of a street railway, and the regular running of cars thereon a specified number of daily trips, the company receiving such contributions may stipulate that the damages for a failure to comply with these conditions shall be the sum contributed and interest thereon from the date of failure. *Crown Hill R. R. Co. v. Armstrong*, 39 Ind., 418. 1872.

174. Injury to horses. A person on horseback or on foot, moving on the track of a street railway, should look out for the cars and turn off in time to avoid a collision. *Jatho v. Green and Coates Street R. R. Co.*, 4 Philadelphia Rep. (Penn.), 24. 1860.

175. Landlord and tenant. The defendant, a horse railway company, leased the plaintiff's premises, located in a city and on a public street, on which street, by permission of the municipality, and subject to the latter's right to repair, alter, etc., it had placed tracks communicating with the premises. Afterward, under a city ordinance, the grade of the street was changed and the communication removed and rendered impracticable, materially impairing the value of the plaintiff's oc-

cupancy. *Held*, that the plaintiff's damages were not a defense to an action for rent. *Held*, also, that they did not arise out of the same contract or transaction, as the claim for rent. *Gallup v. Albany R. R. Co.*, 7 Lansing (N. Y.), 471. 1872.

176. Obstruction of track. Where a city ordinance gives street cars precedence over other vehicles, and provides that if any person shall unnecessarily obstruct or impede the running of the cars, "he shall be liable to a fine for such offense," it is the duty of a teamster who has obstructed the track by backing his team across it for the purpose of unloading some goods, to remove at once on the approach of the cars, and a delay on his part, even for a short time, for the purpose of removing a box which is the last of his load, thereby causing a stopping of the cars during such delay, is an unnecessary obstruction, within the meaning of the ordinance. *State v. Foley*, 31 Iowa, 527. 1871.

177. Public buildings. Under the act of 1846, an injunction cannot issue to restrain commissioners for the erection of a public building from taking up the rails of a passenger railway company occupying the proposed site of the building. *Market Street R. R. Co. v. Building Commissioners*, 4 Brewster (Penn.), 173. 1873.

178. Transfer of property; assumption of liabilities. A transfer was made by a partnership to the defendant, of their road, franchises, etc., "subject to the payment of all the money which the partnership was bound to pay on account of sewers," etc., which transfer was accepted by the defendant in writing. *Held*, that the party, having a claim on account of sewers, as specified, could maintain an action against the defendant for the amount due him from the partnership. *Dingeldein v. Third Avenue, R. R. Co.*, 37 N. Y., 575, 1868; reversing *Same v. Same*, 9 Bosworth (N. Y.), 79. 1861.

SUBCONTRACTOR.

See CONSTRUCTION OF RAILWAYS.

1. Laborers. Sec. 57, Tay. Stats., 1051, provides that whenever any laborer upon any railroad shall have a just claim or demand

Miscellaneous.

for labor performed on such railroad, against any person being contractor on such railroad with the railroad company, such railroad company shall be liable to the laborer, etc. *Held*, that the words "contractor with the railroad company" do not necessarily restrict the remedy to claims against persons who have contracted directly and immediately with the company; but they may be understood as describing all persons who, by means of laborers in their employ, prosecute work upon the railroad under the primary direction and authority of the company, by virtue of any contract which connects them with the company, though indirectly, mediately and remotely. *Mundt v. Sheboygan and Fond du Lac R. R. Co.*, 31 Wis., 451. 1872.

2. — The language of the act must be construed to include subcontractors since the act taken as a whole indicates that intention, and a narrower interpretation would defeat its object. *Ib.*

3. — A notice of such claim under the statute was held sufficient, although it did not name the contractor by whom the plaintiff was employed. *Ib.*

4. — The statute requires such notice to be given "within thirty days after the claim or demand shall have accrued." Where it was customary for laborers upon a road to receive payment on a certain day of each month for the whole of the previous month; *held*, that the claim did not accrue until the usual day of payment, and notice within thirty days thereafter was sufficient. *Ib.*

SUBROGATION.

1. Bond. L. and others entered into a bond to a railway company to pay all damages that might arise from the location of a certain depot. The damages were assessed at \$1,081 against the company, but could not be collected. The judgment for damages was assigned to M. *Held*, that M. could enforce the collection from the obligors in the bond. *Miller v. Lancaster*, 5 Coldwell (Tenn.), 514. 1868.

SUBSCRIPTIONS TO STOCK.

1. Compensation for obtaining subscrip-

tions. Charges for services of the plaintiff, who was one of the corporators named in defendant's act of incorporation, in procuring the stock subscriptions necessary for a full organization of the company were allowed, though there was no express promise for their payment. The services being necessary, a promise for their payment would be implied. *Hall v. Vermont and Massachusetts R. R. Co.*, 28 Vt., 401. 1856.

2. — And also an allowance was held proper for procuring additional stock, authorized by a vote of the corporators, the corporators having provided by their vote for the payment of "all reasonable expenses." It was *held*, that the term "reasonable expenses" extended to personal services as well as to cash expenditures. *Ib.*

3. — But the court refused to allow compensation for services rendered after the rescission of said vote. *Ib.*

4. — Where the value of plaintiff's services in obtaining subscriptions to the capital stock, and arousing public attention to the enterprise, was drawn in question, *held*, that correspondence between him and others, interested in the subject, was admissible as bearing upon the extent of his services, and also that evidence of his having previously conducted successfully, business requiring qualifications similar to such as would be needed for the business in question, was admissible. *Low v. Connecticut and Passumpsic Rivers R. R. Co.*, 45 N. H., 370. 1864.

5. — *Held*, also, that parol evidence that subscriptions to stock to a large amount were solicited and obtained by him, was admissible, there being no controversy that such subscriptions were made. *Ib.*

SUBSCRIPTIONS BY CITIES AND TOWNS.

See BONDS OF RAILWAY COMPANIES; FEDERAL COURTS; PLEADINGS; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY TOWNSHIPS.

- I. AUTHORITY TO SUBSCRIBE.
- II. PROCEEDINGS.
- III. PROCEEDINGS TO PREVENT THE ISSUANCE OF BONDS.

Authority to Subscribe.

IV. CONDITIONAL SUBSCRIPTIONS.

V. BONDS.

VI. LOCATION OF RAILWAYS.

VII. TAXATION.

VIII. MISCELLANEOUS.

I. AUTHORITY TO SUBSCRIBE.

[For a full citation of all of the authorities on the subject of the power of municipal corporations to subscribe to the aid of railways, see Subscriptions by Counties.]

1. Change of decisions of supreme court.

Where a railway company was by statute permitted to proceed with the construction of the road when the sum of \$6,000 per mile had been subscribed, and a part of the subscription was made by municipalities, the subsequent decision of the supreme court, holding such municipal aid unconstitutional, will not affect the construction of the statute. The municipal aid was intended to be considered in reckoning the \$6,000 per mile. *Swartwout v. Michigan Air Line R. R. Co.*, 24 Mich., 389, 1872.

2. Commissioners. Commissioners, appointed by a town to make a subscription of railroad stock under an act of the legislature providing the manner in which the town may give its assent to such subscription, are agents of the town and of no other party in that business, and are responsible to no other party for the manner in which it is executed, even though they incorporate conditions in their contract of subscription beyond what was required in the instrument of assent by which they received their appointment and authority. *Danville v. Montpelier and St. Johnsbury R. R. Co.*, 43 Vt., 144, 1870.

3. — The insertion of the condition, though unauthorized, was not a void act, unless the town chose to avoid it. *Ib.*

4. — No other party could repudiate such conditions. *Ib.*

5. — Having made the subscription, and having delivered it to the president of the company, they had exhausted their powers. *Ib.*

6. — The authority of the commissioners was joint to the three, and a majority only could not act. *Ib.*

7. — Therefore a second subscription, made on different terms by two of the commissioners, was of no validity. *Ib.*

8. — And as it appeared that the officers of the town were about to deliver the bonds of the town in accordance with the second subscription, it was held, that an injunction to restrain such act was properly issued. *Ib.*

9. Consent of city. A municipal corporation cannot be compelled, without its consent, or that of its taxable inhabitants, to become a stockholder in a railway company. *People ex rel. v. Batchellor*, 53 N. Y., 128, 1873; see contra, *Napa Valley R. R. Co. v. Napa County*, 30 Cal., 435, 1866.

10. Constitutional law — subscriptions sustained. By a series of decisions of the supreme court of Iowa, prior to that in 1859, of *State of Iowa v. County of Wapello*, 13 Ia., 388, the right of the legislature of that state to authorize municipal corporations to subscribe aid to railroads and to issue bonds therefor was settled in favor of the right. Those decisions therefore are held to apply to all bonds issued during the time they were in force. The subsequent decision of the state court overruling its former decisions will not affect bonds negotiated before the latter decision was made. *Gelpcke v. City of Dubuque*, 1 Wallace, 175, 1863.

(See SUBSCRIPTIONS BY COUNTIES.)

11. — Although it is the rule of this court to follow the latest decisions of the state courts construing state laws and constitutions, it will not follow decisions which may prove but oscillations in the course of such judicial settlement. *Ib.*

12. — Subscriptions by municipal corporations to aid railways are not unconstitutional. *Meyer v. City of Muscatine*, 1 Wallace, 384, 1863; *Bissell v. City of Jeffersonville*, 24 Howard 287, 1860; *Rogers v. Burlington*, 3 Wallace, 654, 1865.

13. — To render an act void, it must be clearly not an exercise of legislative authority, or else forbidden so plainly, as to leave the case free from all doubt. Railroads are not private affairs. They are public improvements, and it is the right and duty of the state to advance the commerce and promote the welfare of the people by making or causing them to be made at the public expense. The right of the legislature, with the consent of the local authorities to tax a particular city for a local improvement, is as clear as the

Authority to Subscribe.

right to lay a general tax for any public purpose whatsoever. A city or district may be authorized to aid the construction of a railway by the issue of bonds. *Sharpless v. Mayor of Philadelphia*, 21 Penn. St., 147, 1833; *Moers v. Reading*, ib., 188.

14. — By the act of assembly of April 4, 1837, the Pittsburgh, Kittanning and Warren R. R. Co. was incorporated, and under it any incorporated company, borough or city had authority to subscribe for the stock "as fully as any individual;" the charter was to be null and void if the road was not commenced within five and completed in ten years from the passage of the act. Before the expiration of the time, the act of March 16, 1847, was passed, extending the time of completion till June 1, 1863. In April, 1851, the time was again extended till June 1, 1865. In April, 1852, the name of the company was changed to the Allegheny Valley R. R. Co., certain counties were authorized to subscribe, the counties and cities subscribing to pay by transfer of stocks held in other companies, and removing the disabilities of the acts limiting the corporate debt of the cities of Allegheny and Pittsburgh, so that neither city should be prevented from subscribing. In 1852, the city of Pittsburgh subscribed for 8,000 shares, and issued bonds for payment of subscriptions. On application of a bondholder for a *mandamus* to compel the payment of interest, etc., an answer was filed denying the right of the city to subscribe or to issue the bonds. *Held*, that the right to subscribe under the act of 1837 did not expire, as it had been waived by the legislature. *Commonwealth v. Councils of Pittsburgh*, 41 Penn. St., 278. 1861.

15. — The change of the name of the company did not affect its identity. And the authorized change of the *termini* by the act of 1852, did not invalidate subscriptions afterwards made. *Ib.*

16. — The power to subscribe carried with it the power to execute bonds as evidence of the indebtedness. The power to issue bonds belongs to all corporations, and is inseparable from their existence; it is for this they hold a common seal. *Ib.*

17. — Such bonds if invalid are so for the want of power in the city to make the subscription, and not for the want of power to issue bonds. *Ib.*

18. — Cities and towns have the constitutional right to loan their credit to aid in the construction of railroads. *Rogan v. City of Watertown*, 30 Wis., 259, 1872; *Lawson v. Milwaukee and Northern R. R. Co.*, ib., 597.

19. — Where an act authorized the loaning of the credit of a city "upon such terms as may be agreed upon by the parties," it was *held*, that this should not be construed as authorizing a donation of its bonds, which would render the act invalid, but merely as giving the city officials unlimited authority as to the terms upon which the bonds should be given as a loan of credit. *Ib.*

20. — The power of the legislature to authorize municipal corporations to subscribe for railway stock is settled in favor of the right, although the majority of the court would be disposed to deny it if it were a new question. *Phillips v. Town of Albany*, 28 Wis., 340, 1871.

21. — The words "general law" used in the constitution have the same signification as public act in the ordinary acceptance. *Clark v. City of Janesville*, 10 Wis., 136. 1850.

22. — The charter of the city of Janesville is a general law, and was not in force until published under and by authority of law. Art. 7, § 21, Const. *Ib.*

23. — The charter of said city authorizing the subscription for stock in railway companies was not published authoritatively until after bonds had been issued. *Held*, that the purchasers of such bonds were bound to know of this want of authority. *Ib.*

24. — A donation of money or bonds may be lawfully given by a city for the purpose of aiding in the construction of a railway. *Davidson v. Ramsey County*, 18 Minn., 482. 1872.

25. — The fact that the road is owned and operated for private profit does not prevent it being also of "public use." *Stockton and Visalia R. R. Co. v. Stockton*, 41 Cal., 147. 1871.

26. — Legislative action to the effect that railways are a public use, is not open to review by the courts. The case of *Napa Valley R. R. Co. v. Napa Co.*, 80 Cal., 437, cited and approved. *Ib.*

27. — The acts authorizing the bonding of towns are not unconstitutional, on the ground that the legislature has no power to pass them. And the acts of 1866 (ch. 398), and 1871 (ch. 298), are not so on the ground that they

Authority to Subscribe.

each embrace more than one subject, and that not expressed in its title. *People ex rel. v. Morgan*, 1 N. Y. Sup. Ct., 101, 1873; *Same v. Same*, 65 Barbour (N. Y.), 473, 1873.

28. — The act of the legislature, authorizing the towns in the counties through which the Albany and Susquehanna Railroad is located, to borrow money and subscribe for the stock of the company, with the view of aiding in the completion of the work, is not unconstitutional. *Grant v. Courter*, 24 Barbour (N. Y.), 232. 1857.

29. — The act to amend the charter of the city of Rochester, passed July 5, 1851, including sections 285 to 291 inclusive, which authorize the city of Rochester, upon certain conditions, to subscribe for, and become the purchaser of stock in the Rochester and Genesee Valley R. R. Co., is unconstitutional. *Clarke v. City of Rochester*, 28 N. Y., 605, 1864; see *Same v. Same*, 26 N. Y., 471, note, 1863; *Same v. Same*, 14 Howard's Pr. (N. Y.), 193, 1857; *Same v. Same*, 13 ib., 204, 1856.

30. — The act, notwithstanding the provision that the above mentioned sections should not take effect until they had been submitted to the electors, for the purpose of determining whether or not it was expedient for the city to borrow money for the purpose specified therein, was enacted by the legislature, and not by the people of Rochester. *Ib.*

31. — The act of March 18, 1854, authorizing the loan of the credit of the city of Albany to the Northern R. R. Co., was an exercise of the legitimate power of legislation. *Benson v. Mayor of Albany*, 24 Barbour (N. Y.), 248. 1857.

32. — The city of Evansville had power under its charter to subscribe for "stock in any chartered company to make roads to said city." *Held*, that the term "roads" embraced railroads. *Evansville, Indianapolis and Cleveland R. R. Co. v. Evansville*, 15 Ind., 395. 1860.

33. — The constitutional prohibition against loaning credit, to aid in the construction of railways, applies to the state but not to counties or cities. *Robertson v. City of Rockford*, 21 Ill., 451. 1859.

34. — Though the state is prohibited by the constitution from subscribing to such objects, this limitation was not intended to apply to municipal corporations. *Clark v. City of Janesville*, 10 Wis., 136, 1859; *Bushnell v. Beloit*, ib., 195.

35. — An act which authorized a town to subscribe for such stock is sufficient authority to the railway company to receive the subscription, and to take the bonds of the city in payment. *Ib.*

36. — The acts authorizing the city of Mobile to subscribe for the aid of a railway — construed, and *held* to be constitutional. *Gibbons v. Mobile and Great Northern R. R. Co.*, 36 Ala. N. S., 410. 1860.

37. — A municipal subscription is not valid unless authorized by legislative authority. *Mississippi, Ouachita and Red River R. R. Co. v. Camden*, 23 Ark., 300, 1861; *City of Aurora v. West*, 22 Ind., 88, 1864; *Duanesburgh v. Jenkins*, 40 Barbour (N. Y.), 574, 1863; see *Same v. Same*, 46 ib., 294, 1866.

38. — The fact that the question of taxation is submitted to the voters of the city sought to be taxed for such purpose, is not a delegation of legislative power to the citizens of the municipality. *Moers v. Reading*, 21 Penn. St., 188. 1853.

39. — The question of legislative power to authorize municipal corporations to subscribe for stock in railway companies, discussed, and decided that such power exists. *San Antonio v. Jones*, 28 Tex., 19, 1866; *Same v. Lane*, 32 ib., 405, 1869; *Same v. Gould*, 34 ib., 49, 1870.

40. — The subscription by the city of San Antonio to the San Antonio R. R. Co., *held* invalid, for the reason that the act under which it was made embraced more than one subject. *San Antonio R. R. Co. v. Gould*, 34 Tex., 49. 1870.

41. — The legislature cannot confer upon a municipal corporation unlimited power to levy taxes and raise money beyond what may be needed for legitimate municipal purposes. Art. 11, § 3, Const. *Foster v. City of Kenosha*, 12 Wis., 616. 1860.

42. — A tax levied to pay scrip, issued by such city in aid of a railway, will be restrained; but whether such scrip is void or not is not decided. *Ib.*

43. — The question as to the power of a city to bind a municipality by the execution and issuance of its bonds to aid in the construction of railroads, has never been discussed and decided directly by this court. The case of *Gelpcke v. City of Dubuque*, 1 Wallace, 175, considered and commented on. *Chamberlain v. City of Burlington*, 19 Iowa, 395. 1865.

Authority to Subscribe.

44. — The power granted to a city to borrow money for any public purpose, a vote of the people first being had, does not authorize the borrowing of money to aid in the construction of a railroad. *Ib.*

45. — The power to borrow money conferred upon the city, does not authorize the loan of the credit of the city. *Ib.*

46. — The legislature cannot confer the power upon a municipal corporation to levy a tax, or loan its credit in aid of the construction of a railway. The fact that the state may exercise the power of eminent domain, in behalf of associated parties who propose to accommodate a public need, does not determine its right to exercise the power of taxation in behalf of the same parties, in aid of the same object. *People v. Salem*, 20 Mich., 452. 1870.

47. — A railroad in the hands of a private corporation is no more a public purpose than a manufactory or a newspaper, or any other private enterprise supplying a public need. Hence the legislature cannot compel or empower a municipal corporation to give aid to a railway company by taxation, or to contract an indebtedness for such purpose which must be paid by taxation. *Bay City v. State Treasurer*, 28 Mich., 499. 1871.

48. — Such taxation is a confiscation of private property without due process of law, and is in conflict with Art. 6, § 32, of the state constitution. *Ib.*

49. — Such power of taxation receives no additional aid by the municipal votes. The legislature has the same power to tax without the assent of the municipal authorities that it has with their assent; the permission granted to the municipalities to vote upon the question is one of favor and not of right. *Ib.*

50. — There is no mode in which aid to a railway running through many municipalities can be given by taxation at all, consistent with any recognized theory of taxation, without an apportionment by some rule among them all; and this would be impossible under a system by which one township might tax itself ten per cent. upon its valuation, and another equally benefited refuse to pay but one per cent., while a third might decline altogether. *Ib.*

51. — The state cannot aid a railway by its credit, and what it cannot do directly it cannot

require townships and villages to do for it (Art. 14, §§ 7, 8, and 9, Const.) *Ib.*

See MANDAMUS.

52. Corporation must have power to receive subscriptions. There must be a corporation capable and having power to receive the aid, in the manner offered, as well as a corporation to bestow the aid. *People ex rel. v. Adirondack Co.*, 57 Barbour (N. Y.), 656. 1870.

53. — Although the statutes contemplated that the railway company shall be incorporated, before proceedings can be taken, they do not require that to be proved, as a fact, before the county judge. *People ex rel. v. Peck*, 62 Barbour (N. Y.), 545. 1872.

54. — Under the act of 1869, the legal existence of the corporation is a jurisdictional fact. *People ex rel. v. Van Valkenburgh*, 63 ib., 105. 1872.

55. Discount of bonds. The statute of Iowa, of January 25, 1855 (ch. 128), authorizes cities to give their bonds in payment of subscriptions to railroad stock, and authorizes them to be sold at a heavy discount. *Meyer v. City of Muscatine*, 1 Wallace, 384. 1863.

56. Legalizing acts. No subsequent statute can legalize bonds and make them binding, where they have been issued without the statute authorizing such issue being accepted by the town, and without compliance with the conditions precedent provided by the statute. *Duanesburgh v. Jenkins*, 46 Barbour (N. Y.), 204, 1866; see *Same v. Same*, 40 ib., 574, 1863.

57. — A debt for a specified sum contracted by a city and invalid because a statute which authorized the city to contract a debt did not also limit the extent of it, is made valid by a subsequent statute recognizing the validity of the debt as contracted. *City of Kenosha v. Lamson*, 9 Wallace, 477. 1869.

58. — The legislature, having authorized the subscription by a city of a limited amount of stock (\$150,000) in a railroad company, and having afterwards authorized the subscription of an unlimited amount (which latter act was unconstitutional), and the city, professing to act under the latter law, subscribed \$150,000 a subsequent recognition by the legislature of the subscription, as legal, renders it valid. And such recognition may be by implication. *Campbell v. City of Kenosha*, 5 Wallace, 194. 1866.

Authority to Subscribe.

59. — The city of B. was created out of a part of the town of B. by a statute which provided that "all principal and interest upon all bonds heretofore issued by the town of B. shall be paid, etc., by the city and town" in certain proportions. *Held*, that this statute made the bonds of the town valid, if they were not previously so. *Beloit v. Morgan*, 7 Wallace, 619. 1868.

60. — Bonds illegally issued could not be ratified by the city in the absence of authority in the charter to make such ratification. *City of Atchison v. Butcher*, 3 Kan., 104. 1865.

61. — But an amendment to the charter, authorizing the payment of interest on such bonds, authorized a ratification by the payment of interest thereon in the manner prescribed. *Ib.*

62. — The act of May, 1838, rendered valid the issue of bonds made by the city of Bridgeport prior to that date, whether they were originally valid or not; such legalizing act is not unconstitutional. *Bridgeport v. Housatonic R. R. Co.*, 15 Conn., 475. 1843.

63. — The subscription made by the city of Macon to the Monroe R. R. Co., was ratified and recognized by the act of 1838. *Winn v. City Council of Macon*, 21 Ga., 275. 1857.

64. **Limitation of debt.** In 1850, the legislature passed an act limiting the debt of Allegheny city to \$500,000, exclusive of the first of two subscriptions to the stock of the Ohio and Pennsylvania R. R. Co. The debt of the city had reached that limit prior to the second subscription. The second subscription was authorized by an act passed in 1852. *Held*, that the limitation was binding on the council but not on the legislature, and the legislature, having authorized the second subscription, it was therefore valid. *Amev v. Allegheny City*, 24 Howard, 364. 1860.

65. — The fact that the ordinance making the second subscription was not recorded or published did not invalidate the bonds. This ordinance did not belong to the class required by the city charter to be published and recorded. *Ib.*

66. — The provisions of ch. 100, P. and L. laws of 1853, authorizing the city of Kenosha to borrow money and issue bonds or scrip therefor, being void for want of any limitation

upon the amount of such indebtedness (*Foster v. Kenosha*, 12 Wis., 616), the scrip issued under that provision, and disclosing on its face the purpose of the issue, is also void. *Fisk v. City of Kenosha*, 26 Wis., 23. 1870.

67. — A subsequent act of the legislature recognizing the right of a city to redeem such scrip must fix a definite sum, or it will not comply with the constitutional provision requiring the legislature to limit such amount. *Ib.*

68. **New York and Oswego Midland R. R. Co.** The statutes in relation to municipal aid to the New York and Oswego Midland R. R. Co. — construed. *People ex rel. v. Morgan*, 1 N. Y. Sup. Ct., 101, 1873; *Same v. Same*, 65 Barbour (N. Y.), 473, 1873.

69. **Partial construction of another road.** A town is not deprived of the power to invest its bonds in a railway named in the petition by reason of the incorporation and partial construction of any railway which is not constructed in such town, and not in operation within its limits, and not taxed or upon the assessment roll. *People ex rel. v. Peck*, 4 Lansing (N. Y.), 528. 1871.

70. **Renewal of bonds.** Where a city has once lawfully contracted a debt and issued its bonds, it may, like any other debtor, have them taken up and canceled and new ones issued in their stead, without any special authority therefor. *Rogan v. City of Watertown*, 30 Wis., 259. 1872.

71. **St. Louis.** The act of incorporation of the city of St. Louis, as amended in 1843, contained the provision, "The city shall not at any time become a subscriber for any stock in any corporation." While the above prohibition was in force, the city was authorized, by the act of March 1, 1851, to subscribe stock in the O. & M. R. R. Co. An amended city charter of March 3, 1851, contained said provision, and also the following, that "all acts and parts of acts contrary to and inconsistent with the provisions of this act, or within the purview thereof, etc., are hereby repealed." These provisions took effect from their passage. *Held*, that the act of March 3, 1851, did not repeal the enabling act of March 1, 1851, and that a subscription made under said enabling act was valid. *St. Louis v. Alexander*, 23 Mo., 483. 1856.

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II. PROCEEDINGS.

72. Certiorari. Proceedings having been had to authorize the issue of bonds of a municipal corporation to aid in the construction of a railroad, under the act of 1869, requiring the county judge to determine certain facts and render judgment thereon, a writ of certiorari may properly issue to such county judge, for the purpose of a review of his proceedings by the supreme court, notwithstanding his determination has been entered of record. *People ex rel. v. Smith*, 45 N. Y., 772. 1871.

73. — Upon the return to such writ, the court is not limited to the inquiry whether jurisdiction to the parties and subject matter was acquired, but should examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made. *Ib.*

74. Change of corporation. A subscription to a different corporation than that designated by the petition, or for a larger amount of stock than that authorized thereby, is void. *Held*, accordingly, that commissioners appointed to subscribe to the stock of a certain railroad company had no power, and the court would not compel them to subscribe for stock of a company formed by the consolidation of that company with another under a different name and having different termini. *Rochester, etc., R. R. Co. v. Cuyler*, 7 Lansing (N. Y.), 431. 1872.

75. Commissioners. Where, upon an application by twelve resident freeholders, to the county judge, and proof to him, he found, as facts, that commissioners had made a contract to sell stock subscribed for by them in the name of a town, on credit; and the county judge thereupon adjudged and determined that this was a violation of their duty; and that for their neglect to perform that duty, their offices had become vacant; and that the defendants should be appointed to fill their places; *held*, that the findings were legitimate, and the adjudication right. *People ex rel. v. Eddy*, 57 Barbour (N. Y.), 503. 1870.

76. Elections. An act of the legislature passed in May, 1847, empowered the city of New London to issue bonds to the amount of \$100,000, to be loaned, on proper security, to the N. L. W. and S. R. R. Co., a corporation

chartered at the same session, to aid in the construction and completion of its road; the act containing a proviso that it should not take effect until approved by two-thirds of the electors present at a city meeting held for that purpose. Different meetings of the city were holden for the purpose of acting on the subject, and a vote was taken at each, and less than two-thirds of the votes were cast in its favor. Another meeting was subsequently called and holden, at which a vote of more than two-thirds was obtained in favor of the approval. *Held*, that the power of the city on the subject was not exhausted by its first action, and that the action of the last meeting was a valid acceptance of the power to issue the bonds. *Society for Savings v. City of New London*, 29 Conn., 174. 1860.

77. — Under ch. 273, P. and L. Laws of 1870, a vote of a town in reference to the subscription of stock shall be held by ballot at a town meeting, and it is proper to keep the polls open till sundown according to the general rule for elections, instead of till 5 P. M., the hours prescribed for closing the polls at a town meeting. *Phillips v. Town of Albany*, 28 Wis., 340. 1871.

78. — Where notice of election is to be given by the board of supervisors of a town, it may be given by order of the board, signed only by their clerk. *Lawson v. Milwaukee and Northern R. R. Co.*, 30 Wis., 597. 1872.

79. — Where a statute requires notice of a town meeting to be posted in "three of the most public places in the town," if they were posted in three public places, the officer charged with the duty acting fairly according to his best judgment, the court will not inquire whether the places selected were in fact the most public. *Sauerhering v. Iron Ridge and Mayville R. R. Co.*, 25 Wis., 447. 1870.

80. — The charter of the city of Janesville provided that the common council might submit to a vote of the people of the city the question of subscribing stock in aid of a railway company. The election was had and the subscription was made, and bonds issued before the charter had been published so as to become operative. *Held*, that after such charter took effect, the council was not authorized either to make such a subscription without again submitting the question to the people in accordance with the charter, or to ratify

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and confirm the subscription previously made and the bonds previously issued. *Clark v. City of Janesville*, 13 Wis., 414. 1861.

81. — The bonds issued under such circumstances without any subsequent vote of the people ratifying their issue are void, even in the hands of third persons having no notice of the facts further than appeared upon the face of the bonds. *Town of Rochester v. Alfred Bank*, ib., 432; *Berliner v. Town of Watertown*, 14 Wis., 378, 1861.

82. — The supervisors could not, by any subsequent act of theirs, render the bonds valid. *Ib.*

83. — Where the statute requires that notice of an election shall be posted by the town clerk or supervisors, they need not do it in person, but may have it done by others. *Philips v. Town of Albany*, 28 Wis., 340. 1871.

84. — If the legislature confers the power, directly and exclusively upon the mayor and city council to subscribe for stock, it is not necessary that the proposition should be submitted to a vote of the inhabitants. *McCallie v. Mayor of Chattanooga*, 3 Head (Tenn.), 317. 1859.

85. — **town meeting.** An article in a warrant for a town meeting is sufficient, if it gives notice, with reasonable certainty, of the subject matter to be acted upon. Thus an article in a warrant for a town meeting, "to see if the town will loan its credit to aid in the construction" of a certain road, was held sufficient. *Belfast and Moosehead Lake R. R. Co. v. Brooks*, 60 Me., 568. 1872.

86. — Where in such meeting, a subscription was authorized without designating the kind of stock, and the selectmen subscribed for nonpreferred stock, the town is bound. *Ib.*

87. — In the absence of any evidence to the contrary, the persons subscribing for such stock as selectmen will be presumed to be lawfully chosen selectmen. *Ib.*

88. — Under § 16 of ch. 34, Gen. Stat., a two-thirds vote at a legal meeting is necessary to appropriate the money raised, as much as it is to raise the money to aid in the construction of a railroad. *Monadnock R. R. Co. v. Peterborough*, 49 N. H., 281. 1870.

89. — The appropriation of the money is the selecting and designating of the particular road, that is to receive the benefit of the money thus raised to aid in its construction. *Ib.*

90. — What the statute requires to be done by a town at a legal meeting, cannot be done by a committee. *Ib.*

91. — A town cannot delegate its power to any committee to elect which of two or more railroads shall be aided by the town, by the appropriation of money raised to aid in the construction of a railroad under this statute. *Ib.*

92. **Irregularities.** A court of equity will not cancel the bonds of a town, at the instance of a taxpayer, for a mere technical irregularity in calling the town meeting which directed their issue, but will leave the parties to their legal rights. *Sauerhering v. Iron Ridge and Mayville R. R. Co.*, 25 Wis., 447. 1870.

93. **Petition.** A petition of the majority of the resident freeholders of a city is necessary to authorize a donation to a railroad, but is not necessary to authorize a subscription of stock. *Thompson v. City of Peru*, 29 Ind., 305. 1868.

94. — In proceedings to bond a municipal corporation in aid of a railroad (L. 1869, p. 2303), a petition must be presented to the county judge, signed by the requisite number of taxpayers (§ 1), before he is authorized to make an order for notice of a hearing. *People ex rel. v. Hughitt*, 5 Lansing (N. Y.), 89. 1871.

95. — Several petitions may be signed, and they may be presented to the judge at different times. *Ib.*

96. — In ascertaining whether a majority of the persons whose names are upon the tax roll have consented to bonding a town for railroad purposes, on application under the statute (Laws 1869, ch. 907, p. 2303, etc.), joint owners of property are to be counted separately. *People ex rel. v. Franklin*, 5 Lansing (N. Y.), 129. 1871.

97. — A partnership is to be counted as one taxpayer, under the amendment of 1871 (ch. 925) to ch. 907 of 1869; it was otherwise under the law of 1869 before the amendment. *Ib.*

98. — The statute makes nonresident owners of land, taxpayers, and when their names appear on the assessment roll, although not properly taxed, they must be included in estimating the number necessary to unite in a petition for bonding a town. *People ex rel. v. Oliver*, 1 N. Y. Sup. Ct., 570. 1873.

99. — The right to appoint commissioners to issue bonds, under the act of the legislature

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of May, 1869, depends upon the fact of a majority in number of the taxpayers of the town, owning or representing a majority in amount of taxable property within the limits of the town, petitioning the county judge for that purpose. The last assessment roll of the town is made the criterion for ascertaining that fact. *People ex rel. v. Hulbert*, 59 Barbour (N. Y.), 446. 1871.

100. — It is not necessary that the petitioners should be the owners of the property for which they are taxed. If they represent it, in any capacity, and are assessed on the tax list as so representing it, then they are taxpayers, and may become petitioners. *Ib.*

101. — It is not sufficient that the signatures to the petition be proved, unless such petitions are in some way identified as the persons named on the "last preceding tax list or assessment roll." If the names upon both are identical, this is *prima facie* evidence that the persons are the same. *People ex rel. v. Smith*, 45 N. Y., 772. 1871.

102. — The authority conferred by the act must be exercised in strict conformity to and by a rigid compliance with the letter and spirit of the statute. *Ib.*

103. — The petition required is that of the taxpayers, and the act is not satisfied by the petition of an agent. *Ib.*; see also *People ex rel. v. Peck*, 62 Barbour (N. Y.), 545, 1872; 4 Lansing, 529.

104. — Where it was the duty of the common council of a city to determine whether the requisite number of the freeholders of the city had petitioned for the subscription (no other tribunal having been provided for the purpose), and having passed upon that question, their determination is conclusive, unless it may be set aside in some direct proceeding for that purpose. *Evansville, Indianapolis and Cleveland R. R. Co. v. Evansville*, 15 Ind., 395. 1860.

105. — In proceedings under the act of 1869, to issue bonds in aid of the construction of a railroad, the petition must direct whether it is in *stock*, or in *bonds*, that the money to be raised shall be invested. *People ex rel. v. Van Valkenburg*, 63 Barbour (N. Y.), 105. 1872.

106. — The common council of Jeffersonville, Indiana, had authority to subscribe for stock in a railway company, and to issue bonds therefor, upon the petition of three

fourths of the legal voters of the city. *Bis ell v. City of Jeffersonville*, 24 Howard, 287. 1860.

107. — The common council were the tribunal to decide the question as to whether three-fourths of the legal voters had signed the petition. *Ib.*

108. — When sued upon these bonds by innocent holders for value, parol evidence cannot be introduced to show that such requirement had not been complied with. *Ib.*

109. — bribery. Signatures to the petition of tax payers appearing on the proper roll, induced by payments in the nature of a bribe, are nevertheless valid. *People ex rel. v. Franklin*, 5 Lansing (N. Y.), 129. 1871.

110. — withdrawal of signature. The signers may withdraw their names from the petition before the city council has finally acted upon it, and if there is an insufficient number of names after such withdrawal, the subscription cannot be made. *Noble v. Vincennes*, 42 Ind., 125. 1873.

111. — When the consent of the tax payers is lawfully given, such consent is irrevocable. *People ex rel. v. Henshaw*, 61 Barbour (N. Y.), 409, 1870; *People ex rel. v. Peck*, 62 ib., 545. 1872.

112. — After the hearing before the county judge, signers will not be permitted to withdraw their names from the petition. *People ex rel. v. Hatch*, 1 N. Y. Sup. Ct., 118. 1873.

113. — Such withdrawal will be permitted at or before the hearing. *People ex rel. v. Wagner*, 1 N. Y. Sup. Ct., 221, 1873; *People ex rel. v. Deyoe*, 2 ib., 142. 1873.

114. Philadelphia. The county commissioners of Philadelphia have no power without the sanction of the county board, to subscribe for stock in the Sunbury and Erie R. R. Co. *Brown v. County Commissioners*, 21 Penn. St., 87. 1858.

115. Presumptions. Unless the party endeavoring to maintain such proceedings is able to show that the terms of the statutes have been, in all essential particulars, complied with, they are to be held invalid. *People ex rel. v. Peck*, 62 Barbour (N. Y.), 545. 1872.

116. — There is no presumption to be indulged, that public officers have done their duty; but every step in the proceeding must be proved to be within the powers conferred by the statute. *People ex rel. v. Van Valkenburg*, 63 Barbour (N. Y.), 105. 1872.

 Proceedings to Prevent the Issuance of Bonds — Conditional Subscriptions.

117. Ratification. Although the mayor of a city may have, in some particulars, deviated from the directions of the common council in making the subscription, yet the subsequent issue of a portion of the bonds under the order of the council is a ratification of his act. *Evansville, Indianapolis and Cleveland R. R. Co. v. Evansville*, 15 Ind., 395. 1860.

118. Statute. The validity of a proceeding for bonding a town to aid in the construction of a railway must be determined by the law existing at the time the application is made. *People ex rel. v. Peck*, 62 Barbour (N. Y.), 545. 1872.

119. — The validity of an application to bond a municipal corporation for railway purposes, under the act of 1869 (ch. 907, p. 2308), must be determined by the state of the law at the time it was made. *People ex rel. v. Peck*, 4 Lausing (N. Y.), 528. 1871.

120. Supreme court. Errors in the determination of the county judge, in regard to matters which he has the right to adjudicate upon, cannot be corrected by the supreme court, in an action brought by tax payers against the commissioners appointed by him and the railroad company, to restrain and prevent the issue of the bonds of the town. *Ayres v. Lawrence*, 63 Barbour (N. Y.), 454. 1872.

III. PROCEEDINGS TO PREVENT THE ISSUANCE OF BONDS.

121. Form of proceedings. In an action brought in the name of the people, against the commissioners appointed under the act of 1866, to subscribe for the stock of a railway company, on behalf of a town, to restrain such commissioners from issuing the bonds of said town, in payment for stock subscriptions, the railway company is a necessary party. *People ex rel. v. Clark*, 53 Barbour (N. Y.), 171. 1869.

122. — Such an action cannot be maintained in the name of the people by the attorney general, *it seems*; the people of the state not being interested in the question. *Ib.*

123. Injunction; attorney general. — Neither § 420, nor § 432 of the code, confers upon the attorney general the power to prosecute an action in the name of the people, against the commissioners appointed under an act of the legislature, to restrain them from

issuing, etc., town bonds provided for by such act, without performance of the conditions precedent required thereby; nor has he such power at common law. *People v. Miner*, 2 Lansing (N. Y.), 396. 1868.

IV. CONDITIONAL SUBSCRIPTIONS.

(See *ante* 661, subdivision I of this title.)

124. Condition requiring other subscriptions. If subscriptions are made on condition that certain other towns shall subscribe, the fact that the other towns cannot legally do so will invalidate the subscription. *Phillips v. Town of Albany*, 28 Wis., 340. 1871.

125. Connection of railway. Provisions of an act requiring that the vote of a town shall be based on a written proposition from the company, defining the amount and kind of stock to be subscribed for, the mode and times of payment, the kind of security given, etc., and which may contain stipulations as to the location of the road, depot grounds, etc., in said town, *held*, to be valid and salutary. *Larson v. Milwaukee and Northern R. R. Co.*, 30 Wis., 597. 1872.

126. — A stipulation that the company should connect its road by a side track in the town of M., and would not connect its road within three miles of the town of M. with any other railway, so as to permit the passage of cars from one road to the other, except in a certain locality, without the consent of the town, was *held* to be valid, and not contrary to public policy. *Ib.*

127. Depot and route. Where a town subscribed for stock upon condition that the road "shall be built through the town on the line as run by the engineer, with a suitable depot for the convenience of the public;" *held*, that this was a condition subsequent, and will not defeat the right to collect the assessments before the performance of the contract. *Belfast and Moosehead Lake R. R. Co. v. Brooks*, 60 Me., 568. 1872.

128. Failure to comply with conditions. A town authorized the issue of its bonds to the relator, in exchange for his stock, upon certain specified conditions. Three commissioners were appointed, and two of them made a subscription for relator's stock, absolute in form, but upon the representation of relator, and their belief that they could not be com-

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pelled to deliver the bonds of the town until they could make an agreement with the relator, in pursuance of laws of 1870, ch. 507. The relator did not perform the conditions upon which the bonds were to be issued to it. *Held*, that the commissioners were not estopped by their subscription, and that relator was not entitled to a peremptory *mandamus* for the delivery of the bonds. *People ex rel. v. Hitchcock*, 2 N. Y. Sup. Ct., 134. 1873.

129. Legalizing act. In case of subscriptions in aid of the N. Y., Oswego and Midland R. R. Co., it was *held*, that the conditional consent of tax payers of certain towns, authorizing municipal subscriptions for such railway stock, if invalid under the law of 1866, was rendered valid by the subsequent enactment of ch. 61 of the laws of 1868. *People ex rel. v. Clark*, 53 Barbour (N. Y.), 171. 1869.

130. Time as a condition. A town, by a two-thirds vote, issued bonds in aid of a railway, on condition that by a given time, the road should be completed to C, and the cars running and transporting freight and passengers over the road from M. to C. *Held*, that the road must be completed within the specified time, before the aid could be demanded. *Portland and Oxford Central R. R. Co. v. Inhabitants of Hartford*, 58 Me., 23. 1870.

131. — A subsequent majority vote could not modify the conditions in the original vote, the statute requiring a two-thirds vote. *Ib.*

V. BONDS.

132. Charter. A city charter authorizing a city to borrow money "for any object in its discretion," authorizes the issue of bonds in aid of the construction of a railway. *Meyer v. The City of Muscatine*, 1 Wallace, 384. 1863.

133. — A city, having power to borrow money, may make the place of payment of the principal and interest where it pleases. *Ib.*

134. Collateral security. A note and mortgage to a railroad company, procured by fraudulent representations, having been transferred to a city to secure it against liability on its bonds issued in aid of the railroad, and it being claimed that the bonds are invalid for want of authority in the city to issue them, that question will not be determined, and the city required to deliver up the note and mort-

gage to the maker to be canceled, unless the holders of the bonds are not only made parties to the action for that purpose, but so subjected to the jurisdiction of the court that it may compel the surrender of the bonds. *Burhop v. Roosevelt*, 20 Wis., 338. 1866.

135. Guaranty. The city of Watertown issued its bonds in aid of the Milwaukee and Watertown R. R. Co., which guarantied their payment. Subsequently that company became consolidated, in pursuance of law, with the Milwaukee and La Crosse R. R. Co., which subsequently sold the Watertown division of its road (including what had previously been owned by the Milwaukee and Watertown Co.), to a third corporation, which sold it to the defendant. *Held*, that while the guaranty of said bonds became part of the general indebtedness of the Milwaukee and La Crosse Co., after the consolidation, defendant, as purchaser of the Watertown division of its road, is not liable for any part of such indebtedness. *Wright v. Milwaukee and St. Paul R. R. Co.*, 25 Wis., 46. 1869.

136. Interest. Where money has been collected and placed in the hands of town officers, for the purpose of paying the interest upon bonds issued by the town, in pursuance of the provisions of a statute, and the statute makes it the duty of such officers to apply the money in satisfaction of such interest, a bondholder may maintain an action against such officers, to recover the interest due upon his bonds. *Murdock v. Aikin*, 29 Barbour (N. Y.), 59. 1858.

137. — Calls were made by the directors, for installments amounting in the aggregate to the precise sum subscribed, which were all paid, but not at the times designated for payment in the respective calls, and receipts given. Nothing was said about interest, and no claim made for it, until several months after the whole principal had been paid. *Held*, that an action would not lie to recover interest on the several amounts specified in the calls, during the time they were delinquent. *Southern Central R. R. Co. v. Moravia*, 61 Barbour (N. Y.), 180. 1871.

138. Misnomer. The issuing of bonds in the name of "the town of Perrysburg," instead of in the name of "the incorporated village of Perrysburg," when the latter would have been its proper legal designation, is merely a misnomer, which does not affect the validity of

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obligation of such bonds. *State ex rel. v. Perrysburg*, 14 Ohio St., 472. 1863.

139. Negotiability. An instrument of writing in the form following, with interest coupon attached is, in legal effect, a promissory note, and governed by the law merchant: "The city of A. acknowledges itself indebted to the O. and M. R. R. Co., or bearer, in the sum of \$1,000, negotiable and payable at the N. R. Bank, in the city of N. Y., twenty-five years from date hereof, upon the presentation and delivery of this certificate, bearing an interest of six per cent. per annum, payable annually on the first day of January, at said bank, in the city of N. Y., upon presentation and delivery of the proper coupon hereto attached, signed by the clerk of said city; and at all times the holder shall have a lien on the stock of said city in said company, for which this is received in payment, and may exchange the same for a like amount of said stock at any time before the first declaration of cash dividends, and be substituted as stockholder in place of said city, upon surrender of this bond. This bond is issued in part payment of a subscription of \$50,000 by the said city of A. to the capital stock of the said railroad company, by order of the common council of the city of A., on the 28th of September, 1850, in pursuance of § 18 of the charter of said city." *City of Aurora v. West*, 22 Ind., 88. 1864.

140.—Certain city bonds were in the following form: "This certifies that the mayor, aldermen, common council, and freemen of the city of New London are indebted to the N. L. W. and P. R. R. Co., or bearer, in the principal sum of \$1,000, payable to said company or bearer, at the end of fifteen years from the 1st day of July, 1852, with six per cent. interest thereon, payable semi-annually on presentation of the annexed interest warrants." (Signed by the mayor and treasurer of the city and sealed with the corporate seal.) *Held*, that the bonds were negotiable, and that suit could be brought on them in the name of the holder. *Society for Savings v. City of New London*, 29 Conn., 174. 1860.

141.—City bonds "payable to the N. R. R. Co. or bearer" are negotiable, and suit may be brought thereon in the name of the holder. *Ib.*

142.—Municipal bonds, with coupons pay-

able to "bearer," have all the qualities of commercial paper. *Gelpcke v. City of Dubuque*, 1 Wallace, 175, 1863; *San Antonio v. Lane*, 32 Tex., 405, 1869.

143.—Town bonds are negotiable instruments in such a sense as to exempt them in the hands of a *bona fide* holder from a defense which might be available against the railroad company. *Bank of Rome v. Village of Rome*, 19 N. Y., 20, 1859; affirming *Same v. Same*, 27 Barbour (N. Y.), 65, 1858.

144.—The certificate of the commissioners is conclusive in behalf of the *bona fide* holder, of the facts therein stated. *Ib.*

145.—notice of extent of powers. Persons receiving bonds issued by towns are bound at their peril to ascertain whether the statute, authorizing their issue, has been complied with. *Duanesburgh v. Jenkins*, 40 Barbour (N. Y.), 574, 1863; see *Same v. Same*, 46 ib., 294, 1866.

146.—If bonds are issued by a town without the consent required by the statute having been obtained, they are void, at least in the hands of the railway company to which they are issued, if not in the hands of every subsequent holder. *Ib.*

147.—Mercantile paper made void *ab initio*, by statute, is void in the hands of a *bona fide* holder. *City of Aurora v. West*, 22 Ind., 88. 1864.

148.—The purchasers of the bonds of the city of Janesville were bound to know that there was no law authorizing their issue. *Clark v. City of Janesville*, 13 Wis., 414. 1861.

149.—When bonds, issued by a municipal corporation, show upon their face the authority under which they are executed, and such authority is insufficient, they are void in the hands of any parties. *Chamberlain v. City of Burlington*, 19 Ia., 395. 1865.

150.—The company to whom the bonds were originally sold is bound to know the extent of the authority of the agent of the city in transferring and issuing bonds. *City of Atchison v. Butcher*, 3 Kans., 104, 1865; *City of Aurora v. West*, 22 Ind., 88, 1864.

151.—One who has purchased municipal bonds of a railroad company at a discount, with knowledge that the company had obtained them in exchange for its stock, is not a *bona fide* holder, and takes them subject to all equities which would exist as against the com-

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pany. *Starin v. Genoa*, 23 N. Y., 439, 1861; reversing *Same v. Same*, and *Gould v. Venice*, 29 Barbour (N. Y.), 442, 1859.

152.—Where cities issue bonds with coupons attached, which have passed into the hands of *bona fide* purchasers for value, the city cannot defeat an action on the coupons, by showing that the election authorizing their issue was not regular. *Clark v. City of Janesville*, 10 Wis., 136. 1859.

153.—The purchaser of such bonds is bound to see that there is a law authorizing their issue, but he is not bound to inquire as to whether the proceedings under the law have been regular. *Ib.*

154.—**presumptions.** The holder of city bonds, when the city has a right to issue them, has a right to presume that they were issued under the circumstances which give the requisite authority. *Lexington v. Butler*, 14 Wallace, 282, 1871; *Moran v. Miami County*, 2 Black, 722, 1863; *City of Atchison v. Butcher*, 3 Kans., 104, 1865; *Mercer County v. Hackett*, 1 Wallace, 83, 1863; *Meyer v. City of Muscatine*, 1 ib., 384, 1863.

155.—Where authority was given to a city to take stock in a road, provided the act be "on the petition of two-thirds of the citizens," this proviso will be presumed to have been complied with where the bonds show, on their face, that they were issued by virtue of an ordinance of the council of the city making the subscriptions; the bonds being in hands of innocent holders. *Van Hostrup v. Madison City*, 1 Wallace, 291. 1863.

156.—Power to issue the bonds being shown, the municipal corporation, as against *bona fide* holders for value, is estopped to deny that the power was properly executed. *Rogers v. Burlington*, 3 Wallace, 654. 1865.

157.—**purchase by pre-existing creditor.** Bonds were issued, not payable to bearer, and transferred to the plaintiff on a pre-existing debt. *Held*, that he was not an innocent holder. *City of Atchison v. Butcher*, 3 Kans., 104. 1865.

158. **Power to issue bonds.** Under § 60 of the act for the incorporation of cities, of March 14, 1867, express authority is given to subscribe to the stock of railroads running into or through the city, and to borrow money to pay such subscriptions. *Thompson v. City of Peru*, 29 Ind., 305. 1868.

159.—Where a city is empowered to make a subscription for stock in a railway corporation, the power to determine the time of payment and to issue bonds and other evidences of indebtedness is manifestly implied. *Evansville, Indianapolis and Cleveland R. R. Co. v. Evansville*, 15 Ind., 395. 1860.

160.—Such power also carries with it the power to borrow money wherever it can be procured on the best terms and the right to agree to pay where borrowed. *Ib.*

161.—An authority given by act of legislature to a city corporation to subscribe for stock in a railway company, "as fully as any individual," authorizes the issue of bonds in payment of the stock. *Seybert v. City of Pittsburgh*, 1 Wallace, 272. 1863.

162.—The issuing and sale of bonds being the usual method adopted by corporations to borrow money, cities may exercise the power thus given to borrow by issuing and selling bonds. *Thompson v. City of Peru*, 29 Ind., 305. 1868.

163. **Power to sell bonds.** Power "to issue bonds for the stock, or for the loan of the money to pay for the same" gave no authority to sell the bonds to raise money to pay for stock, especially below par. *City of Atchison v. Butcher*, 3 Kans., 104. 1865.

164.—**discount.** Where an act authorized the town officers to borrow money at a rate of interest not exceeding seven per cent., and pay it over to the railroad corporation, taking the railway stock at par, it was not in their power to exchange the bonds of the town for an equal nominal amount of stock, leaving it in their power to sell such stock at a discount. *Starin v. Genoa*, 23 N. Y., 439, 1861; see *Gould v. Town of Venice*, 29 Barbour (N. Y.), 442, 1859; *Venice v. Breed*, 1 N. Y. Sup. Ct., 130, 1873.

165. **Recitals in bonds.** The town is not bound by the recitals of its officers upon the face of the bonds that the requisite assent of the taxpayers had been obtained. *Starin v. Genoa*, 23 N. Y., 439, 1861; see *Bank of Rome v. Village of Rome*, 19 ib., 20; see *Gould v. Venice*, 29 Barbour (N. Y.), 442, reversed.

VI. LOCATION OF RAILWAY.

166. **Judicial notice.** The courts cannot take judicial knowledge that a railroad company, in locating its road between two points,

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will not run the same to or near certain other places from which it receives subscriptions of stock. *Phillips v. Town of Albany*, 28 Wis., 340. 1871.

167. Road between other cities. An authority to a city to subscribe for stock in a company, chartered for making "a road or roads to said city," authorizes the taking of stock between other cities, from the nearest of which to the city subscribing there is a direct road, the road being in fact an extension of one leading into the city. *Van Houttrup v. Madison City*, 1 Wallace, 291. 1863.

168. Road Running through a city. A railway running *through*, is a railway running *to* a city; and if a city is authorized to subscribe stock to a railway running to it, and it is not made a point in the charter of such road, it can only be made so by subsequent action of the directors of the railway company, and until such action has been had, no absolute subscription of stock in such corporation can be made by such city. *City of Aurora v. West*, 22 Ind., 88. 1865.

169. Validity of law. The objection to an act authorizing subscriptions by cities to aid in the construction of a railway, that it authorized subscriptions to be made by cities through which such road will not run, will not be considered when made by a city through which the road is required to run, either by its charter or by the terms of its subscription. *Lawsen v. Milwaukee and Northern R. R. Co.*, 30 Wis., 597, 1872; *Phillips v. Town of Albany*, 28 ib., 340, 1871.

VII. TAXATION.

170. Levy. By the law of Wisconsin, a provision in a statute under which a town issued its bonds to a railroad, that a tax requisite to pay the interest on these bonds should be levied by the supervisors of the town, is not exclusive of a right in the town clerk to levy a tax under a general statute making it his duty to lay a tax to pay all the debts of the town; a mandamus having issued under the first act, but after efforts to make it productive, having produced nothing. *Morgan v. Town Clerk*, 7 Wallace, 610. 1868.

171. Power of taxation. Where a municipal corporation has had power to issue bonds and to levy taxes to pay them, and the bonds

have been negotiated for value, the power of taxation cannot subsequently be withdrawn until the contract is satisfied. *Von Hoffman v. City of Quincy*, 4 Wallace, 535, 1866; *Butz v. City of Muscatine*, 8 ib., 575, 1869.

VIII. MISCELLANEOUS.

172. Fees for collecting subscriptions. A person, authorized by a railroad company to collect calls made upon subscriptions of stock, and entitled to receive as compensation a certain rate per cent. of the amount collected, would not be entitled to charge such commissions for receiving and delivering to the treasurer of the company bonds of a city and county, with which, in lieu of money, said city and county were allowed to pay the calls on their subscriptions of stock. *Lakenan v. Hannibal and St. Joseph R. R. Co.*, 24 Mo., 505. 1857.

173. Aldermen as stockholders. The fact that several of the aldermen and common council were, at the time a contract with a railway company was entered into, stockholders in the railroad company, does not, *per se*, invalidate such contract. *Gibbons v. Mobile and Great Northern R. R. Co.*, 36 Ala., N. S., 410. 1860.

174. Charter. The act of April 4, 1837, to incorporate the P. K. and F. R. R. Co., provides that any "city or borough shall have authority to subscribe to the stock of that company as fully as any individual." *Held*, that the act only authorizes the making of the subscription and not the issuing of bonds or levying of a tax to carry the same into effect. *Oeblicke v. Pittsburgh*, 5 Penn. Law. Jour. Rep., 485. 1858.

175. Compromise. A contest arose between taxpayers of the city of New Albany and a railway company, in reference to bonds issued by the city in aid of the road. The bonds had not all been issued, and the suits were compromised by the release of the city from the further issue of bonds. The arrangement was in good faith and for the interest of the company as well as the city. A party holding a judgment against the company filed a bill in equity against the city, alleging that the compromise was illegal, and praying an ascertainment of the balance due from the city on its subscription. *Held*, that the transaction was valid. *New Albany v. Burke*, 11 Wallace, 96. 1870.

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176. — The city of New Albany having made a subscription to the stock of the New Albany and Sandusky City Junction R. R. Co., and issued its bonds therefor, an action was brought by B. and T. against the city and the company to enjoin the collection of taxes assessed to pay the interest on said bonds. A compromise was agreed upon between the city and the company, by which the bonds were to be surrendered and the subscription canceled; in consideration of which the city, by an ordinance of the common council, agreed, among other things, to pay all costs of the suit brought by B. and T., as agreed between them and their said attorneys, and said city and attorneys of said railroad company. *Held*, that the ordinance did not bind the city to pay the fees of the attorneys of the railroad company. *New Albany v. Smith*, 16 Ind., 215. 1861.

177. De facto officers of corporation. A taxpayer of a town, that has issued its bonds for the stock of a railroad company, cannot have them declared void, or their delivery to *de facto* officers of the company restrained, on the ground that such officers were not legally elected. *Saurehering v. Iron Ridge and Mayville R. R. Co.*, 25 Wis., 447. 1870.

178. Estoppel. If a municipal corporation has taken a subscription upon more favorable terms than other subscribers, such fact cannot be urged by it to defeat its liability on such subscription. *Evansville, Indianapolis and Cleveland R. R. Co. v. Evansville*, 15 Ind., 395. 1860.

179. — There is nothing against public policy in an agreement by such company to allow the city interest on the stock subscribed by it. *Id.*

180. Instalments. The law for the incorporation of railway companies (1 R. S., p. 412), which provides that the directors may make calls, etc., provided that such subscriptions shall not be required to be paid except in equal instalments of not more than ten per cent. a month, has no application to cases where the times of payment are agreed on in the contract of subscription. *Id.*

181. Mortgage upon land of city. The United States ceded to the mayor and aldermen of Memphis, seventy-five acres of land lying within the corporate limits, for the benefit of that city. The mayor and aldermen mortgaged the land to aid in the construction

of a railroad, one of whose termini was on the bank of the Mississippi, opposite to the city of Memphis. *Held*, that this was a proper purpose, and "for the benefit of said city." *Adams v. Memphis and Little Rock R. R. Co.*, 2 Coldwell (Tenn.), 645. 1866.

182. Res adjudicata. A judgment in favor of a bondholder upon certain municipal bonds, part of a larger issue, against the town issuing them, is conclusive on the question of the validity of the other bonds of the same issue, in a suit between the same parties where the same objections were urged in the second suit as in the former one. *Beloit v. Morgan*, 7 Wallace, 619. 1868; *Aurora v. West*, *ib.* 88.

SUBSCRIPTIONS BY COUNTIES.

See BONDS OF RAILWAY COMPANIES; CERTIORARI; COLLATERAL SECURITIES; FEDERAL COURTS; INJUNCTION; MANDAMUS; SUBSCRIPTIONS BY CITIES AND TOWNS; TAXATION.

I. AUTHORITY TO SUBSCRIBE.

II. PROCEEDINGS.

III. CONDITIONAL SUBSCRIPTION.

IV. BONDS.

V. CHARTER.

VI. SWAMP LANDS.

VII. MANDAMUS.

VIII. TAXATION.

IX. MISCELLANEOUS.

I. AUTHORITY TO SUBSCRIBE.

1. Bonds. The power to subscribe the internal improvement fund of a county to the stock of a railway company does not authorize the county to issue bonds, and become liable in its political capacity for such subscription. *English v. Chicot County*, 26 Ark., 454. 1871.

2. — The bonds of Butler county having been signed by two out of three of the county commissioners, and the requirements of the act authorizing the subscription having been complied with, the bonds were held valid. *Curtis v. County of Butler*, 24 Howard, 435. 1860.

3. Change of ruling by state courts. If a contract, when made, was valid under the con-

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stitution and laws of a state, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity. *Olcott v. The Supervisors*, 16 Wallace, 678, 1872; *Gelpcke v. City of Dubuque*, 1 ib., 175, 1868.

4. Charter. The charter of the St. Joseph and Iowa R. R. Co. (Sess. Acts, 1856-7, pp. 107, 108) authorized it to establish branches and receive county subscriptions, although the counties subscribing had not been empowered to do so by a vote of the people. Article 11, section 14 of the present constitution, was not intended to retroact so as to have any controlling application to laws in existence when that instrument was adopted. *State ex rel. v. Sullivan County Court*, 51 Mo., 522. 1873.

5. — The board of supervisors of Schuyler county is not authorized to issue bonds under the act incorporating the Rock Island and Alton R. R. Co. *Supervisors of Schuyler County v. People ex rel.*, 25 Ill., 181. 1860.

6. Consent of county. The legislature may compel a county to become a subscriber for stock in a railway already built, and may compel it to issue its bonds for the stock and raise money by taxation to pay the bonds. *Napa Valley R. R. Co. v. Napa County*, 30 Cal., 435, 1866; *contra*, see *People ex rel. v. Batchellor*, 53 N. Y., 128, 1873.

7. Constitutional law. The authority of municipal corporations to subscribe for the aid of railway companies has been sustained in the following cases, or recognized in them. *Mitchell v. Burlington*, 4 Wallace, 270, 1866; *Von Hoffman v. Quincy*, 4 ib., 535, 1866; *Riggs v. Johnson County*, 6 ib., 166, 1867; *United States v. Lee County*, ib., 210, 1867; *Same v. Keokuk*, ib., 514; *Bissell v. City of Jeffersonville*, 24 Howard, 287, 1860; *Amey v. Allegheny City*, ib., 364, 1860; *Curtis v. Butler County*, ib., 435, 1860; *Supervisors v. Schenck*, 5 ib., 772, 1866; *Galena v. Amey*, 5 ib., 705, 1866; *Gelpcke v. City of Dubuque*, 1 Wallace, 175, 1863; see also *Seybert v. City of Pittsburgh*, ib., 272, 1863; *Van Hostrop v. Madison City*, ib., 291, 1863; *Meyer v. City of Muscatine*, ib., 384, 1863; *Havemeyer v. Iowa County*, 3 ib., 294, 1864; *Thompson v. Lee County*, ib., 327, 1865; *Rogers v. Burlington*, ib., 654, 1864; *Campbell*

v. City of Kenosha, 5 ib., 194, 1866; *Lee County v. Rogers*, 7 ib., 181, 1868; *Beloit v. Morgan*, ib., 619, 1868; *City of Kenosha v. Lamson*, 9 ib., 477, 1869; *Railroad Co. v. County of Otoe*, 16 ib., 667, 1872; *Olcott v. Supervisors*, ib., 678, 1872; *Gilman v. Sheboygan*, 2 Black, 510, 1862; *Woods v. Lawrence County*, 1 ib., 386, 1861; *Selma and Gulf R. R. Co., ex parte*, 45 Ala., N. S., 696, 1871; *Gibbons v. Mobile and Great Northern R. R. Co.*, 36 ib., 410, 1860; see also *Mississippi, Ouachita and Red River R. R. Co. v. Camden*, 23 Ark., 300, 1861; *English v. Chicot County*, 26 ib., 454, 1871; *Napa Valley R. R. Co. v. Napa County*, 30 Cal., 435, 1866; *Stockton and Visalia R. R. Co. v. Stockton*, 41 ib., 147, 1871; *People v. Coon*, 25 ib., 635, 1864; *Robinson v. Bidwell*, 22 ib., 379, 1863; *Beardsley v. Smith*, 16 Conn., 368, 1844; *Bridgeport v. Housatonic R. R. Co.*, 15 ib., 475, 1843; *Cotton v. Com'rs of Leon County*, 6 Fla., 610, 1856; *Powers v. Inferior Court of Dougherty County*, 23 Ga., 65, 1857; *Winn v. City Council of Macon*, 21 Ga., 275, 1857; *Prettyman v. Supervisors of Tazewell County*, 19 Ill., 406, 1858; *Robertson v. City of Rockford*, 21 Ill., 451, 1859; *Butler v. Dunham*, 27 Ill., 474, 1861; *Supervisors of Schuyler County v. People*, 25 ib., 181, 1862; *Duranovan v. Green*, 57 ib., 63, 1870; *Madison County v. People ex rel.*, 58 ib., 456, 1871; *Board of Bartholomew County v. Bright*, 18 Ind., 93, 1862; *Evansville, Indianapolis and Cleveland R. R. Co. v. Evansville*, 15 ib., 395, 1863; *City of Aurora v. West*, 22 ib., 88, 1864; *Same v. Same*, 9 ib., 74, 1857; *Thompson v. City of Peru*, 29 ib., 305, 1868; *La Fayette, Muncie and Bloomington R. R. Co. v. Geiger*, 34 ib., 185, 1870; *Com'rs of Crawford County v. Louisville, etc., R. R. Co.*, 39 ib., 192, 1872; *John v. Cincinnati, Richmond and Ft. Wayne R. R. Co.*, 35 ib., 539, 1871; *Dubuque County v. Dubuque and Pacific R. R. Co.*, 4 G. Greene (Iowa), 1, 1853; *State v. Bissell*, ib., 328, 1854; *Clapp v. Cedar County*, 5 Ia., 15, 1857; *McMillen v. Boyles*, 6 ib., 304, 1858; *Same v. Lee County*, 3 ib., 311, 1856; *Same v. County Judge*, 6 ib., 391, 1858; *Games v. Robb*, 8 ib., 193, 1859; *Stewart v. Board of Supervisors*, 30 ib., 9, 1870; *McGregor and Sioux City R. R. Co. v. Birdsall*, ib., 255, 1870; *City of Atchison v. Butcher*, 3 Kan., 104, 1865; *Com'rs of Leavenworth County v. Miller*, 7 ib., 479, 1871; *Talbot v. Dent*, 9 B. Monroe (Ky.), 526, 1849; *Slack v. Maysville and Lexington R. R. Co.*, 13 ib., 1, 1852; *Shelby*

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County Court v. Cumberland and Ohio R. R. Co., 8 Bush (Ky.), 209, 1871; *Maddox v. Graham*, 2 Metcalf (Ky.), 56, 1859; *Police Jury v. McDonough*, 8 La. An., 841, 1858; *Parker v. Scoggin*, 11 La. An., 629, 1856; *Augusta Bank v. Augusta*, 49 Me., 507, 1860; *Davidson v. Ramsey County*, 18 Minn., 482, 1872; *St. Louis v. Alexander*, 28 Mo., 483, 1856; *St. Joseph and Denver R. R. Co. v. Buchanan County*, 39 ib., 485, 1867; *State ex rel. v. Macon County Court*, 41 ib., 453, 1867; *Chillicothe and Brunswick R. R. Co. v. Mayor, etc. of Brunswick*, 44 ib., 553, 1869; *State ex rel. v. Linn County Court*, ib., 504, 1869; *State ex rel. v. Greene County*, 54 ib., 540, 1874; *Same v. Sullivan County Court*, 51 ib., 522, 1873; *Osage Valley, etc. R. R. Co. v. Morgan County*, 53 ib., 156, 1873; *Smith v. Clark County*, 54 ib., 58, 1873; *Gibson v. Mason*, 5 Nev., 233, 1869; *Benson v. Mayor of Albany*, 24 Barbour (N. Y.), 248, 1857; *Clarke v. City of Rochester*, 28 N. Y. 605, 1864; *Same v. Same*, 14 Howard's Pr. (N. Y.), 193, 1857; *Same v. Same*, 13 ib., 204, 1856; *People v. Mitchell*, 45 Barbour (N. Y.), 208, 1865; *Same v. Same*, 35 N. Y., 551, 1866; *People ex rel. v. Batcheller*, 53 ib., 128, 1873; *Caldwell v. Justices of Burke County*, 4 Jones' Eq. (N. C.), 323, 1858; *Taylor v. Newbern*, 2 ib., 141, 1855; *Hill v. Com'rs of Forsythe County*, 67 N. C., 367, 1870; *Cincinnati v. Walker*, 1 Cincinnati Rep., 121, 1871; see *opinion of Hitchcock, J.*, 20 Ohio, appendix A.; *Walker v. Cincinnati*, 21 Ohio St., 14, 1871; *Cincinnati, Wilmington and Zanesville R. R. Co. v. Com'rs of Clinton County*, 1 Ohio St., 77, 1852; *Steubenville and Indiana R. R. Co. v. North Tp.*, ib., 105, 1852; *Thompson v. Kelley*, 2 Ohio St., 647, 1853; *State ex rel. v. Perrysburg*, 14 ib., 472, 1863; *Com'rs of Knox County v. Nichols*, ib., 260, 1863; *State ex rel. v. Union Tp.*, 8 ib., 394, 1858; *State ex rel. v. Goshen*, 14 ib., 569, 1863; see also *Brown v. County Com'rs*, 21 Penn. St., 37, 1853; *Sharpless v. Mayor of Philadelphia*, ib., 147, 1853; *Moers v. Reading*, ib., 188, 1853; *Commonwealth ex rel. v. Allegheny County*, 32 ib., 218, 1858; *Commonwealth v. Councils of Pittsburgh*, 41 ib., 278, 1861; *Same v. Pittsburgh*, 34 ib., 496, 1859; *Same v. Perkins*, 43 ib., 400, 1862; *Same v. McWilliams*, 11 ib., 61, 1849; *Nichols v. Mayor of Nashville*, 9 Humphreys (Tenn.), 252, 1848; *Louisville and Nashville R. R. Co. v. County Court*, 1 Sneed (Tenn.), 637, 1854; *San Antonio v. Jones*, 28 Tex., 19, 1860; *Same v. Lane*, 32 ib., 405; 1860;

Same v. Gould, 34 ib., 49, 1870; *Goodin v. Crump*, 8 Leigh (Va.), 120, 1837; *Clark v. City of Janesville*, 10 Wis., 136, 1859; *Bushnell v. Beloit*, ib., 195, 1860; see also *Fisk v. City of Kenosha*, 26 ib., 23, 1870; *Phillips v. Town of Albany*, 28 ib., 840, 1871; *Rogan v. City of Watertown*, 30 ib., 259, 1872; *Lawson v. Milwaukee and Northern R. R. Co.*, ib., 597, 1872.

8. — A county or other municipal corporation has no inherent right of legislation, and cannot subscribe for stock in a public improvement unless authorized to do so by the legislature. (Citing *Thompson v. Lee County*, 3 Wallace, 327.) *People ex rel. v. Mitchell*, 85 N. Y., 551, 1866; *Same v. Same*, 45 Barbour (N. Y.), 208, 1865.

9. — The legislature has power to authorize a county to subscribe for stock in a railroad company, if the people choose to do so, by a popular vote to that effect. *Selma and Gulf R. R. Co., ex parte*, 45 Ala., N. S., 696, 1871; *Hill v. Commissioners of Forsythe County*, 67 N. C., 367, 1870.

10. — The fact, that a vote of the people is necessary to carry the provisions of an act into execution, does not render the taking effect of the act dependent upon any authority other than the legislative power of the general assembly, and therefore does not render the act unconstitutional. *Lafayette, Muncie and Bloomington R. R. Co. v. Geiger*, 34 Ind., 185, 1870; *Board, etc., of Bartholomew County v. Bright*, 18 ib., 93, 1862.

11. — That portion of the act of January 23, 1869, amendatory of the charter of the Decatur and East St. Louis R. R. Co., which permits a portion of each of several counties to aid the corporation, is not in violation of that clause of the constitution of 1848, which forbids the credit of the state to be given to, or in aid of, any individual, association or corporation. *Madison County v. People ex rel.*, 58 Ill., 456, 1871.

12. — Section 8, article 11, of the constitution, prohibiting the state from ever being a party in carrying on any works of internal improvement, applies to the state in its sovereign corporate capacity, and not to the subordinate political subdivisions thereof. It prohibits the state as a state, and not counties, from being parties in carrying on any works of internal improvement. *Commissioners of Leavenworth County v. Miller*, 7 Kans., 479, 1871; *State ex rel. v. Nemaha County*, ib., 542.

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13. — The localities along the line of a railroad may be taxed to aid its construction and operation, if they choose to take stock therein and issue bonds thereto; and a fair rule of apportionment, of which the taxpayers cannot complain, is, to allow the localities to be taxed the privilege of saying how much the benefit of the improvements is worth to them, and for what amount they are willing to be taxed. *Ib.*

14. — Where an election was held under the acts of 1865 and 1866, authorizing such a subscription and the issuing of bonds to a railroad company upon certain conditions, and where another election was held under the laws as they existed on the 22d of May, 1869, for the purpose of changing in some respects such conditions, *held*, that said second election was valid. *Morris v. Commissioners of Morris County*, 7 Kans., 576. 1871.

15. — The city of Maysville, under the act authorizing subscription to stock in the Maysville and Lexington R. R. Co., had a right to vote jointly with the county on the question of the propriety of making the subscription, and the call for the vote by the president and directors of the railroad company was authorized by the statute. *Slack v. Maysville and Lexington R. R. Co.*, 13 B. Monroe (Ky.), 1. 1852.

16. — It is no objection to the mode of exercising the power to take such stock that it is referred to the consent of those to be affected by its operation. *Ib.*

17. — Where a decision of a question is referred to the popular vote, it is fair to take the decision of the majority of those who do vote as decisive of the question, and that those who did not vote acquiesce. *Ib.*

18. — It is no objection to the validity of a vote for imposing a railroad tax, that the power was given to the president and directors of the company to designate the time of taking the vote, instead of the county court. *Ib.*

19. — The provision of the charter of the Missouri and Miss. R. R. Co. (Sess. Acts 1865, p. 86, § 13), authorizing the county courts of any county to subscribe for the stock of said company, and to issue bonds therefor, etc., was not repealed by the constitution, Art. XI., § 14. *State ex rel. v. Macon County Court*, 41 Mo., 453, 1867; see *Chillicothe and Brunswick R. R. Co. v. Mayor, etc., of Brunswick*, 44 Mo., 553, 1869.

20. — A county has the constitutional right

to aid in building a railroad within its limits. *Dubuque County v. Dubuque and Pacific R. R. Co.*, 4 G. Greene (Iowa), 1. 1853.

21. — The proceedings under which the citizens of Dubuque county voted two hundred thousand dollars, to aid in constructing the Dubuque and Pacific R. R. through the county, were regular, and authorized by law. *Ib.*

22. — The statute (Code, § 114) provides for borrowing money by authority of a vote of the people "to construct any road or bridge which may call for extraordinary expenditure." *Held*, that the term, any road, includes railways. *Ib.*

23. — The authority of counties to subscribe for stock in railway companies, whose road is to run through such counties, whatever might be the opinion of the court, were it *res nova*, is not now an open question in the state of Iowa. After one or two judicial decisions by the supreme court, affirming the power, and repeated legislative recognition of the right, the counties must be held to possess the right and authority. Following *State v. Bissell*, 4 G. Greene, 328, and *Dubuque County v. Dubuque and Pacific R. R. Co.*, *ib.*, 1; *Clapp v. Cedar County*, 5 Ia., 15, 1857.

24. — A statute enacted prior to the constitution of 1851, authorizing the commissioners of a county, upon the approval of a majority of the electors, to deliver county bonds to *bona fide* stockholders of a railroad located through such county, to be applied, at par, in payment of their stock subscriptions, and the proceeds to be applied exclusively in constructing the road within the county, the county being amply indemnified for the loan of its credit by bond and mortgage of the subscribers, is not in conflict with the constitution of 1802. *Comm'rs of Knox County v. Nichols*, 14 Ohio St., 260. 1863.

25. — Nor is such statute repealed by the constitution of 1851, although the bonds had not been issued, nor the vote of the electors given, until after that constitution went into operation. *Ib.*; *State ex rel. v. Perrysburg*, *ib.*, 472; *State ex rel. v. Union Township*, 8 Ohio St., 394, 1858.

26. — The act of March 1, 1851, authorizing the commissioners of Clinton county to subscribe to the capital stock of the relator, does not delegate legislative power to contravene the constitution of 1802, in providing that the subscription shall not be made until the assent

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of a majority of the electors of the county (except two townships) is first obtained at an election held for that purpose. *Cincinnati, Wilmington and Zanesville R. R. Co. v. Com'rs of Clinton County*, 1 Ohio St., 77. 1852.

27. — Such a tax, when thus authorized, is not beyond the legitimate scope of local, municipal taxation; nor is it opposed to Art. 8, § 4 of the constitution, declaring that "private property ought to and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner." *Id.*

28. — The legislature having empowered a county to subscribe for stock in a railway company, the courts cannot consider the question as to whether or not the road will be a public benefit. *Napa Valley R. R. Co. v. Napa County*, 30 Cal., 435. 1866.

29. — The power conceded to the counties or other municipal corporations by a railroad charter, to take and subscribe for stock in aid of such railroad, was intended as a privilege to the railroad company. *State ex rel. v. Greene County*, 54 Mo., 540. 1874.

30. — A provision in the charter of a railway company, authorizing county courts to subscribe for stock in such railroad, without a vote of the people, is not repealed by subsequent general laws, nor by the subsequent adoption of the present constitution. *Id.*; *Smith v. Clark County*, ib., 58.

31. — A county may be authorized by law to subscribe for stock of railroads located in other states, terminating at or near the boundaries of such county. *St. Joseph and Denver R. R. Co. v. Buchanan County*, 39 Mo., 485. 1867; see also *Railroad Company v. County of Otoe*, 16 Wallace, 667. 1872.

32. — the right denied. The authority of municipal corporations to subscribe to the aid of railway companies has been denied in the following cases: *Stokes v. Scott County*, 10 Iowa, 166, 1859; *State ex rel. v. Wapello County*, 13 ib., 388, 1862; *Myers v. Johnson County*, 14 ib., 47, 1862; *McMillen v. Boyles*, 14 ib., 107, 1862; *Rock v. Wallace*, 14 ib., 593, 1862; *Ten Eyck v. Mayor of Keokuk*, 15 ib., 486, 1863; *Smith v. Henry County*, 15 ib., 385, 1863; *Hanson v. Vernon*, 27 ib., 28, 1869; *Chamberlain v. City of Burlington*, 19 ib., 395, 1865; *McClure v. Owen*, 26 ib., 248, 1868; *Griffith v. Commis-*

sioners of Crawford County, 20 Ohio, 609, 1851; *contra* see ib., Appendix A, per Hitchcock, J., alone; *People v. Salem*, 20 Mich., 452, 1870; *Bay City v. State Treasurer*, 23 ib., 499, 1871; *Whiting v. Sheboygan, etc. R. R. Co.*, 25 Wis., 167. 1870.

33. — Ch 448, private and local laws of 1867, authorizing the supervisors of a county (after an affirmative vote of the people of the county upon the question, and after certain portions of said company's road have been graded), to issue county orders in aid of the road, and levy a tax to pay such orders, *the county not becoming a stockholder in the company*, held invalid, as not a legitimate exercise of the taxing power. *Whiting v. Sheboygan, etc. R. R. Co.*, 25 Wis., 167. 1870.

34. — The counties of Iowa have no power to borrow money or subscribe stock, to aid in the construction of railroads; and the issuing of bonds by the counties, or the transfer of them by the corporations to whom they are issued, may be restrained by injunction. The case of *Dubuque and Pacific R.R. Co. v. Dubuque County*, 4 G. Greene, 1, overruled; *State v. Bissell*, ib., 328; *Clapp v. Cedar County*, 5 Iowa, 15; *McMillan v. Lee County*, 8 ib., 811 and 391, and *Ring v. Johnson County*, 6 ib., 265, reviewed; *Stokes v. Scott County*, 10 Iowa, 166. 1859.

35. — The legislature of the state of Iowa has no power to authorize counties to become as corporations, stockholders in railway companies; and has never attempted by the provisions of § 114 of the Code of 1851, or otherwise, to confer such power; overruling *Dubuque County v. Dubuque and Pacific R. R. Co.*, 4 G. Greene, 1; and approving *Stokes v. Scott County*, 10 Iowa, 166; *State ex rel. v. Wapello County*, 13 ib., 388, 1862; *Myers v. Johnson County*, 14 ib., 47, 1862; *McMillan v. Boyles*, ib., 107; *Rock v. Wallace*, ib., 593; *Smith v. Henry County*, 15 ib., 385, 1863; *Ten Eyck v. Mayor of Keokuk*, ib., 486.

36. — The acts of 1855, regulating the issue of corporate bonds, regulated the exercise of a power which it was supposed had been already granted, but cannot be construed as an original grant of power. *Id.*

37. — The legislature has no constitutional power to authorize a county to subscribe for stock in a railway company. Per SPALDING, J., alone. *Griffith v. Commissioners of Crawford*

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County, 20 Ohio, 609. 1851. *Contra*, see *ib.*, appendix A. HITCHCOCK, J., *alone*.

38. — money must be paid down. A county cannot, under § 6 of art. 10 of the constitution, take stock in any incorporated company without paying the money down; and § 17 of the act of May 12, 1869, for aiding railroads, does not conflict with this provision of the constitution. *Commissioners of Crawford County v. Louisville, etc. R. R. Co.*, 39 Ind., 192. 1872.

39. County Courts. The powers of the county court of Shelby county, Ky., to subscribe for stock in a railway, determined with reference to the particular facts of the case. *Shelby County Court v. Cumberland and Ohio R. R. Co.*, 8 Bush. (Ky.), 209. 1871.

40. Legalizing acts. A subscription of a county made without authority may become valid by subsequent legislative enactment. *Ib.*

41. — The power to subscribe to the capital stock of railway corporations, and to issue county bonds in payment of such subscriptions, having been conferred on counties, any defect in the exercise of the power may be cured by the general assembly. *McMillan v. Boyles*, 6 Iowa, 304, 1858; *Same v. County Judge*, *ib.*, 391.

42. North Missouri R. R. Co. Section 14 of the charter of the North Mo. R. R. of 1851, authorized counties along the line of the road to subscribe thereto without sanction of a popular vote. Section 10 of the act of 1857, creating the Alexandria and Bloomfield R. R. Co. (Sess. Acts, 1856-7, p. 94), made said section 14 a part of the latter charter. *Smith v. County of Clark*, 54 Mo., 58, 1873.

43. Notice. Section 119 of the Code does not require the county judge to give thirty days' notice of the adoption by a vote of the people of a proposition for subscribing to the capital stock of a railroad company. *Clapp v. Cedar County*, 5 Iowa, 15. 1857.

44. Ratification. The levy of a tax and payment of interest, by the proper county authorities, validates in the hands of *bona fide* holders for value, county bonds irregularly issued in their origin. *Supervisors v. Schenck*, 5 Wallace, 772, 1866; See *Marsh v. Fulton County*, 10 *ib.*, 676, 1870.

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45. Consolidation. Where after a subscription had been legally authorized by votes, but not yet made, the railway company consolidated with another company, it was held that a subscription upon such election could not be made to the new company. Ch. 44, Laws of 1865, construed. *State ex rel. v. Nemaha County*, 10 Kans., 569. 1873.

46. Control of proceedings. All the acts of county commissioners and the voters of a county, in taking steps to raise money to take stock in an incorporated company, are between themselves, one the principal and the other the agent; there is no contract with the incorporated company, nor has it any right in, or control over the matter, until the money is raised and the stock taken. *Com'rs of Crawford County v. Louisville, etc., R. R. Co.*, 39 Ind., 192. 1872.

47. Election. The county judge possesses the power to submit to a vote of the people of the county, the question whether the county will subscribe to the capital stock of a railway company, whose road is to run through such county, and such vote is not in derogation of law. *Games v. Robb*, 8 Ia., 193. 1859.

48. — The failure of the county judge, or other officer, to comply with the directory provisions of the law regulating the manner of conducting the election, or their neglect to make proper entries, will not make the county treasurer a wrongdoer in the collection of taxes levied under such vote, if authorized by a proper warrant. *Ib.*

49. — Where a county issues its bonds to a railroad company, if there was reasonable certainty in the manner of voting and ordering the subscription, and the subscription was made to the road authorized, and the other provisions of the statute were complied with, such bonds are valid. *Ranney v. Baeder*, 50 Mo., 600. 1872.

50. — The power given by § 6 of the act to incorporate the Platte City and Fort Des Moines R. R. Co. (Adj. Sess. Acts 1859-60, p. 443), to the county court of Platte county, to subscribe capital stock to said company, is by § 8 of the same act made subject to the general railroad law (R. C. 1855, p. 427, § 30). And the true meaning and effect of this law is, that an election to ascertain the sense of the tax-

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payers as to such subscription is a necessary condition of the power to subscribe. A subscription made without such election was without authority of law, and void. *Leavenworth and Des Moines R. R. Co. v. Platte County Court*, 42 Mo., 171. 1868.

51. — Where a question is submitted to the people of a county, and is made to depend upon the vote of a majority of the voters of said county, the only proper test of the number entitled to vote in such election is the result thereof, as determined by the ballot box. *Louisville and Nashville R. R. Co. v. County Court*, 1 Sneed (Tenn.), 687. 1854.

52. — amount specified. The submission to a vote of the people of a county, whether the bonds of the county shall be issued in payment of a stock subscription, need not specify the rate of interest or its time of payment, if the rate of taxation and the whole amount to be paid is stated. *Whittaker v. Johnson County* 10 Ia., 161. 1859.

53. — The law authorizing the Saline county court to subscribe for stock in the Lexington and St. Louis R. R. Co., expressly provided that the subscription should not be made unless a majority of the taxpayers should vote for it, "specifying the amount." The order of the county court, submitting the question to the people, called on them to vote for or against an amount "not exceeding \$70,000," leaving the precise amount undetermined. The entry in the records of the county court, subsequent to the vote, declared that the election resulted "in favor of levying a tax of \$70,000, to subscribe the same to the capital stock of the Lexington and St. Louis Railroad." In *mandamus* against the court to compel the issue of the bonds, and levy of tax for their payment, it was *held*, that such entry was not a conclusive finding of the court of the fact that the taxpayers voted to subscribe the specific sum of \$70,000, but that under a fair interpretation of the record, it showed merely that the question submitted had received a majority of the votes. The bonds of a county can be made valid only by a substantial compliance with the law that authorizes their issue; and the failure of voters to specify their amount, in the cause at bar, rendered bonds issued in pursuance of such vote invalid. *State ex rel. Lexington and St. Louis R. R. Co. v. Saline County Court*. 45 Mo., 242. 1870.

54. — But these bonds will not be held invalid in the hands of innocent purchasers for value. *State, to use of, etc., v. Same*, 48 Ib., 890. 1871.

55. — ballots. Where the statute prescribed that the ballots to be used should contain the words, "for the railway appropriation;" and, at the election, a large portion of the ballots cast and counted contained only the words "for the railroad;" *held*, that the casting and counting of such ballots was an irregularity which would not affect the validity of the election. *Detroit, Eel River, etc., R. R. Co. v. Bears*, 39 Ind., 598. 1872.

56. — certificate. The certificate of the proper officer as to the result of the election is *prima facie* evidence of its fairness; but this certificate may be impeached. *Prettyman v. Supervisors of Tazewell County*, 19 Ill., 406. 1858.

57. — constitutional law. The county of St. Louis was authorized by an act of the legislature to subscribe to the stock of the O. and M. R. R. Co. The act contained the following clause: "Before the subscription hereby authorized shall be made, the county court of the county of St. Louis shall submit the question of making such subscription to the qualified voters of said county; and if a majority of those voting shall be in favor of such subscription, the county court shall at once proceed to make the same for the county." *Held*, 1. That this act under the general law took effect ninety days after its passage, a different time not being appointed therein; 2. That the requirement directing the submission of said question to the voters was not merely directory; 3. That the act must be in force before the submission to the voters can be lawfully made; 4. That the requirement as to the submission of such question to the qualified voters was constitutional. *St. Louis v. Alexander*, 23 Mo., 488. 1856.

58. — effect of election. A county, by voting to subscribe stock in a railway company, and to issue bonds in payment therefor, does not thereby create a contract between the county and the railway company for that purpose. *Land Grant R. R. Co. v. Commissioners*, 6 Kan., 256. 1870.

59. — It makes no difference if there are certain conditions attached to the vote, which are afterwards complied with by the company. *Ib.*

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60. — In such case, the subscription not having been made, the county is not bound to issue bonds on the tender of the stock. *Ib.*

61. — **form of submission.** In submitting to the voters of a county a proposition to have the county issue bonds for stock in a railway company, the form of the vote is sufficient when it reads: "For Lyons Railroad," or "Against Lyons Railroad." *State v. Bissell*, 4 Greene (Iowa), 328. 1854.

62. — A proclamation directing a vote of the people for or against issuing bonds to a railroad company, under the stipulation that they should be issued "only in the event of said railroad being constructed centrally through the county;" *held*, that the vote being favorable to the road, the county judge had a right to issue the bonds, on being made satisfied that said road will be built centrally through the county. *Ib.*

63. — The submission by the county judge, of three several propositions at the same time to a vote of the people, will not of itself render invalid the proceedings under such submission, if each proposition submitted, in other respects meets the requirements of the law. *McMillan v. Lee County*, 3 Iowa, 311. 1856.

64. — But all the requirements of the statute must be complied with, in reference to each question or proposition submitted to the vote. *Ib.*

65. — No vote upon such proposition is of any effect, unless it is accompanied by a provision for levying a tax to pay the subscription, and unless the people adopt the tax also. *Ib.*

66. — It is not required that there should be a vote upon the proposition to tax separate from the question of subscribing the stock. *Ib.*

67. — **form.** A proposition to subscribe for stock in a railway company, coupled with a proposition on the part of the railway company to build a free wagon and passenger bridge across a river in the county, is not such a proposition as may be submitted to the decision of the electors of the county. *Selma and Gulf R. R. Co., ex parte*, 46 Ala. N. S., 230. 1871.

68. — A proposition for an appropriation to two or more railroad companies should not be submitted at the same time, in such a form

that the voters cannot vote for one and against the other, but must vote for or against both. *Garrigus v. Commissioners of Parke County*, 39 Ind., 66, 1872; *Indianapolis, Bloomington and Western R. R. Co. v. Commissioners of Fountain County*, *id.*, 215.

69. — A vote taken upon a proposition to appropriate an entire sum to be apportioned between two railways, to aid in their construction, by a county, is illegal, and the collection of the taxes levied in accordance therewith may be enjoined. *Bronenberg v. Commissioners of Madison County*, 41 Ind., 502. 1873.

70. — It is improper to submit more than one project to a vote at a time. *Supervisors of Fulton County v. Mississippi and Wabash R. R. Co.*, 21 Ill., 338, 1859; *People ex rel. v. Tazewell County*, 22 *ib.*, 147, 1859.

71. — **notice.** Where, under the act of March 15, 1870 (Wagn. Stat., 2d ed., 321, a), a county court ordered a special election to vote on a proposition to subscribe to the capital stock of a railroad, but no sufficient notice was given of the election, it was *held*, that an assessment against the landholders of the county, to meet the subscription ordered by the vote, would be unauthorized by law. That if the assessment had been warranted by law, the sheriff could not collect it under that statute by levy upon and sale of real estate; and that injunction would lie to restrain the officer from making such sale. *McPike v. Pen*, 51 Mo., 68. 1872.

72. — The certificate of the sheriff, that he has posted notices of election in ten public places in the township, is not defective for not specifying the places. If, in fact, notices of an election be not posted in ten public places, as prescribed by the statute, the election will be invalid. *Detroit, Eel River, etc., R. R. Co. v. Bearss*, 39 Ind., 598. 1872.

73. — Where the statute provides that in order to authorize a subscription, the proposition must receive a majority of all the qualified voters, taking the preceding governor's election as a basis, it is immaterial whether notice of the election is duly given or not. A failure to give such notice would only favor the negative voters. *Hord v. Rogersville and Jefferson R. R. Co.*, 3 Head (Tenn.), 208. 1859.

74. — The notice of election must specify the amount of the appropriation, and not the per centum. 3 Ind. Stat., 389. *Cincinnati*,

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Wabash and Michigan R. R. Co. v. Wells, 39 Ind., 539, 1872; *Detroit, Eel River and Illinois R. R. Co. v. Beures*, ib., 598.

75. — order of county court. To authorize a county court to make a subscription in aid of the Lexington and Big Sandy Railway, under the statute (Sess. Acts of 1851-2, p. 786), it was necessary that the election for ascertaining the sense of the voters of the county as to the making of such subscription should have been ordered by the county court, on the application of the officers of the railroad company. And a vote taken in any other way did not authorize the subscription, by the county court. *County Court of Fayette County v. Lexington and Big Sandy R. R. Co.*, 17 B. Monroe (Ky.), 335. 1856.

76. — The payment by the county court to the officers who held the election without authority, could not give validity to an election which was illegal. *Ib.*

77. — polls. The mere fact that the sheriff failed, in a county election, to open the polls in one or more precincts, does not, of itself, invalidate the election. To have that effect, it must appear also by the facts, that such failure did, or might have affected the general result of the contest. The *onus* in this respect is upon the contestants. *Louisville and Nashville R. R. Co. v. County Court*, 1 Sneed (Tenn.), 637. 1854.

78. — representations. Such subscriptions are not invalid because made upon the representations of persons interested in the company. *Lawrence County v. Northwestern R. R. Co.*, 32 Penn. St., 144. 1858.

79. — vote unnecessary. In mandamus against the county court of Nodaway county, to compel the issue of certain county bonds in payment of shares of stock in the Missouri Valley R. R. Co.; *held*, 1, that the court might subscribe such stock without submitting the matter to popular vote (acts 1865, pp. 102-3); 2, that the fact that the road was not completed in the time called for by the contract — there being nothing to show that time was the essence of the contract — would constitute no valid defense. If injury resulted from the delay, there might be an abatement in the shape of damages, but not an entire release from payment. *Kansas City, St. Jos. and Council Bluffs R. R. Co. v. Alderman*, 47 Mo., 349, 1871; *State ex rel. v. Nodaway Co. Court*, 48 ib., 389.

80. Illegal tax. A subscription of stock ordered by a county court to a railway company, before its articles of association have been executed, or filed with the secretary of state, is illegal and void. But where the county court orders a levy of a tax to meet the subscription, and the collector proceeds to enforce its collection, a tax payer cannot have his action to recover back the amount so collected from him. His remedy is by proceeding to arrest the execution of such illegal subscription, and the state may, through her legal representatives, arrest the issue of the bonds. *Rubey v. Shain*, 54 Mo., 207. 1878.

81. Location. Where the charter of a railway company authorizes the counties "through which it may pass" to subscribe to its stock, a county lying between the two *termini* of the road may subscribe without waiting for the actual location of the route. *Woods v. Lawrence County*, 1 Black., 386. 1861.

82. — If the statute requires the grand jury to fix and approve the amount of the subscription, and authorizes the commissioners to act on their report and make the subscription, if the law in these respects is complied with, the county is bound. *Ib.*

83. — In a suit to recover the arrears of interest on bonds issued for such stock, it is enough to show that the manner and terms of payment were agreed upon between the company and the commissioners. *Ib.*

84. Ratification. Where county bonds were issued without any authority, they are invalid in the hands of an innocent purchaser. *Marsh v. Fulton County*, 10 Wallace, 676. 1870.

85. — A ratification of an act can only be made by a person who possesses the power to perform the act ratified. *Ib.*

86. — In a suit to enforce the payment of bonds issued by a county for stock in a railroad company, although it appear that at the time the court authorized the subscription, no election had been held to ascertain the sense of the tax payers, yet, if it appeared that the county, by its authorized agent, had voted on its stock in such railway company for more than twelve years, such action of the county was, for the purposes of this suit, a waiver of the defects in the original subscription. *Barrett v. Schuyler County Court*, 44 Mo., 197. 1869.

87. Repeal of law. Certain counties were authorized by law to subscribe to the stock of

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a railway company upon a vote of the majority of the holders of real estate in such counties first being had. An election was accordingly held, and resulted in favor of the subscription. Before the subscription was actually made, the law was repealed. *Held*, that the railroad company had not acquired any such vested rights by reason of such election as to entitle it to have the subscription enforced. *Covington and Lexington R. R. Co. v. Kenton County Court*, 12 B. Monroe (Ky.), 144. 1851.

88. — Under an act passed in 1849, stock was voted to the Ohio and Mississippi Railroad Company, but the county commissioners did not subscribe the stock or issue bonds till 1852. In 1851, a new constitution of the state of Indiana was adopted, which prohibited such subscriptions, unless paid in cash, and prohibited the borrowing of money for that purpose. *Held*, that the mere vote to subscribe did not, of itself, form such a contract with the company as would be protected by the tenth section of the first article of the constitution of the United States. The contract was unexecuted until the subscription was made. *Aspinwall v. Commissioners of the County of Daviess*, 22 Howard, 364. 1859.

89. — Where an act of legislature authorized the subscription to the stock of a railway company, to be made by certain counties upon the recommendation of the grand jury being first made; *held*, that all discretionary power touching the subscription was given exclusively to the grand jury, and they could not transfer any part of it to the county commissioners. That the recommendation of the grand jury that an amount not exceeding a certain sum be subscribed, was not a compliance with the provisions of the act. The amount should have been designated. The law in force at the time that the proposal for a contract is made, is a part of it, and if the proposal is not accepted until after the law is essentially changed, such acceptance comes too late. Where the act authorizing the subscription provided that the acceptance of its provisions by the company should also be deemed an acceptance of another act imposing certain restrictions on the corporation, and the latter act was repealed before the acceptance of the subscription, and after the recommendation of the grand jury, the sub-

scription could not not be subsequently made. *Mercer County v. Pittsburgh and Erie R. R. Co.*, 27 Penn. St., 389. 1856.

90. — The commissioners having no power to make a subscription, cannot ratify one. *Id.*

91. **Statutory requirements.** Where money is raised for the purpose of taking stock in a railway company, the company cannot have any of the money until it has fully constructed the road, so that cars shall pass over the same; and no one but a petitioner, or a tax payer, can have a mandate to compel the payment of the money. § 17, act of May 12, 1869. *Commissioners of Crawford County v. Louisville R. R. Co.*, 39 Ind., 192. 1872.

III. CONDITIONAL SUBSCRIPTIONS.

92. **Expenditures required.** The act of 1860 (Stat. 1860, 133), relative to the issuance of bonds in Butte county, requires that the *actual expenditure* and not the *value* of the work shall be considered in estimating the work. *California Northern R. R. Co. v. Butte County*, 18 Cal., 671. 1861.

93. — The county might refuse to issue the bonds if the required expenditure has not really been made. *Id.*

94. **Power to make conditions.** The act of March 12, 1852, authorizing police juries to subscribe to works of internal improvements, and requiring the insertion in the ordinance of the number and amount of shares proposed to be subscribed, does not prevent the insertion of such other clauses and conditions as the police jury may think proper. The ordinance, if accepted at all, must be accepted according to its terms and conditions. *Vicksburg, Shreveport and Texas R. R. Co. v. Ouachita Parish*, 11 La. An., 649. 1856.

95. **Precedent conditions.** Where the subscription was made upon condition that the county "was to receive for each bond as issued, a certificate for the same amount of stock in said company;" *held*, that the actual tender of the certificate of stock was not a condition precedent to the issue or delivery of the county bonds. *State ex rel. Burlington and Missouri River R. R. Co. v. Wapello County*, 9 Ia., 288. 1859.

96. — In an information for a writ of mandamus to compel the issue and delivery of such bonds, it is only necessary on the part

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of the relator, to allege a readiness and willingness to issue the certificates when the bonds are delivered. *Ib.*

97. Repeal of proviso. By a special act of the legislature, passed February 26, 1846, the county of K. was authorized to subscribe for stock in a railway company, provided that no sale of the stock should be made except at par. The stock was accordingly subscribed for. By the act of May 1, 1852, the commissioners of any county were empowered to sell railroad stock of counties on such terms as they might deem for the interest of the county. *Held*, that the act of 1852, by necessary implication, repealed the limitation on the power of sale imposed by the act of 1846. *Commissioners of Knox County v. McComb*, 19 Ohio Stat., 320. 1869.

98. Route. The statute provided for the issuance of county bonds to a railroad company, provided that it should build a road from Carson to Virginia, and that the line should run within 1,200 feet of French's mill. *Held*, that the building of the road between the cities named, but running 2,400 feet from French's mill, was not a compliance with the statute, although a branch was built to within 400 feet of French's mill. *Virginia and Truckee R. R. Co., v. Lyon Co.*, 6 Nev., 68. 1870.

99. — Where the condition of a subscription is, that the railroad must pass a certain point, the road must pass that point or lose the subscription, even if it is impracticable to build the road in accordance with such condition. *Ib.*

100. Time. The time within which a railway company must commence work upon its road in a county, in order to avail itself of an appropriation by the county, commences from the time when the order levying the tax is made by the board of county commissioners, and not from the time when the levy is placed on the tax duplicate. *State ex rel. v. Wheadon*, 39 Ind., 520. 1872.

101. — When a railway company fails to commence work in good faith upon the railroad within one year from the levy of the tax, the taxpayer is discharged from his obligation to pay the tax. *Ib.*

IV. BONDS.

102. Collateral. When county bonds have

been deposited by a railway company with its president, under an agreement with an accommodation indorser, that the bonds should be held for the purpose of paying notes which had been indorsed for the benefit of the company, the president becomes a trustee, independent of his official character, and is personally responsible for the execution of the trust. It is no defense for him to allege that he was directed by the corporation to make another disposition of the bonds. *Wilkinson v. Stewart*, 30 Ill., 48. 1862.

103. Coupons. In an action upon coupons of bonds, issued by a county in aid of a railway, it is not necessary to aver the power of the county to make the contract. Code, § 108. *Ring v. Johnson County*, 6 Ia., 205. 1858.

104. — Where such coupons were signed "by order of the county judge," etc., S. J. H., clerk, and no seal was attached; *held*, that the seal was not essential. *Ib.*

105. — Where such coupons refer to certain bonds, of which they form a part, it is to be presumed that the bonds were properly executed and under seal. *Ib.*

106. — Action may be maintained upon such coupons, without setting out the bonds in the pleading. *Ib.*

107. Discount. Where bonds, issued by a county in payment of its subscription to the stock of a railway company, were sold below par, in violation of the statute authorizing their issue, the county may, by a proceeding in equity, compel the holder to receive in satisfaction of the bonds the sum paid by the first purchaser with interest thereon. The railroad company is not a necessary party defendant to such proceeding. *Armstrong County v. Brinton*, 47 Penn. St., 367. 1864.

108. — Where the law prohibited the bonds of counties from being sold by a railway company at less than par, and the company sought to evade the provision by increasing the compensation of their contractors and paying them in the bonds, it was *held*, that this was a fraud on the counties, and entitled them to a rescission of the contract for the stock. *Lawrence County's Appeal*, 67 Penn. St., 87. 1870.

109. — In a suit brought upon the coupons of county bonds by a *bona fide* holder, his right to recover is not affected by the fact that the railway company sold the bonds at a rate of

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discount forbidden by its charter. *Woods v. Lawrence County*, 1 Black, 386. 1861.

110. — Where a county or city issues bonds, payable to the bearer, under an act of assembly referred to on the face of the bonds, and those bonds pass into the hands of *bona fide* holders, for value, the county is bound to pay them. It is no defense that the restrictions and limitations of the law had not been formally complied with. Nor is it any defense that they were sold at less than par, although the act authorizing their sale provided that they should not be sold at a discount. *Mercer County v. Hackett*, 1 Wallace, 83, 1863; *Meyer v. City of Muscatine*, ib., 384, 1863.

111. *Guaranty.* The defendant corporation had full power to guarantee the punctual payment of the coupons attached to the bonds of Allegheny county. *Evans v. Cleveland and Pittsburgh R. R. Co.*, 5 Philadelphia Rep. (Penn.), 512. 1864.

112. *Interest.* Bonds should bear date and draw interest, as of and from the time when they should have been issued. *Prettyman v. Supervisors of Tazewell County*, 19 Ill., 406. 1858.

113. — Where an act of assembly authorized a county to subscribe to the capital stock of a railroad company, and provided that the bonds to be issued in payment therefor should not be sold under par; it was *held*, that the county was bound to provide for the accruing interest on such bonds, notwithstanding they had been disposed of below par; and although there might be a remedy in equity as to a part of the principal. *Commonwealth v. Commissioners of Allegheny County*, 32 Penn. St., 218. 1858.

114. — By acts of assembly, a county was authorized to subscribe to the stock of a railway company, to issue bonds with interest and deliver them to the company in payment for the stock; the company was authorized to receive them on the terms of paying to the county, or its creditors holding the bonds, interest equal to the interest on the bonds. This was a promise to induce the county to subscribe, and the legislature could grant to both corporations power so to contract. *Pittsburgh and Connellsville R. R. Co. v. Allegheny County*, 63 Penn. St., 126. 1869.

115. — Payment of interest on stock, periodically, out of the capital before earnings

are made, is within the prohibition of a charter against paying dividends out of the capital. *Ib.*

116. — A railroad company was authorized to make a road between two points named, and to pay interest on installments on stock until the road should be completed. Interest is not payable beyond the time the road had been completed between these points. *Ib.*

117. — The company was afterwards authorized to extend its road to other points. *Held*, that this did not authorize it to pay interest until the road should be completed to these points. *Ib.*

118. — Bonds, with semi-annual coupons, were issued to the company by the county, in payment of stock, the company agreeing to pay the interest on the bonds. The county paid the interest. *Held*, that the company was liable for the interest on the coupons. *Ib.*

119. — Under a judgment against the county, her stock was sold by the marshal. *Held*, that this vendee obtained the stock only, not a right to the interest on the bonds. *Ib.*

120. *Negotiability.* Where a county, acting under an authority it supposed to be valid, subscribed to the stock of a railway company in good faith — issued its coupon notes in payment of such subscription — for a series of years voted on such stock and paid its coupons — and such notes passed into the hands of innocent and *bona fide* purchasers — it is estopped from asserting that such notes were illegally issued. *Hannibal and St. Joseph R. R. Co. v. Marion County*, 36 Mo., 294. 1865.

121. — In proceedings for *mandamus* by the purchaser of certain bonds issued by Schuyler county court to the North Missouri R. R. Co., to enforce payment thereof; *held*, that although such bonds did not contain the words "value received, negotiable and payable without defalcation," as provided by the act concerning "bonds, bills and notes" (R. C., 1855, ch. 21, §§ 2, 3), yet they imported a consideration and possessed the ordinary elements of negotiable instruments; and, in the hands of an innocent holder for value, before maturity, were not subject to antecedent equities. The act concerning bonds, etc., had in view classes of paper not usually employed in banking and commercial operations, and not adapted or intended for such uses. It was not meant to embrace bonds put in circula-

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tion as commercial securities, to be sold and used by a railroad company in defraying expenses of its road. *Barrett v. Schuyler County Court*, 44 Mo., 197. 1869.

122. — A purchaser of coupon bonds in good faith is unaffected by want of title in the vendor. *Murray v. Lardner*, 2 Wallace, 110. 1864.

123. — Corporate bonds payable to bearer, have, in this day, the qualities of negotiable instruments. The corporate seal does not change the case. *Mercer County v. Hackett*, 1 Wallace, 83, 1863; see *State v. Union Township*, 8 Ohio St., 304, 1858; *State ex rel. v. Van Horne*, 7 ib., 327, 1857; *Knox County v. Aspinwall*, 21 Howard, 539, 1858; *Supervisors v. Schenk*, 5 ib., 772, 1866.

124. — Bonds issued by a county in payment of such subscription are negotiable. *Clapp v. Cedar County*, 5 Ia., 15. 1857.

125. — Whether the coupons have an existence separate from the bond so as to be sued separately, *quære?* *Ib.*

126. — Though such bonds are negotiable, yet they are obligations executed by a public officer in the name of the county, and if issued without authority of law, they are not binding. *Ib.*

127. — The purchaser may rely upon the records of the county in relation to such bonds, and is not required to go behind such records to ascertain their truth. *Ib.*

128. — The purchaser is only bound to know that there is a law authorizing the issue of such bonds. *Ib.*

129. — And where it appears from the record, that pursuant to an order, a vote had been taken by the people of the county with regard to such bonds, it was *held*, that the purchaser of the bonds had the right to presume that the statutory notice was duly published. *Ib.*

130. — The fact that a county has subscribed for stock in a railway company cannot appear in the county records. *Ib.*

131. — Though the powers of a county judge are limited by law, yet he is a public officer, keeping a record; and strangers have a right, as against the county, to take that record as true. *Ib.*

132. — Railroad coupons are not rendered non-negotiable by the fact that they are not made payable to a particular person. *Smith v. County of Clark*, 54 Mo., 58. 1873.

133. — *fraud.* Fraud in the payee is no defense to negotiable bonds in the hands of innocent holders for value before due. *Muscattine v. Mississippi and Missouri R. R. Co.*, 1 Dillon (8 U. S. C. C.), 536. 1870.

134. — Where a suit is brought upon a negotiable instrument by an indorsee, a defense which goes to the original inducement and motive for the execution of the instrument is not available against the holder, unless it is proved that he had notice of the subject matter of the defense. *Clapp v. Cedar County*, 5 Ia., 15, 1857.

135. — Where fraud and misrepresentation in obtaining the bonds is relied upon as a defense against such bonds, it must be alleged and proved that the assignee is not a *bona fide* holder. *Ib.*

136. — A plea that the plaintiff is not a *bona fide* holder, without alleging how or why, is insufficient. *Ib.*

137. — *pleadings.* Where a county has power to issue bonds upon certain conditions, and the bonds have been issued and are in the hands of *bona fide* holders, the holder is not bound to allege, in his declaration, the facts showing a compliance with the conditions on which the issue of the bonds is authorized. *Railroad Co. v. Otoe County*, 1 Dillon (8 U. S. C. C.), 338. 1871.

138. — *presumptions.* The proposition to subscribe to the capital stock provided, that the money thus voted "should be expended only in the event of the railroad being constructed and running centrally through the said county;" it was claimed that the construction of the road, as provided in the condition, was a condition precedent to the issuing of the bonds. *Held*, that the clause was ambiguous and admitted of doubt as to whether the word "constructed" did not belong to the word "centrally" as the word "running" did, making it mean, "constructed, and running centrally." That the county judge having placed a construction on this ambiguity, by issuing the bonds, and that when the bonds had been issued, a purchaser was warranted in presuming that the road had been built to the acceptance of the county. *Clapp v. Cedar County*, 5 Ia., 15. 1857.

139. — *statute.* Where an act authorizing certain counties to issue bonds in aid of a railway company provided that the bonds,

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when regular upon their face, should be deemed conclusive evidence of the regularity of all preliminary proceedings in the hands of a *bona fide* holder, it was *held*, that where bonds, regular on their face, were issued and delivered to a railroad company, ostensibly in payment of a subscription of stock, and have passed into the hands of a *bona fide* holder, they must, as to such holder, be regarded as issued and negotiated within the meaning of the act. Fraud as between the railroad company and county commissioners cannot be pleaded against such holder. *State ex rel. v. Com'rs of Hancock Co.*, 12 Ohio St., 596. 1861.

140. — An act of the general assembly provided that the county commissioners of any county through or in which a railway might be located by a railway company, should be authorized to subscribe to the capital stock of the company, and issue negotiable bonds in payment of such subscription. An alternative *mandamus* was awarded to require the commissioners to levy a tax to pay bonds purporting on their face to have been issued in payment of such a subscription, and to be payable to bearer, and which were stated to be held by the relator as a *bona fide* holder. The answer to the writ stated that the road had never been located through or in the country. *Held*, on demurrer, to be a sufficient defense, as showing that the bonds had been issued illegally and without authority of law. *Same v. Same*, 11 Ohio St., 183. 1860.

141. — The act provided that bonds issued and negotiated by the commissioners, and regular on the face thereof, should, in the hands of the company, or of any *bona fide* holder thereof, be deemed and taken in all courts and elsewhere, as conclusive evidence of the regularity of everything required by the act to be done preliminary to the issuing and negotiation of such bonds. *Held*, that to make bonds regular on the face thereof, such conclusive evidence, and an estoppel to a defense showing a want of power in the commissioners, there must be an averment that they had been "issued and negotiated by the commissioners." *Id.*

142. Place of payment. Counties and cities have no right to make bonds, issued in aid of railways, payable in the city of New York. *People ex rel. v. Tazewell County*, 22 Ill., 147. 1859.

143. Rescission. Butler and Lawrence counties, under the same act of assembly, each subscribed to the stock of a railway company whose road passed through their territory, and on the same terms and about the same time. *Held*, that there was no implication of a joint liability by the two counties, or of a liability to contribute for each other's losses. *Lawrence County's Appeal*, 67 Penn. St., 87. 1870.

144. — The counties having been declared to be entitled to a rescission of the contract, and the bonds of Lawrence county having been paid out by the company, the county obtained a decree for their value; a large amount of Butler county's bonds were still in the company's hands and she obtained a decree to have them restored. *Held*, that Butler county having a defense to the bonds on account of the fraud of the company, they were not assets for the payment of their debts, and Lawrence county, although a creditor of the company, had no standing in the case and could not appeal. *Id.*

145. — Where a county issued bonds in payment of a subscription under an act which provided that the bonds should not be sold under par, and the company disposed of a large quantity of such bonds at 64 per cent.; *held*, that the county was entitled to rescind the subscription, to have a return of the bonds remaining in the hands of the company, and to be paid the par value of those disposed of. *Lawrence County v. Northwestern R. R. Co.*, 32 Penn. St., 144. 1858.

146. — The parties to whom such bonds were sold by the company are not necessary parties to a bill to rescind the subscription; nor are they within the original jurisdiction of the supreme court. *Id.*

V. CHARTER.

147. Amendments. Where a company was incorporated to build a railway across the state, as a continuous project under one management, if the charter is afterwards amended so as to divide the project into three parts, to be under separate control, and no proper acceptance of the change of charter has been manifested, subscribers to the stock will be released. *Supervisors of Fulton County v. Mississippi and Wabash R. R. Co.*, 21 Ill., 338. 1859.

Swamp Lands — Mandamus — Taxation.

148. — A railway company was organized to build a railroad from Warsaw to the east line of the state. Subsequently the charter of the company was amended so as to divide the road into three divisions, and each division was created a new and distinct company, in place of the old organization. *Held*, that a subscription made by a county to the original corporation could not legally be made to one of the three new companies. *Marsh v. Fulton County*, 10 Wallace, 676. 1870.

VI. SWAMP LANDS.

149. Mortgage. The act of the Illinois legislature, of February, 1855, chartering the Mount Vernon Railroad Company, authorized (other things permitting) the mortgage of the swamp and overflowed lands of Wayne county, Illinois, by the judges of the county court. *Kenicott v. The Supervisors*, 16 Wallace, 452. 1872.

150. Election. It is competent for the board of supervisors to call a special election for the purpose of submitting to the voters of the county the question of the ratification of a contract between the county and a railway company, under which the swamp lands of the county are to be conveyed to the company to aid in the construction of its road. *Rev.*, § 986, *et seq.* *Cedar Rapids and Missouri River R. R. Co. v. Boone County*, 34 Iowa 45, 1871; see also *Parks v. Iowa Central R. R. Co.*, 24 ib., 188, 1868.

151. — It is no objection to such election, that the question was not submitted to all the electors of the county, because at the time of the election a portion of them, to whom no submission was made, were engaged in the military service of the United States. *Cedar Rapids and Missouri River R. R. Co. v. Boone County*, 34 ib., 45. 1871.

VII. MANDAMUS.

152. Refusal to issue bonds. A writ of mandamus will be granted to enforce a lawful subscription for stock, and the issuance of bonds of the county, in payment for the same, if the court of county commissioners refuse to comply with the requisitions of the law, upon the ground that the same is void for want of

conformity to the constitution of the state. *Selma and Gulf R. R. Co. ex parte*, 45 Ala. N. S., 696. 1871.

153. Refusal to pay over money. The relator held the bonds of Leavenworth county for the payment of which a tax had been levied and collected. The county officers refused to pay over the money. *Held*, that there was an adequate remedy by a suit at law against the county treasurer, and the writ of mandamus was therefore quashed. *State of Kansas ex rel. v. McOrillous et al.*, 4 Kan., 250. 1868.

VIII. TAXATION.

154. Constitutional law. The provision in the act to facilitate the construction of railroads, *Sess. Acts* 1868, p. 92, requiring that the taxes for the payment of bonds issued for that purpose shall be based exclusively on real estate, is more in the nature of an assessment for benefits than general taxation. The provision of the constitution against exempting property from taxation has only reference to ordinary and general taxation for the purposes of revenue. *State ex rel. North Mo. Cent. R. R. Co. v. Linn County Court*, 44 Mo., 504. 1869.

155. Equitable proceedings to amend. Taxpayers can file bills in equity to annul illegal acts of county courts, when such acts will increase the taxation, and the state is not a necessary party to such suits. *Newmeyer v. Mo. and Miss. R. R. Co.*, 52 Mo., 81. 1873.

156. Injunction. An injunction will not be granted, at the instance of a taxpayer, to restrain a county court from levying a tax, upon the ground that the court had no jurisdiction, and that its action was a nullity. It must appear that the injury to the taxpayers would be irreparable, or such as could not be redressed by action at law. (*Sayre v. Tomkins*, 23 Mo., 443, affirmed). *State v. Parkville and Grand River R. R. Co.*, 32 Mo., 496. 1862.

157. — The state cannot properly be made a party plaintiff at the relation of a private citizen to a bill of injunction to restrain the county court of a county from issuing its bonds or levying a tax to pay for a subscription to the stock of a railroad company. The state has no interest, legal or equitable in the subject matter. *Id.*

158. Rate. Under a proposition to issue

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bonds to assist in the construction of a railway which was submitted to and adopted by the people, a tax not exceeding three mills on the dollar was to be levied during the first ten years, for the payment of interest, etc., it was *held*, that the rate could be reduced by the county when the maximum rate named would yield more than the amount to be paid in such year. *State ex rel. v. County Judge of Johnson County*, 12 Ia., 237. 1861.

159. Regularity of levy — by whom decided. An officer who has collected tax, voted in aid of a railroad company, has no right to decide whether the tax has been regularly laid or not. *Bell v. Mobile and Ohio R. R. Co.*, 4 Wallace, 598. 1866.

160. — His omission to give the bond required by law, before making the collection, does not affect his obligation to pay over the money collected. *Id.*

IX. MISCELLANEOUS.

161. Bonus. A *bonus* is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of what would ordinarily be given. *Kenicott v. The Supervisors*, 16 Wallace, 452. 1872.

162. Compromise. Municipal corporations, when authorized to do acts which they otherwise would have no power to do, such as subscribing to the stock of a railway company, cannot modify or alter the subscription after it is made. And a compromise with the railway company which alters or modifies the subscription is void. *Bell v. Mobile and Ohio R. R. Co.*, 4 Wallace, 598. 1866.

163. Consolidation. When several railroads consolidate, the new road shall stand in their place, and possess the rights, power and privileges they had severally enjoyed in the portions of the road which had previously belonged to them. *State ex rel. v. Greene County*, 54 Mo., 540. 1874.

164. Estoppel. Where the issue of bonds without previous authority would be a misdemeanor, by the county officers, it is to be presumed, though not conclusively, that the necessary conditions were fulfilled. And an estoppel would take place where the county had received the proper amount of stock for the bonds issued, and had held it for seventeen years, and was actually enjoying it at the

time when pleading the want of authority to subscribe. *Pendleton Co. v. Amy*, 13 Wallace, 297. 1871.

165. Existence of Corporation. In an action brought upon a bond given by a county court in aid of a subscription for a railroad, the question, whether the corporation had a legal existence cannot be raised. The only proper way to test this question would be by *quo warranto* on the part of the state. *Smith v. County of Clark*, 54 Mo., 58. 1873.

166. Fraud. An agreement to sell and transfer stock by a county to the amount of \$20,000, for two dollars, is a fraud *per se*. *Macoupin County v. The People ex. rel.*, 58 Ill. 191. 1871.

167. Jurisdiction. In an action brought to recover upon coupons of railway bonds issued by a county court, the question, whether the amount sued on is sufficient to bring it within jurisdiction of the circuit court, is to be determined by the aggregate amount of the coupons. *Smith v. County of Clark*, 54 Mo., 58. 1873.

168. Release. Municipal subscriptions to the stock of a railroad company, that had previously released its private subscribers from their subscriptions, is not valid; and a rescission of the contract will be decreed on a bill filed for that purpose. *Crawford County v. Pittsburgh and Erie R. R. Co.*, 32 Penn. St., 141. 1858.

SUBSCRIPTIONS BY INDIVIDUALS.

See APPEALS; ASSIGNMENT FOR THE BENEFIT OF CREDITORS; CHARTER; CONSOLIDATION; CONVEYANCE; CREDITOR'S BILL; DAMAGES; DOMICIL; ESTOPPEL; EVIDENCE; GIFT; LIMITATIONS; SETOFF; STAMPS; STOCK, AND STOCKHOLDERS.

I. CONSIDERATION.

II. FORM OF SUBSCRIPTION.

III. MORTGAGE.

IV. SUBSCRIPTIONS PAYABLE IN PROPERTY OR WORK.

V. CONSTRUCTION OF CONTRACT OF SUBSCRIPTION.

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- IX. LOCATION.
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- XV. CONSOLIDATION.
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- XVII. APPORTIONMENT OF STOCK.
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- XIX. EVIDENCE.
- XX. STOCK CERTIFICATES.
- XXI. ASSIGNMENT OF STOCK.
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- XXIX. PLEADING AND PRACTICE.
- XXX. RIGHTS OF CREDITORS.
- XXXI. ARTICLES OF ASSOCIATION.
- XXXII. SPECIAL CASES.
- XXXIII. DE FACTO CORPORATIONS.
- XXXIV. MISCELLANEOUS.

I. CONSIDERATION.

1. **Construction of road as a consideration for donation.** If the construction of a railroad within some reasonable and certain time was the consideration inducing a party to convey land to a railroad company, the legislature has no power to release such company from its obligation. *Henderson v. Railroad Company*, 17 Tex., 560. 1856.

2. — A promise to pay a railway company a sum of money, when it shall have constructed and put in operation its road between certain points, is valid and supported by a sufficient consideration. *Rose v. San Antonio, etc., R. R. Co.*, 31 Tex., 49. 1868.

3. **Mutuality.** Where the commissioners, appointed to receive subscriptions, are empowered to reject such subscriptions before the organization of the company, and do not do so, the contract is not void for want of mutuality. *Connecticut and Passumpsic Rivers R. R. Co. v. Bailey*, 24 Vt., 465. 1852.

4. **Right of membership a sufficient consideration.** The right of holding shares is a

sufficient consideration to support a promise to the corporation to take such shares and pay for them. *Kennebec and Portland R. R. Co. v. Jarvis*, 34 Me., 360, 1852; *East Tennessee and Virginia R. R. Co. v. Gammon*, 5 Sneed (Tenn.), 567, 1858; *Lake Ontario and New York R. R. Co. v. Mason*, 16 N. Y., 451, 1857; *Thigpen v. Mississippi Central R. R. Co.*, 32 Miss., 347, 1856; *Danbury and Norwalk R. R. Co. v. Wilson*, 22 Conn., 435, 1853.

5. — A regular subscription, whether made previous to the organization of the company or not, if it organizes as provided by the charter, imports in itself a sufficient consideration. *Selma and Tennessee R. R. Co. v. Tipton*, 5 Ala., N. S., 787. 1848.

6. **State aid.** A subscription made for the purpose of enabling a railway company to secure a subscription made by the state — construed. *Wilmington and Raleigh R. R. Co. v. Robeson*, 5 Iredell's Law (N. C.), 391. 1845.

II. FORM OF SUBSCRIPTION.

7. **Acceptance of proposition.** A subscription for a certain portion of capital stock, on condition that a proposition made by the subscriber shall be accepted, which was in fact but the basis of a contract, but when drawn up in form was repudiated by the subscriber as being variant from the proposition, is invalid, although the general proposition may have been accepted by the corporation. *Oldtown and Lincoln R. R. Co. v. Veazie*, 39 Me., 571. 1855.

8. **Assignment of shares to subscriber.** Where the whole amount of stock subscribed for in a railway corporation did not exceed the capital to be raised, and the commissioners received a subscription to the stock from the defendant, and assented to his acting as a stockholder in the meetings of the corporation; it was held, that a formal assignment by the commissioners, of shares subscribed for by the defendant, was not necessary. *Danbury and Norwalk R. R. Co. v. Wilson*, 22 Conn., 435. 1853.

9. **Charter prescribing form.** The charter of a railway company prescribed a form in which subscriptions of stock should be taken, and also provided that the company should have all powers incident to a corporation at common law. A subscription, after pursuing

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the language of the form given, contained also additional stipulations, not inconsistent with those prescribed, and which by the common law, it would have been competent for the parties to make. *Held*, that the subscription was valid. *Fisher v. Evansville and Crawfordsville R. R. Co.*, 7 Ind., 407. 1856.

10. Contract to take and fill shares. An agreement to take and fill a given number of shares in an incorporated company is equivalent to a promise to take and pay for such shares. *Penobscot and Kennebec R. R. Co. v. Dunn*, 39 Me., 587. 1855.

11. — A contract made between the defendant and others, to subscribe for stock in a corporation, creates an obligation from the subscriber to the company. *Kennebec and Portland R. R. Co. v. Palmer*, 84 Me., 367. 1852.

12. — A subscription to the capital stock of a railway company, whereby the subscriber promises to take five shares of the stock, subject to the conditions, requirements, liabilities and benefits of the act of incorporation, is equivalent to an express promise to pay for the stock, as it shall be called for by the directors. *Northern R. R. Co. v. Miller*, 10 Barbour (N. Y.), 260. 1851.

13. — A simple agreement to "take" stock in a railway company imposes no obligation to pay for the shares. *Belfast and Moosehead Lake R. R. Co. v. Moore*, 60 Me., 561. 1872.

14. — The construction of such agreement is not affected by the provision in the charter purporting to render the subscriber liable for the balance remaining due after a sale of his shares. *Ib.*

15. — Nor will the right to recover be aided by a subsequent enactment. *Ib.*

16. — The defendant agreed in writing to pay the assessments on the delivery to him of certain mortgage bonds of the company. *Held*, that the delivery of the bonds was a condition precedent to the payment of the assessments. *Ib.*

17. Irregularity—waiver. The defendant had subscribed for additional stock, and his subscription was procured by the directors, after the organization of the company, without the intervention of the commissioners named in the charter. The defendant had afterwards acted as a director. *Held*, that by so doing, he should be deemed to have waived all objection, if any existed, to the regularity

of his subscription. *Lane v. Brainerd*, 30 Conn., 565. 1862.

18. Joint and several contracts. A subscription paper, by which the signers were severally but not jointly bound, was signed by A. as an individual and also as executor. *Held*, that the two contracts were separate, and separate actions might be properly maintained thereon. *Erie and New York R. R. Co. v. Patrick*, 2 Abbott's Ct. of Ap. Dec. (N. Y.), 72. 1865.

19. — The obligation of each of several subscribers to the stock of a railway company, where they all sign the same subscription agreement, must be construed to be several and not joint. *Price v. Grand Rapids and Indiana R. R. Co.*, 18 Ind., 137. 1862.

20. Misnomer. Where a subscription is made to a corporation by a wrong name, such error in the name will not defeat a recovery on the subscription by the assignee thereof. *Racine County Bank v. Ayers*, 12 Wis., 512. 1860.

21. Mistakes. A subscriber to the stock of a railway company can have no relief in a court of equity on the ground that when intending merely to renew an old subscription to the stock, which had fallen through, he, by some unaccountable mistake, subscribed for double the amount; such subscriber ascertaining his mistake immediately after his subscription, and suffering the company to organize and act upon the faith of his subscription, during several months, without notice of his alleged mistake. *Diman v. Providence, Warren and Bristol R. R. Co.*, 5 R. I., 131. 1858.

22. Notice. Where the charter requires that the notice of the opening of the subscription books shall be given by certain persons named, the notice is sufficient if given by a majority of such persons. *Penobscot R. R. Co. v. White*, 41 Me., 512. 1856.

23. Profits and losses. Where one-half of the stock subscribed had been called in and paid, and a resolution was subsequently adopted by the directors, "that any stockholder who shall pay in anticipation a part, or the full amount due on the stock held by him, shall be entitled to a dividend thereon, in proportion to the amount so paid in," it was *held*, that the payment of the balance of his stock by any shareholder was not a loan, but the

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contract was in the nature of a partnership, entitling him to a dividend in case of profits, but increasing his liability in case of losses. Civil Code Art. 2772. *Purton v. New Orleans and Carrollton R. R. Co.*, 3 La. An., 19. 1848.

24. Recitals in contract of subscription.

The signature to a subscription for stock in an alleged railway company reciting that a company had been formed under the general act, and that the articles of association, with the necessary affidavits, had been duly filed, is conclusive evidence of an incorporation against the subscriber. *Black River and Utica R. R. Co. v. Clarke*, 25 N. Y., 208. 1862.

25. *Statute.* It is not competent for the legislature to provide that a promise to subscribe a certain amount for a specified object, shall be deemed a subscription to the capital stock of a particular company. *Pittsburgh and Steubenville R. R. Co. v. Gazzam*, 32 Penn. St., 340. 1858.

26. *Subscription books.* Where a subscription is made in a small blank book, and is afterwards accepted by the railway company, it is not necessary that the same should be transferred to the stock books of the company; and its acceptance would seem to make the book in which it was made the stock book of the company to that extent, and would make the contract of subscription complete, and no notice of acceptance need be given before suit. *Brownlee v. Ohio, Indiana and Illinois R. R. Co.*, 18 Ind., 68. 1862.

27. — A subscription, unexceptionable in other respects, will not be rendered invalid by reason of not having been made in a book opened by the company for the purpose. *Ash-tabula and New Lisbon R. R. Co. v. Smith*, 15 Ohio St., 328. 1864.

28. — A book containing subscriptions to the stock of a corporation for as many shares as the charter required should be subscribed for before any assessment should be laid, which came into the possession of the corporation immediately on its organization, and has always been treated by it as showing the number of shares subscribed for, and on the faith of which the directors have laid an assessment, is *prima facie* evidence that the number of shares requisite for an assessment have been subscribed for. *Marlborough Branch R. R. Co. v. Arnold*, 9 Gray (Mass.), 159. 1857.

29. — Under the general railroad law of

1855, a railroad company was organized, with articles of association, which fixed the amount of capital stock, and named five commissioners to open books for subscriptions to the stock. The commissioners, however, never opened such books, but a subscription paper was circulated by an agent appointed by the directors, and the plaintiff in error subscribed a sum thereon, which he subsequently, on several occasions, promised to pay. *Held*, that the subscription thus made was not binding. *Shurtz v. Schoolcraft and Three Rivers R. R. Co.*, 9 Mich., 269. 1861.

30. — No persons but the commissioners could accept such subscription. *Ib.*

III. MORTGAGE.

31. *Power to take mortgage for subscription.* In the absence of any restriction, a railway company, authorized to accept subscriptions, has the power to take a bond and mortgage to secure the subscriptions made to its stock. *Western Bank of Scotland v. Tallmon*, 17 Wis., 530. 1863.

32. — The Racine, Janesville and Mississippi R. R. Co. was authorized, under its charter, to take a note and mortgage upon subscriptions to its capital stock. *Andrews v. Hart*, 17 Wis., 297. 1863.

33. — Notice to a purchaser of such note and mortgage before maturity, that they were given for stock, was notice of a lawful consideration, and did not impair his rights as a *bona fide* holder. *Ib.*

34. — There was attached to the note and mortgage a bond of the company, guaranteeing the payment of semi-annual interest, at a different place from that named in the note, and it was provided in the bond that the note and mortgage "might be transferred in connection therewith, but not otherwise." *Held*, that this guaranty did not affect the negotiability of the instrument. *Ib.*

IV. SUBSCRIPTIONS PAYABLE IN PROPERTY OR WORK.

35. *Construction.* A contract of subscription for railway stock, the payment to be made in work — construed. *Eppe v. Mississippi, Gainesville and Tuscaloosa R. R. Co.*, 35 Ala. N. S., 38. 1859.

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36. Demand; place of payment. When the place of payment was fixed by contract, and the time of payment not fixed, a demand should have been made; and a resolution of the board of directors, calling for payment by installments, was not a sufficient demand when the subscription to the capital stock was payable in materials. *Ohio, Indiana and Illinois R. R. Co. v. Cramer*, 23 Ind., 490. 1864.

37. — The 8th section of the "act to provide for the incorporation of railroad companies" (1 G. & H., 507), authorizing notice to be given of calls for payment by installments of stock subscriptions, only includes money subscriptions. *Ib.*

38. — Where a subscription to the capital stock of a railroad company is made payable in work and materials, and not in installments, the company cannot require payment in installments by resolution of the board of directors. *Ib.*

39. Mistake as to powers of party receiving subscription. A sale of stock by the commissioner of contracts of the Lake Erie and Mad River R. R. Co., with a secret agreement that the plaintiff may receive land of the company at a future day, and pay in the stock certificate, entitles the purchaser of stock to recover back the money advanced, with interest, if the company refuse to execute the agreement. *Weeden v. Lake Erie and Mad River R. R. Co.*, 14 Ohio, 563. 1846.

40. — Such a contract is an entire contract; and, if the company would retain the money, the land must be conveyed, on demand, according to the terms of the agreement. *Ib.*

41. — The commissioner of contracts has no authority to make such agreement under the charter or by-laws, but if he and the plaintiff acted under a mutual mistake as to his power, the law raises an implied promise on the part of the company to pay back the money and interest. *Ib.*

42. Payment in land. A railway company may receive by voluntary grant or purchase, and hold real estate for the purpose of aiding it "in the construction of its railway." *McClure v. Missouri River, Ft. Scott and Gulf R. R. Co.*, 9 Kans., 373. 1872.

43. — A contract to convey real estate to a railway company for such purpose, provided it build a railway to a certain place, and locate

its depot within a certain town, is not in contravention of public policy, or void. *Ib.*

44. — A subscriber for shares of stock in a railway company, which is not authorized by law to receive land in payment for its stock, cannot, in an action against the stockholders of the company by its creditors, set up or avail himself of the benefit of a collateral agreement between himself and the company, to the effect that the amount of his subscription was to be paid in land. *Noble v. Clinton Line Extension R. R. Co.*, 20 Ohio St., 199. 1870.

45. — Previous to the passage of the general railroad act of February 11, 1848, a railway company was chartered by a special act of the legislature, empowering the directors to transact all the business of the company, but did not expressly authorize subscriptions to the capital stock in real estate. The privilege was conferred by § 14 of the act of 1848, upon all railroad corporations then existing that might accept the power so conferred. After the passage of that act, the directors entered on the records of the company a resolution that subscriptions to the capital stock might be made in real estate. The company then received such subscriptions to its stock, and sold and conveyed the same to *bona fide* purchasers, with the knowledge of such subscribers, and without objection on their part, until many years after, when the stock had become worthless, and the enterprise for which the company was organized had been abandoned. *Held*, that in a suit by a subscriber, against a vendee of the company, to recover back the land conveyed by him to the company on such subscription, proof of the exercise of the privileges conferred in the act of 1848, by the company, under a resolution of the directors, and with the acquiescence of the parties to the suit, was sufficient evidence, as between them, of the acceptance of the powers conferred in that act. *Goodin v. Evans*, 18 Ohio St., 150. 1868.

46. — Suit was brought upon a subscription to the capital stock of a railway company, payable by the conveyance of a specific tract of land, and conditioned that in case the company should decline to take the land at the price named, the subscription should be void. *Held*, that the subscription was a simple proposition to put in the land at the price named, and until accepted by the company, there was

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no binding obligation upon the subscriber. *Held*, also, that the acceptance of the proposition could only be made through the board of directors of the company, or perhaps, through an authorized agent. *Held*, also, that the consent of several members of the board, acting separately, and not shown to constitute a quorum, did not constitute a valid acceptance of the proposition. *Junction R. R. Co. v. Reeve*, 15 Ind., 286. 1860.

47. — The directors of a corporation, alone, are authorized to receive real estate, and hence it would seem that real estate subscriptions cannot be taken upon the preliminary articles of association; but, perhaps the board, after it is constituted, may receive real estate in payment of such preliminary subscriptions. *State ex rel. v. Bailey*, 16 Ind., 46, 1861; *Matlock v. Indiana and Illinois R. R. Co.*, ib., 176.

48. — rescission. Where a corporation has, by the false representations of its agent, induced a subscriber to convey his land, and receive his stock certificates, before the condition of his subscription has been performed by the company, and the land has afterward been conveyed by the corporation to purchasers, with full knowledge of the condition, and its nonperformance, no action for rescission can be maintained against the company and its assignees, until a tender of the stock certificates has been made to the corporation, conditional upon its procuring a deed of conveyance of the land to the subscriber. *Parks v. Evansville, Indianapolis and Cleveland R. R. Co.*, 23 Ind., 567. 1864.

49. Payment in property. The president of a corporation has the right to collect subscriptions to the stock of the corporation, and he having received payment of such subscriptions in property, the corporation is bound by his acts. *East New York and Jamaica R. R. Co. v. Lighthall*, 36 Howard's Pr. (N. Y.), 481, 1868; *Same v. Same*, 5 Abbott's Pr., N. S. (N. Y.), 458, 1868; *Same v. Same*, 6 Robertson (N. Y.), 407, 1868.

50. — Subscriptions made before the company is organized must be unconditional. But after the organization of the company, conditional subscription may be agreed upon. *Pittsburgh and Connellsville R. R. Co. v. Stewart*, 41 Penn. St., 54. 1861.

51. — The act of the president of the com-

pany in accepting such conditional subscriptions is binding on the company. *Ib.*

52. — A payment by the subscriber in cash on call, after a special contract that he might pay in materials, will not estop him from setting up that contract as a defense against a claim to the payment of the whole subscription in cash. *Ib.*

V. CONSTRUCTION OF CONTRACT OF SUBSCRIPTION.

53. Change of amount of shares. Where the subscriber agreed to take two shares of \$200 each, and the shares were afterwards fixed at \$100 each, and the defendant made payments on the shares, after the change, he was held liable for four shares of \$100 each. *Kennebec and Portland R. R. Co. v. Palmer*, 34 Me., 367. 1852.

54. Charter and statute. Subscribers for railway stock are presumed to know the provisions of the charter under which the subscription is taken. *Wight v. Shelby R. R. Co.*, 16 B. Monroe (Ky.), 4. 1855.

55. — The law providing for the organization of railroad companies, and for receiving subscriptions to the stock thereof, enters into, forms part, and determines the effect of subscriptions, as fully as if it were written out and formed in terms, a part of the contract of subscription. *Hoagland v. Cincinnati and Ft. Wayne R. R. Co.*, 18 Ind., 452. 1862.

56. — The charter of a railway company provided that no installments of subscriptions to its stock, after the first, should be called for until at least \$500,000 of such stock should be subscribed. After subscriptions to the amount of \$200,000 had been made, a contractor agreed with the company to construct its road, and to accept in part payment, on the completion of the road, \$300,000 in its capital stock. The contractor afterwards became insolvent, and failed to fulfill his contract. *Held*, that such agreement was not a subscription to stock within the meaning of the proviso in the charter. *New York, Housatonic, etc., R. R. Co. v. Hunt*, 39 Conn., 75. 1872.

57. Locomotives. Where C., who was president of the Taunton Locomotive Co., subscribed to the stock of a railroad company, "payable in cash on the delivery of the last engine of twelve from the T. locomotive man-

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ufactory," *held*, in an action against C. for the amount of the subscription, that it was competent for C. to put in evidence a contract made by the Taunton Co. with the railroad company, on the same date with the subscription, for the delivery of twelve engines, and to show by parol that that was the contract referred to in the subscription, and that all twelve of the engines referred to in it had not been delivered. *Rutland and Burlington R. R. Co. v. Crocker*, 4 Blatchford (U. S. C. C.), 179. 1858.

58. Monadnock R. R. Co. A contract for a subscription to the stock of the Monadnock R. R. Co. — construed. *Monadnock R. R. Co. v. Felt*, 52 N. H., 379. 1872.

59. Sense in which words are used. The terms of a contract in writing must be understood in their plain, ordinary, popular sense, unless they have, generally, in respect to the subject matter, acquired a peculiar sense, distinct from the popular sense; or unless the context shows that in the particular instance, in order to effectuate the immediate intention of the parties, they must be understood in some other and peculiar sense. *Evansville, Indianapolis and Cleveland R. R. Co. v. Meeds*, 11 Ind., 273. 1858.

60. Stockholders to have privilege of taking contracts for construction. Where the article under which a railway company organized provided that subscribers of stock should have the privilege of taking contracts of grading the road, furnishing ties, etc., at the estimate of the engineer, and lettings of such work were publicly advertised to take place on a certain day, and the subscribers did not before or on that day, offer to take jobs, etc.; *held*, that they could not afterwards claim the right to do so. *Johnson v. Crawfordsville, Frankfort, etc., R. R. Co.*, 11 Ind., 280. 1858.

VI. ESCROW.

61. Delivery without consent. Where a committee was appointed by the inhabitants of a town, to obtain subscriptions which were to be delivered to the company only upon certain parol conditions; *held*, that a member of said committee, acting as such, was not an agent of the railroad company in such a sense as to prevent his receiving the subscription list as an escrow; and if he delivered it to the

company without the consent of the subscribers, and without a fulfillment of the conditions, such delivery was not binding. *Beloit and Madison R. R. Co. v. Palmer*, 19 Wis., 574. 1865.

62. Must be held by third person. It is not a valid defense to allege that a subscription paper was delivered as an *escrow*, to become effectual on condition, when it was delivered to one of the commissioners appointed to receive subscriptions to a railroad company. It should have been delivered to a third person to become effectual as an *escrow*. *Wight v. Shelby R. R. Co.*, 16 B. Monroe (Ky.), 4. 1855.

VII. CONDITIONAL SUBSCRIPTIONS.

63. Agent; powers. The act of an agent taking a conditional subscription, being recognized by the corporation, by receiving and registering the subscription among the conditional subscriptions, was equivalent to a previous appointment of the agent for that purpose. *Taggart v. Western Maryland R. R. Co.*, 24 Md., 563. 1866.

64. Charter. Subscriptions to the stock of a railway company may be collected, although the construction of a road has been commenced before twenty per cent. of such share subscribed has been paid in, contrary to the provisions of the charter. *Agricultural Branch R. R. Co. v. Winchester*, 13 Allen (Mass.), 29. 1866.

65. Commissioners. Conditions attached to stock of a railway company by the commissioners appointed to receive them, preparatory to the procurement of a charter are not binding. *Bedford R. R. Co. v. Bowser*, 48 Penn. St., 29. 1864.

66. — Under the act of 1849, the commissioners have no right to receive conditional subscriptions. If such subscriptions are made, they are binding and the conditions are void. *Pittsburgh and Steubenville R. R. Co. v. Woodrow*, 3 Philadelphia Rep. (Penn.), 271. 1858.

67. Compliance with conditions. The obligor in a conditional contract is bound to perform his agreement, if the conditions specified have been complied with. *Wear v. Jacksonville and Savannah R. R. Co.*, 24 Ill., 593. 1860.

68. — Conditional subscriptions to a railway company, not inconsistent with the terms

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of a charter, are binding if the conditions are performed. *Henderson and Nashville R. R. Co. v. Leavell*, 16 B. Monroe (Ky.), 358. 1855.

69. — Suit was brought upon a subscription of stock, conditioned that the railway should be located on a given line; and providing that such location should be sufficiently evidenced by an order of the board of directors accepting said subscription on the condition named therein. There was no evidence of such an order having been made; but the road had, in fact, been so located and built, and the subscriber knew it. *Held*, that the stipulation in the subscription, by which an order of the board of directors was to be accepted as evidence of the required location having been made, did not preclude other evidence of the fact; and that the actual construction of the road was the best evidence of a compliance with the condition. *Moore v. New Albany and Salem R. R. Co.*, 15 Ind., 78. 1860.

70. **Contract to take stock off of subscriber's hands.** Where a contract was alleged to have been made, by which the agent of a company bound himself to a party subscribing for stock, to take it off his hands at the expiration of a certain time; *held*, that to be binding, such a contract should have been reciprocal, so that either party could enforce it. *Vicksburg, Shreveport and Texas R. R. Co. v. Terry*, 13 La. An., 419. 1858.

71. **Damages on breach of condition.** Where a conditional subscription was paid by the transfer of land to the company, before the condition was performed, and the company failed to construct the road according to the condition, but transferred the land to an innocent purchaser, *held*, that in an action by the subscriber against the company, the measure of damages would be the value of the land at the time it was transferred to the company. *Jewett v. Lawrenceburgh and Upper Mississippi R. R. Co.*, 10 Ind., 539. 1858.

72. **Estoppel.** A commissioner, appointed to receive subscriptions to the stock of a railroad company, subscribed for a certain number of shares in his own name, and united with the other commissioners in a certificate to the governor, on which letters patent were issued, that the subscriptions "were in all respects made and taken in good faith, and agreeably to the provisions and requirements of the acts of assembly and the laws of the common-

wealth;" *held*, that he was estopped from showing that it was made on a condition that had not been complied with, in locating the road. *Bavington v. Pittsburgh and Steubenville R. R. Co.*, 34 Penn. St., 358. 1859.

73. — Such subscription must be deemed absolute, for the condition is a fraud on the commonwealth, as well as the other subscribers. *Id.*

74. **Evidence.** When a subscription is made on condition that a certain number of shares shall be subscribed for before the corporation shall be organized, the records of the proceedings of the company are competent and *prima facie* evidence that the condition has been performed. *Penobscot and Kennebec R. R. Co. v. Dunn*, 39 Me., 587. 1855.

75. **Fraudulent conditions.** Though a conditional subscription may be admitted, yet private arrangements, not expressed in the subscription, between an agent of a company and a subscriber, by which he is to have peculiar privileges not extended to other subscribers, or by which his subscription is not to be collected — being made to induce others to subscribe — are regarded as fraudulent on other subscribers, and are no defense to a suit for the amount subscribed. *New Albany and Salem R. R. Co. v. Fields*, 10 Ind., 187, 1858; *Same v. Slaughter*, *ib.*, 218; *Evansville, Indianapolis and Cleveland R. R. Co. v. Posey*, 12 *ib.*, 363. 1859.

76. **Grant of right of way.** In an action upon an instrument, by which the defendant promised to pay a certain sum to A., B. and C., in trust, to be expended within a county named, in constructing a railway within certain limits, the persons named to select the corporation which should have the benefit of the subscription, an answer that when the instrument was executed by the defendant, it was agreed that if the railroad was located through the farm of the defendant, he should have the choice of paying the sum subscribed or giving the right of way to the corporation, and that he had given such right of way, which had been accepted by the company, was *held* a sufficient defense, as an accord and satisfaction. It was also held good on the ground that A., B. and C. held a power not coupled with an interest, and the power could be revoked before execution and the acceptance thereof by the corporation. *Evansville, Terre Haute*

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and *Chicago R. R. Co. v. Wright*, 38 Ind., 64. 1871.

77. Guaranty against loss. An agent, for the purpose of procuring a subscription, upon taking from a subscriber a note for his stock secured by a mortgage, gave to him an instrument by which the company guaranteed him against loss upon his stock. The agent was authorized to execute such an instrument. After the stock became entirely worthless, the complainant filed a bill to foreclose the mortgage. The defendant filed an answer and a cross bill, setting up these facts, and praying a cancellation of the notes and mortgage. *Held*, that the defense would have been good against the company, and that as the complainant claimed the note and mortgage under an instrument which did not operate to transfer the legal title to him as an assignee under the statute, he occupied the same position as the company. *Peck v. Bligh*, 37 Ill., 317. 1865.

78. Impossible condition. A subscription, made July 5, 1855, provided that a subscriber might forfeit his stock after paying one-third of the amount, provided he should give notice of his intention prior to July 1, 1855. *Held*, that such notice being impossible, the condition did not exist. *Rocine County Bank v. Ayers*, 12 Wis., 512. 1860.

79. Increase of capital stock. A railway company voted to issue 600 additional shares, and to allow each stockholder to take one new share for every two shares already held by him, provided he should by a certain day subscribe therefor, and pay a part of the price, and give notes for the remainder. *Held*, that there was no implied condition that the whole number of six hundred new shares should be issued; and that the failure of the corporation to issue that number was no ground for maintaining an action by a stockholder to recover back money so paid by him, nor for defeating an action on notes so given by him. *Nutter v. Lexington and West Cambridge R. R. Co.*, 6 Gray (Mass.), 95. 1856.

80. Interest. The plaintiff's charter required that 10,000 shares of stock should be subscribed before any assessments should be made. That number of shares was subscribed for, but the subscription contained a condition that interest should be paid by the corporation on all sums assessed and paid in, from the time of payment until the railroad should be

put in operation. *Held*, that this condition was not a violation of the said requirement of the charter. *Rutland and Burlington R. R. Co. v. Thrall*, 35 Vt., 536. 1863.

81.—A condition, annexed to a subscription, which provides for a dividend by way of interest, to each paying subscriber, until the full completion of the road, is illegal and against public policy. *Troy and Boston R. R. Co. v. Tibbitts*, 18 Barbour (N. Y.), 297, 1854; see *Same v. Same*, 11 Howard's Pr. (N. Y.), 168, 1855.

82. Location and time as conditions. After the passage of the act incorporating the plaintiff as a railway company, the defendants signed a paper by which they agreed to take stock in the company, "provided said road comes to Columbia." A subscription book was afterwards opened, but they did not subscribe stock and refused to pay upon their agreement. It was *held* that they were not liable as stockholders, for the reason that they had not taken the stock, and that they were not liable on their agreement to subscribe, as the company had not been organized under its charter when the agreement was signed. *Charlotte and South Carolina R. R. Co. v. Brakeley*, 3 Strobhart's Law (So. Car.), 245. 1848.

83.—A subscription conditioned that the railway shall be located over a certain route cannot be collected if the condition is not complied with. *Nashville and Northwestern R. R. Co. v. Baker*, 2 Coldwell (Tenn.), 574. 1865.

84.—Where a subscription is made on condition that "the town of Fairfield is made a point on said road, and said road is put under contract in one year from the 1st day of September, 1853; provided, also, that said stock is not to be called in faster than five per cent. per month on the whole amount, and no installment is to be called in on said stock until the whole road from Burlington to Fairfield is put under contract, with conditions to be built within twenty months from the time of letting such contract." *Held*, that putting the road under contract within the time named, and with the conditions specified, was a condition precedent to the right to recover on the contract. That the completion of the road by Sept. 1, 1858, without the letting of the contract stipulated in the condition precedent,

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was not a sufficient compliance to enable the company to recover on the contract. *Burlington and Missouri River R. R. Co. v. Boettler*, 15 Ia., 555. 1864.

85.—In 1853, M. subscribed for twenty shares in the P. and C. R. R. Co. on the express condition that the company should "locate and construct its road" along a certain route. He paid one installment and a part of a second, but delayed the payment of the balance, until the company suspended operations. The road had been located as required, but had not yet been constructed. *Held*, that the construction was not a condition precedent. That the company having located its road as agreed upon, the defendant could not complain that it had not been constructed, when he himself had refused performance of his contract. *Miller v. Pittsburgh and Connelleville R. R. Co.*, 40 Penn. St., 237. 1861.

86.—The undertaking was that the subscription should be paid in accordance with the calls, and upon the part of the company that the location should be made as stipulated, and that the construction should proceed as fast as possible. *Ib.*

87.—The suspension of work, long after defendant's stock became due, was no defense to the action. *Ib.*

88.—Where a subscription was made to the capital stock of a railroad company, upon condition that the final location of the road should be upon a certain route, the permanent location of the road contemplated by the contract was *held* to be the adoption by the directors of the route mentioned. *Smith v. Allison*, 23 Ind., 306. 1864.

89.—Where railroad stock is subscribed for, with a proviso that the "road shall be built" in a specified locality, the permanent location of the road in the place designated is a sufficient compliance with the condition to make the subscriber liable for calls on his subscription. *Warner v. Callender*, 20 Ohio St., 190, 1870; *Swartwout v. Michigan Air Line R. R. Co.*, 24 Mich., 889, 1872.

90.—Where a subscription is made on condition that the railway shall "pass" through a certain county, the construction of the road through such county is not a condition precedent to the collection of the subscription; it is sufficient if the road be thus permanently located. *North Missouri R. R. Co. v. Winkler*,

29 Mo., 318, 1860; *Ashtabula and New Lisbon R. R. Co. v. Smith*, 15 Ohio St., 328, 1864; *Chamberlain v. Painesville and Hudson R. R. Co.*, *ib.*, 225.

91.—The appellant, with others, agreed to pay to the Maysville and Lexington R. R. Co., on each share of stock subscribed by them, upon condition that said railway should be so located and constructed as to make the town of Carlisle a point, "at such times and places as may be required by the board of directors." *Held*, that the subscribers were bound to pay their subscriptions upon the location of it so as to make Carlisle a point, and that its construction by the company was not a condition precedent. *McMillan v. Maysville and Lexington R. R. Co.*, 15 B. Monroe (Ky.), 218. 1854.

92.—The failure of the company to complete the Maysville and Lexington railroad did not have the effect to release the subscribers for stock from the payment of their subscriptions as they may be necessary to pay debts incurred. *Ib.*

93.—A subscription was made with the condition that it should be payable "if the road was built through the village of P." *Held*, that the condition was complied with when the road was in good faith located and designed to be built through that village, and a portion of the route built, although none of the road was completed. *Woonsocket Union R. R. Co. v. Sherman*, 8 R. I., 564. 1867.

94.—It is not a good defense to an action brought upon a stock subscription, to aver that at the time the subscription was made, the soliciting agent of the company agreed in writing, separate from the contract of subscription, that if the citizens of a named place and vicinity would subscribe a given sum to such stock, the proposed road should be located within a given distance of such place, and that such subscription should be expended on a certain part of said road, and that the subscription was made in consideration of such agreement, and that said agreement was not performed by the company. *Brownlee v. Ohio, Indiana and Illinois R. R. Co.*, 18 Ind., 68. 1862.

95.—The condition in the subscription in this case was that the road should be located within 20 rods of St. Omer. *Held*, that the meaning was, that the road should be constructed to run within 20 rods of St. Omer

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Jewett v. Lawrenceburgh and Mississippi R. R. Co., 10 Ind., 539. 1858.

96. — The articles of association of a railway company provided that the road should extend through portions of the counties of Monroe and Ontario. The defendant subscribed these articles for stock. After he had subscribed the articles, the road was constructed without passing through, or touching, either of the counties of Monroe or Ontario. *Held*, that this was a substantial departure from the contract, and one which released the defendant from his obligation to pay his subscription. *Buffalo, Corning and New York R. R. Co., v. Pottle*, 23 Barbour (N. Y.), 21. 1856.

97. — Where subscribers promise and undertake to pay a railroad company a certain sum or sums if it will build its road to a designated place, the subsequent completion of the road, according to the terms of the promise, furnishes in itself a consideration, removes the objection of want of mutuality in the contract and renders the promise of the subscribers binding. *Des Moines Valley R. R. Co. v. Graff*, 27 Ia., 99. 1869.

98. — Defendants as a committee acting for citizens of Pella, entered into a contract to furnish right of way, depot grounds and cattle yards, and to obtain subscriptions in accordance with the blank notes furnished by the company for that purpose, to the amount of \$10,000, provided the company should run its road through Pella. Defendants accordingly obtained a large amount of notes conditioned to be void if trains were not running to Pella on or before a certain date. The road was not completed to Pella till about two and a half months after the required time. In an equitable proceeding by the company to compel the defendants to disclose the names of each subscriber and the amount of his subscription, and to deliver over the notes to the company, it was *held* on demurrer to the petition, that the said facts entitled the plaintiff to the relief sought; that the defendants were trustees and not entitled to interpose the defense which properly belonged to the subscribers; that the notes were not void because the road was not completed within the stipulated time. *Ib.*

99. — commissioners. The commissioners to receive subscriptions to the stock of a railroad company, under the act of Feb. 19, 1849, can only receive unconditional subscriptions.

Subscriptions made to them on condition that the road shall be located on a certain route will be deemed absolute, the condition only is illegal. *Pittsburgh and Steubenville R. R. Co. v. Biggar*, 34 Penn. St., 455. 1859.

100. — depot. Where a subscription was made for stock in a railway company, payable at such times, and in such installments, as the directors may prescribe, provided the road is "permanently located" on a given route, and that a "freight house and depot be built" at a point named. *Held*, I. That on the permanent location of the road, in accordance with the terms proposed, the subscription became absolute. II. That the provision in relation to the erection of the buildings, was a stipulation merely, and its performance was not a condition precedent to the right to collect the amount of the subscription. III. The giving, by a subscriber, of his note for the balance of his subscription, and taking, therefor, from the company, a receipt stipulating that, when paid, the amount of the note should be applied on his stock, was *prima facie* a waiver of conditions precedent. *Chamberlain v. Painesville and Hudson R. R. Co.*, 15 Ohio St., 225. 1864.

101. — A condition as to the location of a depot does not invalidate a subscription. *Racine County Bank v. Ayers*, 12 Wis., 512. 1860.

102. — Certain persons entered into a contract in the following form: "We, the subscribers, bind and obligate ourselves to subscribe to the capital stock of the North Missouri R. R. Co. the sums set opposite our names, one-half the amount to be paid in six months, and one-half in twelve months from this date, on condition that a depot is located on the land of D., which adjoins High Hill. This subscription is made to comply with the terms on which the directors of said company have made the location of a depot on said D.'s land." *Held*, that this was a subscription *in presenti*, and not a mere agreement to subscribe in future; that the subscription became absolute upon the location of the depot at the designated place. *North Missouri R. R. Co. v. Miller*, 31 Mo., 19. 1860.

103. — evidence. If a subscription of stock in a railway company is conditioned that the road be located on a certain route, the plaintiff may prove, in a suit upon it, that the defendant owned land upon that route. *Vau-*

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ter v. Ohio and Mississippi R. R. Co., 14 Ind., 174. 1860.

104. Membership of corporation. A mere subscription of stock does not make the subscriber a member of the corporation; especially so, when such subscription is conditional. *Chase v. Sycamore and Courtland R. R. Co.*, 38 Ill., 215. 1865.

105. — Where a subscription is made upon conditions the subscriber is not a stockholder, and consequently not liable upon his agreement, until the condition is performed; and whether it has been performed is a question of fact. *Jewett v. Lawrenceburgh and Upper Mississippi R. R. Co.*, 10 Ind., 539, 1858; *Evansville, Indianapolis and Cleveland R. R. Co. v. Shearer*, ib., 244, 1858; *Shearer v. Evansville, Indianapolis and Cleveland R. R. Co.*, 12 ib., 452, 1859.

106. — Under the provisions of the statute (Session Acts of 1849-1850, § 24), the president and directors of the Maysville and Lexington R. R. Co. had a right to make a conditional sale of the stock to the subscribers. The subscribers did not become stockholders until they performed the condition on which their subscriptions were made. *McMillan v. Maysville and Lexington R. R. Co.*, 15 B. Monroe (Ky.), 218. 1854.

107. Memorandum. In the absence of proof as to the time when a memorandum was added to the formal subscription, the presumption would be that it was there when the subscription was made. *Robinson v. Pittsburgh and Connellsville R. R. Co.*, 32 Penn. St., 384. 1858.

108. Notice. Upon the acceptance of a conditional subscription by the entry thereof by the company upon the record, the contract of subscription is complete and absolute, and the subscriber is a stockholder; and no notice from the company is necessary before bringing suit upon the subscription. *New Albany and Salem R. R. Co. v. McCormick*, 10 Ind., 499. 1858.

109. — But if notice of the location according to the conditions were necessary, an agreement that the kind of notice named in the contract should be sufficient, would not render invalid any other kind of notice which might be in itself sufficient in point of fact. *Ib.*

110. — The terms of payment contained in the resolutions subscribed were, that one dollar be paid in hand on each share, at the time of

subscribing, and that 10 per cent. on each share be paid every sixty days after the work shall be put under contract. The work was put under contract in 1850; but there was no evidence that the defendant had notice of that fact, nor that any call had been made for the payment of installments, or payment demanded, though the declaration alleged such demand. *Held*, that such notice was not necessary. *Bredlove v. Martinsville and Franklin R. R. Co.*, 12 Ind., 114. 1859.

111. Other subscriptions required as a condition. A party, subscribing on condition that a certain amount of stock shall be subscribed, cannot be made liable until it is shown that this has been complied with, and that the installments had been called before suit. *Philadelphia and Westchester R. R. Co. v. Hickman*, 28 Penn. St., 318. 1857.

112. — An error in making the call before the liability accrued may be corrected by a subsequent call, made after the condition was fulfilled, and before suit brought. *Ib.*

113. — No greater evidence is required to prove such subscription than is required to prove the other subscriptions. *Ib.*

114. — A subscription paper for shares in a railway company, which provides that the assessments may be laid "when 3,000 shares shall have been subscribed," does not authorize the laying of an assessment until the stipulated amount has been unconditionally subscribed, payable in cash. *Troy and Greenfield R. R. Co. v. Newton*, 8 Gray (Mass.), 596. 1857.

115. — Where the defendant subscribed for stock, on the condition that not less than a certain sum should be subscribed, it was *held*, that he could not show that the subscribers were not pecuniarily responsible, though he might show that the subscriptions were not made in good faith. *Penobscot R. R. Co. v. White*, 41 Me., 512. 1856.

116. — A subscription to the stock of a railway company, conditioned to be paid when the sum of \$5,000 was raised for a certain purpose, is a conditional contract. *Chase v. Sycamore and Courtland R. R. Co.*, 38 Ill., 215. 1865.

117. — On the 19th of January, 1860, the defendant, a resident of Montpelier, subscribed for 100 shares of the stock of the plaintiff corporation, of \$100 each. At a legal meeting of the commissioners of said corporation, of whom the defendant was one, *held* December

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20, 1869, the defendant, in presence of said commissioners, annexed the following written condition to his subscription: "Condition that good and responsible individuals in Montpelier shall subscribe \$50,000 within one year from above date, and a list of subscribers, and amount of each, given me January 19, 1870." *Held*, that the true meaning of said condition was, that the amount of the defendant's subscription was to be counted towards the \$50,000 named therein. *Montpelier, etc., R. R. Co. v. Langdon*, 45 Vt., 137. 1872.

118. Parol conditions. Contemporaneous parol representations cannot be set up as a defense to an action on a contract of subscription to the stock of a railway company, when it is not shown that they were omitted as conditions in the written contract by some fraud of the plaintiff, or by accident or mistake. *Jack v. Naber*, 15 Ia., 450, 1863; *Cedar Rapids and Missouri River R. R. Co. v. Willetts*, ib.

119. — The appellee was authorized by its charter to construct a railway from Lawrenceburgh to Indianapolis, by way of Greensburgh, with a branch from the latter place to Milford. The appellant, a citizen of Milford, made an unconditional subscription to the stock of the company, and paid it out; the company promising that the branch should be made to Milford, which had not been done at the commencement of this suit. The appellant took and still holds his certificate of stock without any offer to cancel, or assign it to the company. Suit was brought by appellant to recover the money. *Held*, that the parol promise to construct the branch to Milford could not be proven as a part of the written contract of subscription; and hence, the money paid could not be recovered on the ground of a breach of contract. *Held*, also, that a recovery could not be had on the ground of fraud; the parol promise and representation being, under the circumstances, no more than the expression of an existing intention to make the branch. *McAllister v. Indianapolis and Cincinnati R. R. Co.*, 15 Ind., 11. 1860.

120. — Parol agreements, made at the time of subscribing for stock, and inconsistent with the written terms of subscription, are inadmissible, inoperative and void. *Connecticut and Passumpsic Rivers R. R. Co. v. Bailey*, 24 Vt., 465, 1852; *North Carolina R. R. Co. v. Leach*, 4 Jones' Law (N. C.), 340, 1857; *Cunningham*

v. Edgefield and Kentucky R. R. Co., 2 Head. (Tenn.) 23, 1858.

121. — It is no defense to an action, to recover the amount of a subscription to the capital stock of a company, that it was made at the request of the president of the company, with the understanding that the defendant was not to pay for or hold the stock subscribed, and the same was to be canceled. *Robinson v. Pittsburgh and Connellsville R. R. Co.*, 32 Penn. St., 334. 1858.

122. — Such an agreement would be a fraud on all subsequent subscribers. *Ib.*

123. — A written subscription for stock in a railroad company was shown to have been conditional by parol evidence. Notice had been given, and an order of court made, to obtain the production of the subscription on the trial; but it was not produced. The question as to the admissibility of such evidence was not presented in this court. *Held*, that the evidence was entitled to full weight. *Jewett v. Lawrenceburgh and Upper Mississippi R. R. Co.*, 10 Ind., 539. 1858.

124. Place of expending subscription. A condition in a subscription that it shall be applied to the construction of a particular portion of the road is not against public policy, and does not invalidate the subscription. *Milwaukee and Northern Illinois R. R. Co. v. Field*, 12 Wis., 340. 1860.

125. — The defendant signed a paper, by the terms of which he agreed "to take the number of shares in the New York and Boston R. R. Co., set opposite to his name. Opposite his signature was set the number of the shares and the amount. Appended to his signature were these words: "To be expended between the Connecticut river and the east line of the state." The defendant accepted the office of director and acted as such. *Held*, that in view of this fact, the defendant must be deemed to have intended to become at once a stockholder; and that the words appended to his signature were intended by him, not as a condition precedent, upon the performance of which he would become a stockholder, but merely as a direction that the amount he was to pay should be expended east of the river. *Held*, also, that even if the words did constitute a condition precedent, it could be waived by him, and that his acting as a director would be a waiver. *Lane v. Brainerd*, 30 Conn., 565. 1862.

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126. — A subscription provided that the money subscribed should be expended in the construction of the road from St. J. to Derby Line, and also that it should not be binding until the whole road from St. J. to Derby Line should be put under contract for grading. *Held*, that this was not a mere description of the road, requiring the whole to be put under contract before the subscription was payable, but that it created an express condition to the validity of the subscription, that the road should be put under contract as far north as Derby Line. *Connecticut and Passumpsic Rivers R. R. Co. v. Baxter*, 32 Vt., 805. 1860.

127. — That the term "Derby Line," in the absence of any evidence as to its meaning, except the subscription itself, and the fact that the charter fixed the northern terminus in the north line of Derby, must be construed to mean the north line of Derby. *Ib.*

128. But the defendant having shown that the words, Derby Line, in common usage, meant a village of that name in Derby, it was *held*, that it became a question of fact for the jury to determine which point was meant by the term. *Ib.*

129. — And it was *held* inadmissible to show that the route adopted, terminating in the north line of Derby, and not at Derby Line village, was more feasible, and better for the company and for the public, than any route leading to that village. *Ib.*

130. — *Held*, also, that if the plaintiff's agent, who obtained the subscription, represented that the route intended by the written condition was the one terminating at Derby Line village, and the defendant subscribed in reliance upon such representation, the plaintiff was bound thereby, whether it was made fraudulently or not. *Ib.*

131. — The act, incorporating a company, required it to commence work as near simultaneously as possible in sections, and provided that the subscribers might designate the section on which they desired their subscriptions to be used. On an action upon the subscription of a stockholder, it was *held*, that it was no defense that the company had abandoned work on one section, and had determined to appropriate the funds of the company on another section. *Vicksburg, Shreveport and Texas R. R. Co. v. McKean*, 12 La. An., 638. 1857.

132. — An action was brought upon a rail-

way subscription, conditioned to be paid in installments, as might from time to time be called for by the directors, provided the same should be expended upon a certain line of road to be thereafter located by the company. *Held*, that the petition, showing neither the road constructed nor an offer nor readiness to expend the money subscribed, according to the condition, was defective; that upon a demurrer by the plaintiff to an answer to such petition, such defects in the petition require such demurrer to be overruled. *Trott v. Sarchett*, 10 Ohio St., 241. 1859.

133. — If a railway company is authorized to build its road in three sections, and after the completion of the first section, subscriptions are obtained for the second and third together, the same may be collected, although it does not appear where or how they are to be expended. *Agricultural Branch R. R. Co. v. Winchester*, 13 Allen (Mass.), 29. 1866.

134. — To entitle a railway company to recover under a special subscription to aid in the construction of its road through a certain county, payable in installments as the work progresses, it is not necessary that the whole amount of capital stock, as fixed by the articles of incorporation, should have been subscribed. *Iowa and Minnesota R. R. Co. v. Perkins*, 28 Ia., 281. 1869.

135. — In such case, the liability of the subscribers is governed by the terms of the subscription, and not by the articles of incorporation. *Ib.*

136. **Promissory note.** A note given payable absolutely, in lieu of a conditional subscription, will be presumed to have been given on sufficient consideration. *Henderson and Nashville R. R. Co. v. Moss*, 2 Duvall (Ky.), 242. 1865.

137. — If a condition upon which a part of the subscription is payable has been performed, and a subscriber gives his note unconditionally for the whole, payable at a future day, the postponement of payment of that part then due is a sufficient consideration for a promise to pay the residue before it would have been due by the original terms. *Ib.*

138. — The giving of a note for the balance of a subscription, and the taking of a receipt therefor, is *prima facie* of a waiver of conditions precedent in the subscription. *Chamberlain v. Painesville and Hudson R. R. Co.*, 15 Ohio St., 225. 1861.

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139. — Suit was brought upon the following instrument: "Ten days after the completion of the I. and S. R. R. from I. to H., and the running of a train of cars thereon, I promise to pay to the order of said railroad company, at the D. Bank, Ind., the sum of one hundred dollars, without relief from valuation or appraisal laws. The condition of this note is the construction of said road, as aforesaid, within one-half mile of the town of D., and the promise and agreement of said company, that by means of said road and its connections the company will run trains from I. to S. within two years from July 1, 1869;" dated Nov. 25, 1868, and signed by the defendant. There was an averment in the complaint of performance within the time and manner mentioned. *Held*, that the contract, being capable of performance within one year, was not within the statute of frauds. If it had originally been within the statute, and therefore not binding on the plaintiff, yet, after performance by the company, the maker could not defend on the ground that he alone had signed the instrument. *Straughan v. Indianapolis and St. Louis R. R. Co.*, 38 Ind., 185, 1871; *Curtis v. Same*, ib., 222; *Wilson v. Same*, ib., 227; *Emmons v. Same*, ib., 247; *King v. Same*, ib., 266; *Scarce v. Same*, ib., 271; *Weaver v. Same*, ib., 277; *Nichols v. Same*, ib., 279; *Osborn v. Same*, ib., 294; *Blake v. Same*, ib., 323; *Keeney v. Same*, ib., 348; *Gregg v. Same*, ib., 372; *Hunt v. Same*, ib., 383; *Smith v. Same*, ib., 389; *Welsham v. Same*, ib., 389; *Nave v. Same*, ib., 443.

140. — Where a subscription was made on condition that it should not be payable until work was commenced at a certain point on the road, and a note for such subscription was obtained upon the false representations of the agents of the company that such work had been commenced, it was *held*, that the note was void. *Taylor v. Fletcher*, 15 Ind., 80. 1860.

141. *Second subscription limiting a former one.* A., having made a cash subscription to the stock of a railway company, was induced by an agent of the company to make a further subscription of a certain farm owned by him, upon the promise that his cash subscription should not be demanded until the road was completed. The company, not regarding its undertaking to forbear, commenced suit upon the cash subscription, and was proceeding to enforce the collection of a judgment

recovered thereon. Suit was brought by A. to recover the land, averring a tender of stock taken for the land. *Held*, that the contract to forbear, being founded upon a valid consideration, might perhaps have been set up in defense to the action upon the cash subscription and would certainly have furnished good ground for enjoining its collection until the completion of the road; but no such defense having been made, A. was not entitled to a rescission of the land subscription. *Held*, also, that the company, having broken its contract, was liable for damages, and the complaint was sufficient to authorize their recovery. *Scarce v. Indiana and Illinois Central R. R. Co.*, 17 Ind., 193. 1861.

142. *Void condition.* An arrangement, between the officers of a railway company and a portion of its subscribers, that if the town in which they reside should vote a certain amount of municipal aid, such subscribers, upon paying a certain percentage of their subscription, should be released from the balance, being in effect an agreement to release one portion of the subscriptions without authority of law, is void. *Swartwout v. Michigan Air Line R. R. Co.*, 24 Mich., 389. 1872.

143. — An agreement that subscriptions, made to enable a railway company to receive an installment from the state, should not be paid, is void as against public policy. *McRae v. Atlantic and North Carolina R. R. Co.*, 5 Jones' Eq. (N. C.), 395. 1860.

144. — The general railroad law of 1848 confers no power to make conditional subscriptions; such subscriptions are contrary to public policy. *Troy and Boston R. R. Co. v. Tibbits*, 18 Barbour (N. Y.), 297, 1854; see *Same v. Same*, 11 Howard's Pr. (N. Y.), 168, 1855.

145. — Suit was brought by a railway company against an administrator to recover a subscription of stock made by his decedent. To the subscription the following stipulation was appended: "Said subscription to be paid in two cash notes \$500 each, due December, 1853 and 1854, and to have certificate when said notes become due." It was insisted *arguendo* that the company had no power to make such a condition. *Held*, that if any condition was in fact made, it would, perhaps, be void, and leave the subscription absolute. *Fleece v. Indiana and Illinois Central R. R. Co.*, 8 Ind., 460. 1856.

Representations made to Induce Subscriptions.

146.—A stipulation in an agreement to subscribe for shares in the capital stock of a corporation to the effect that the installments, when collected, are to be applied in a certain way, constitutes no condition to their payment. The stock itself is the only consideration of the agreement, and the subscription is absolute. *New Albany and Salem R. R. Co. v. Fields*, 10 Ind., 187, 1858; *Same v. Slaughter*, ib., 218.

147.—In an action brought upon such an agreement, an answer setting up a contemporaneous verbal agreement varying its terms, is bad on demurrer. *Ib.*

148. Waiver. A condition precedent will be deemed waived by the act of the subscriber in voting upon his stock at a corporate election. *Dayton and Cincinnati R. R. Co. v. Hatch*, 1 Disney (Ohio), 84. 1855.

149.—A condition precedent in a subscription of land is waived when the subscriber, before any act of the corporation indicating its intention to comply with the condition, executes his deed absolute in form, and receives the stock of the corporation therefor. *Parks v. Evansville, Indianapolis and Cleveland R. R. Co.*, 23 Ind., 567. 1864.

150.—A promissory note, given for a conditional subscription of stock, is a waiver of the condition. *O'Donald v. Evansville, Indianapolis and Cleveland R. R. Co.*, 14 Ind., 259, 1860; *Baker v. Same*, ib., 363; *Anderson v. Same*, ib., 388; *Williams v. Same*, ib., 428; *McDaniel v. Same*, ib., 464; *Evansville, Indianapolis and Cleveland R. R. Co. v. Dunn*, 17 ib., 603, 1861; *Same v. Wampler*, 19 ib., 847, 1862.

151.—Such a note, given some time after the date of the subscription, cannot be viewed as a part of the contract of subscription. *Ib.*

VIII. REPRESENTATIONS MADE TO INDUCE SUBSCRIPTIONS.

152. Agent's representations. The representations of a soliciting agent in relation to the ultimate value of railway stock is mere matter of opinion, upon which the subscriber has no right to rely. *Vauter v. Ohio and Mississippi R. R. Co.*, 14 Ind., 174. 1860.

153.—The declaration of the agents of a railway company in relation to the route of the road cannot be introduced in evidence by the defendant in an action upon a subscription. If the subscriber desires conditions as to the

route, he should have such conditions embraced in the subscription. *Mississippi Ouachita and Red River R. R. Co. v. Cross*, 20 Ark., 443. 1859.

154.—The allegation that the stock solicitor fraudulently represented that a sufficient amount of solvent stock was subscribed to complete the road within two years, and that the company was able, and could and would press said road to completion within that time, and failed to do so, constitutes no bar to recovery on such subscription. *Brownlee v. Ohio, Indiana and Illinois R. R. Co.*, 18 Ind., 68. 1862.

155. Chartered powers. A representation made to obtain a subscription for railway stock to the effect that another corporation would do a certain act, involves the question of the power of that other corporation, under its charter, to do that act, and is therefore no defense to a suit on the subscription, if such corporation had not such power. *Johnson v. Crawfordsville, Frankfort, etc., R. R. Co.*, 11 Ind., 280. 1858.

156. Dividends guaranteed. A contract between the defendant and a third person, by which the former guaranteed to the latter, dividends equal to six per cent. per annum, on his stock, and the latter agreed to subscribe for said stock is admissible in evidence for the purpose of showing that the defendant procured others to subscribe to the stock of such company, and the inducements which he held out for that purpose. *Danbury and Norwalk R. R. Co. v. Wilson*, 22 Conn., 435. 1853.

157. Evidence. Where it was admitted on the trial that at the time defendants subscribed for stock the plaintiff's president represented that certain canal stock would be taken in payment; held, that this admission obviated the necessity of proof, and that plaintiff was bound by it, and could not recover, although no evidence of such representation would have been competent. *Swatara R. R. Co. v. Brune*, 6 Gill (Md.), 41. 1847.

158. Fraud. A person becoming a member is presumed to contract with reference to the powers and rights prescribed in the charter of the company, and to give his assent thereto; hence, where the directors were authorized to build the road on such route as they should deem expedient, if a representation be made

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by the company, to a person about to subscribe for stock, that the road had been located and would be constructed upon a particular route, and thereupon in consideration thereof, such person became a subscriber, such representation is not binding on the company, and though false and fraudulent will not release the subscriber from the liability to pay for his stock. (*Irvin v. Turnpike Co.*, 2 Penn. 466); *Ellison v. Mobile and Ohio R. R. Co.*, 36 Miss., 572, 1858.

159. — False representations of an agent of a railroad company soliciting stock, that the persons undertaking to construct and equip the road were able to complete it, without any advance from the company, out of their own resources, are no defense in an action upon subscriptions. *Andrews v. Ohio and Mississippi R. R. Co.*, 14 Ind., 169. 1860.

160. — Fraudulent representations as to the pecuniary condition of a railroad company and its past earnings, made by its officers and other persons employed by it to solicit subscriptions to its stock, while engaged in obtaining such subscriptions, must be regarded as made by them in the execution of their agency. *Waldo v. Chicago St. Paul and Fond du Lac R. R. Co.*, 14 Wis., 575. 1861.

161. — As a general rule, where a party has been induced to execute an agreement by fraudulent representations of the other party, he may set up such representations in bar of an action on the agreement. *Clem v. Newcastle and Danville R. R. Co.*, 9 Ind., 488. 1857.

162. — But not if such representations, though false, relate to the legal effect of the instrument sued on. *Ib.*

163. — A party is presumed to know the contents of an agreement which he signs, and hence, has no right to rely upon the statements of the other party as to its legal effect. *Ib.*

164. — To avoid a contract on the ground of fraudulent misrepresentations it must appear that the party acted on the representations; and that the misrepresentations were concerning matters of fact and not matters of opinion or of law. *Oregon Central R. R. Co. v. Scoggin* 3 Or., 161. 1869.

165. — In an action brought upon a subscription of stock, the answer alleged: 1. Fraud in this, that the soliciting agent represented that in the book he produced there were articles of agreement by which the subscriber

might pay for stock in money or in ties for the road, at the rate of, etc., and the defendant relying, etc., subscribed without reading, etc., and that said representations were false. 2. That a verbal entire contract was made, a part only of which was reduced to writing; that it was agreed that the defendant should subscribe two shares, and might pay the same in ties at the rate of, etc., on demand, and the part reduced to writing is that stated in the complaint, and the other part defendant demands to prove by parol. The latter was for the payment of money absolutely, upon call. *Held*, 1. That the representations were not peculiarly within the knowledge of the plaintiffs, nor such as the defendant might rely upon. II. That the demand to make parol proof was, in effect a demand to contradict or vary a written instrument by proof of a verbal contemporaneous agreement, which cannot be done. *Thornburgh v. Newcastle and Danville R. R. Co.*, 14 Ind., 499. 1860.

166. **Mistake.** If a subscriber is induced to take stock in a railway company by false representations which are not fraudulent, and which form no part of the contract of subscription, he is not entitled to be relieved from the payment of the amount of his subscription. But if he acts upon such representations to his injury, he is entitled to relief, although they may have been innocently made. *Cunningham v. Edgefield and Kentucky R. R. Co.*, 2 Head (Tenn.), 23. 1858.

167. **Promissory notes.** Where subscribers to the stock of a railway company had given their notes for the amounts of subscription, payable when the road should be completed, but were subsequently induced to take up these notes and to give new ones, payable in four years, in order to enable the company to carry out a contract for the completion of the road, and upon the confident but honest expression of opinion by its officers, that if they would do so, the road would be completed under such contract in less than four years, *held*, that although the said contract for building the road was afterward, and before anything had been done under it, abandoned by the contractor, and the road has never been completed, yet the subscribers are liable upon their said new notes. *Four Mile Valley R. R. Co. v. Bailey*, 18 Ohio St., 208. 1868.

168. **Public Meeting.** Where certain rep-

Location.

representations as to what a railway company would do, were made at a public meeting, and upon the strength of these representations, A. conveyed land to the company, with the understanding that he was to have the advantages as stated in such meeting, there being no other consideration, it was *held*, that upon the failure of the company to carry out the promises made at that meeting, A. was entitled to a cancellation of his deed. *Atlanta and West Point R. R. Co. v. Hodnett*, 36 Ga., 669. 1867.

IX. LOCATION.

169. Change of route. A material change of route, unless made in pursuance of authority to make such change contained in the charter, will release all nonassenting stockholders from their subscriptions. *Witter v. Mississippi, Ouachita and Red River R. R. Co.*, 20 Ark., 463, 1859; *Mississippi, Ouachita and Red River R. R. Co. v. Gaster*, 24 ib., 96, 1863.

170. — The materiality of such change is a question of law. *Ib.*

171. — A change of route from that first fixed by law will not release a subscriber, provided the change does not make an improvement of a different character, and his interest is not materially affected by the alteration, *Banet v. Alton and Sangamon R. R. Co.*, 13 Ill., 504. 1851.

172. — A subsequent change in the location of a railroad, which had not been definitely located when the defendant subscribed, will not release him from his contract. *Eppes v. Mississippi, Gainesville and Tuscaloosa R. R. Co.*, 35 Ala., N. S., 33. 1859.

173. — A railway corporation having located its road according to law, afterwards, for a short distance, altered such location, the requisite steps being taken as to such substituted portion; *held*, that such alteration furnished no defense to a stockholder, in an action against him to recover assessment on his stock. *Danbury and Norwalk R. R. Co. v. Wilson*, 22 Conn., 435. 1853.

174. — Where the directors of a railway company were authorized by the charter to change the location of the road whenever a cheaper or better route could be had — a change of location which placed the road upon a cheaper route, and procured a large additional subscription of stock, and also furnished

a reasonable probability that the business and profits of the road, when finished, would be thereby considerably augmented, does not exonerate the subscribers from the payment of their stock. *Frye, Ex'r, v. Lexington and Big Sandy R. R. Co.*, 2 Metcalfe (Ky.), 314. 1859.

175. — Nor are subscribers living at and owners of real estate in a town, made by the charter the terminus of the road, exonerated from the payment of their stock because such change of the location of the road will build up a rival town several miles distant. *Ib.*

176. Change of terminus. A stockholder in a railway company, who seeks to avoid the payment of his subscription upon the ground that one of the *termini* was materially changed from that designated in the charter, must show that the alteration was made without his concurrence, or consent. *North Carolina R. R. Co. v. Leach*, 4 Jones' Law, (N. C.), 340. 1857.

177. Designation of route. The charter of a railway company allowed the company to select such route between fixed points "as a majority of the stockholders should deem most advisable," and provided that, "after the selection of the route, any stockholder who may be dissatisfied with the route selected, shall have the right to withdraw his subscription," etc., "provided such stockholder shall have designated at the time of subscribing, the route which he desires to be selected for the location of the road." *Held*, that such stockholders as had thus designated the route desired by them might vote upon the question of selection, when the company met for that purpose. That a subscriber who had not designated the route at time of subscribing had no right to withdraw, nor could a subscriber show by parol that he had instructed the agent who subscribed for him to designate the route desired. That the company was not bound to select the most practicable route. That a slight deflection from the route first selected did not absolve a stockholder who had not designated the route he desired to be selected. That an amendment to the charter authorizing the construction of a branch road, without the consent of a stockholder, would not release him from his obligation under the circumstances of this case. *Greenville and Columbia R. R. Co. v. Coleman*, 5 Richardson's Law, (So. Car.), 118. 1851. *Same v. Smith*, 6 Richardson's Law, (So. Car.), 91. 1852.

Interest.

178. Evidente. A subscriber cannot show by parol that he would not have subscribed, if he had supposed a particular route would be adopted. *Eakright v. Logansport and Northern Indiana R. R. Co.*, 13 Ind., 404. 1859. *Carlisle v. Evansville, Indianapolis and Cleveland R. R. Co.*, 13 ib., 477.

179. Extension of line. Where, after defendant had subscribed for stock in a railway company, the line was ordered to be extended beyond its original limits without his consent, and such extension had been enjoined at the suit of another stockholder, and the extension abandoned, it was *held*, that these facts constituted no defense to an action on the defendant's stock subscription. *Rutland and Burlington R. R. Co. v. Thrall*, 35 Vt., 536. 1863.

180. Injunction. A railway company cannot be enjoined for collecting installments of stock because the money may be expended in extending the road beyond the county in which the stockholders reside, unless the contract of subscription expressly stipulated that the money should be expended in such county. *Dill v. Wabash Valley R. R. Co.*, 21 Ill., 91. 1859.

181. Length of road. Where there is no fraud, one who signs the articles of association cannot, in an action for the calls, show that the road is in fact longer than the distance stated in the articles. *Troy and Rutland R. R. Co. v. Kerr*, 17 Barbour, (N. Y.), 581. 1854.

182. Two routes—selection. Where the defendant agreed to subscribe for stock, upon condition that one of two routes should be selected by the company, and the company selected the route required by him, he was held liable on his subscription. *Spartanburg and Union R. R. Co. v. De Graffenreid*, 12 Richardson's Law, (So. Car.), 675. 1860.

X. INTEREST.

183. Construction of contract. An agreement of a railway company with a subscriber for stock therein, that he "shall have the privilege of paying in at any time the whole or any part of his subscription, and shall receive interest thereon until the road goes into operation," does not bind the company to pay him any interest until the road goes into operation. *Waterman v. Troy and Greenfield R. R. Co.*, 8 Gray, (Mass.), 433. 1857; and see also *Wright*

v. Vermont and Massachusetts R. R. Co., 12 Cushing, (Mass.), 68. 1853.

184. Where the company received subscriptions on the guarantee that it would pay interest on stock "as soon as paid," until the road was finished, interest would not accrue until the stock was all paid. Where the subscriber has paid a part of the stock, he cannot, in an action for the balance, set up the nonpayment of interest on the part paid as a breach of condition. *Miller v. Pittsburgh and Connellsville R. R. Co.*, 40 Penn. St., 237. 1861.

185. A subscription is not invalid because it contains a stipulation that the amount paid thereon shall bear interest until dividends shall be declared from the earnings of the road. *Racine County Bank v. Ayers*, 12 Wis., 512. 1860.

186. Where the directors of a railway company organized under the act of May 1, 1852, assume to sell shares of their capital stock by special contract, stipulating for the payment of interest annually on such stock until the completion of the road, *held*, that such payment of interest cannot be enforced by action, where it appears that the corporation has no means or resources from which payment can be made, except its capital stock, and that large debts incurred in the partial construction of the road remain due and unpaid. *Painesville and Hudson R. R. Co. v. King*, 17 Ohio St., 534. 1867.

187.—A railway company has authority to stipulate that each stockholder shall be entitled to interest on sums paid on stock subscriptions while its road is in process of construction, till it is completed and goes into operation, payable whenever the surplus earnings shall enable it properly to do so. *Richardson v. Vt. and Mass. R. R. Co.*, 44 Vt., 613. 1872.

188.—This arrangement for payment of interest dividends is equitable and just, and does not interfere with the rights of creditors, and is not in contravention of public policy. *Ib.*

189.—The vote to pay such interest was passed at an annual meeting of the stockholders, the subject not being specially named in the notice calling the meeting. *Held*, without determining whether the corporation had the right to pass such vote, that the defect, if any, could be cured by subsequent ratification. *Ib.*

190.—The subsequent payment of such interest, and the corporation and directors

Ratification.

subsequently voting to issue certificates for the payment of said interest, and the action of the treasurer in issuing such certificate, constitute a ratification of such vote. *Ib.*

191. — Notwithstanding the stock for which \$75 and \$50 per share were paid was to be of equal rank and value as the other stock for which \$100 per share was paid, yet, in the matter of this interest, such stockholders should be limited to "*interest on all amounts paid by them,*" according to the language of the original vote, and are not entitled to interest upon the nominal value of \$100 per share, and the certificates should be reduced accordingly. *Ib.*

192. — The fact that the corporation has a surplus of funds in its treasury sufficient to pay the orators would not be sufficient to entitle them to payment. There should be enough not only to pay them, but to pay all other stockholders having like claims. *Ib.*

XI. RATIFICATION.

193. **Agent.** The ratification of a contract necessarily implies the relation of principal and agent; and, unless that relation existed, the idea of ratification is necessarily excluded, *Pittsburgh and Steubenville R. R. Co. v. Gazzam*, 32 Penn. St., 340. 1858.

194. — A full knowledge of all the material facts and circumstances attending the transaction is necessary to give validity to the ratification; the party must know that he would not be bound without such ratification. *Ib.*

195. — Where A. authorized one of the commissioners to take stock for him, and his name was actually entered by another commissioner who acted as clerk, and the entries were afterwards certified by all the commissioners, and A. afterwards voted by proxy as a stockholder; *held*, that he was liable as a stockholder. *Greenville and Columbia R. R. Co. v. Coleman*, 5 Richardson's Law (So. Car.), 118. 1851.

196. **Unauthorized Subscription.** If the complaint in an action against B. on a subscription of stock, allege that A. made the subscription for B., and B. ratified it, it is no defense for B. to say that he did not subscribe. *Wilson v. Evansville, Cleveland, etc. R. R. Co.*, 9 Ind., 510. 1857.

197. — One B., without authority, signed

the name of the intestate as a subscriber for ten shares of the capital stock of a railway corporation. *Held*, that the subsequent declaration of the intestate to strangers that he had taken that amount of stock did not amount to a ratification of the act of B. *Rutland and Burlington R. R. Co. v. Lincoln's Estate*, 29 Vt., 206. 1857.

198. — A subscription to the stock of a railroad company in the name of a third party, without precedent authority may be ratified. A letter of attorney executed by the person in whose name the subscription is made, constituting the attorney his proxy to vote at a meeting of the company, is evidence of ratification to go to the jury. *McCully v. Pittsburgh and Connellsville R. R. Co.*, 32 Penn. St., 25. 1858.

199. — F., a director of a railway company, upon consultation with the friends and acquaintances of C., subscribed for him and in his name for forty additional shares of stock to relieve the company from embarrassment, C. being at the time a resident of a foreign country, and immediately advised C. who never made any reply to F. or the company. The accruing dividends on the original stock of C. were applied by the company to the payment of the stock so subscribed for him, and nearly seven years after the subscriptions were made, he demanded and sued for the dividends declared upon the original stock, alleging that the subscription of F. was unauthorized. *Held*, that the silence of C. for so long a period was proper to be submitted to the jury as an evidence of his ratification of the act of F. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Corwell*, 28 Penn. St., 329. 1857.

200. — The ratification of an unauthorized act by the silence of the party, is not confined to cases where the relation of principal and agent exists. *Ib.*

201. — Such silence is evidence of ratification more or less expressive according to the circumstances under which it occurs. *Ib.*

202. — Ratification of such an act may not be implied as a conclusion of law from the silence of the party, but it is competent evidence for the jury to consider as a circumstance from which, with others, they may imply such ratification. *Ib.*

203. — A director stands in a fiduciary relation towards a stockholder, and in acting for

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him in his absence, cannot be regarded as altogether a stranger and intermeddler. *Ib.*

204. — A subscription for stock in a chartered railway company, which by its charter states the amount and price of its shares, by signing a written instrument in these words: "We, the undersigned, agree to take the following number of shares in the Mobile and Ohio Railroad," and designating the number thereof opposite the subscriber's name, though taken in a public meeting by persons not authorized by the company, becomes a valid contract to pay the amount subscribed, by being transferred to the books of the company, and thus accepted by it. *Mobile and Ohio R. Co. v. Yandal*, 5 Sneed (Tenn.), 294. 1858.

XII. RENUNCIATION OF SUBSCRIPTIONS.

205. Conditional agreement. A party who has made a conditional subscription for stock of a railway company by agreement with a person who is not the authorized agent of such company, may withdraw or revoke his subscription at pleasure, without notice to the company, at any time while the subscription book remains in the hands of such person and before the company has acquired any right to or interest in it. *Lowe v. Edgefield and Kentucky R. R. Co.*, 1 Head (Tenn.), 659. 1858.

206. Notice of renunciation. If a party who has subscribed for stock of a railway company can renounce and abandon his subscription, it can only be done by notice to the agent or to the company, in proper time. *Cunningham v. Edgefield and Kentucky R. R. Co.*, 2 ib., 23. 1858.

207. — The power and authority of the agent of a railway company to receive subscriptions for stock, ceases when the subscription is complete. When made, the subscription instantly inures to the benefit of the company, and creates in law, a contract directly between the subscriber and the company. The agent has no power to abrogate or annul the subscription; and consequently, notice of an intention to revoke it must be given to the company, and not to the agent. *Lowe v. Edgefield and Kentucky R. R. Co.*, 1 ib., 659. 1858.

XIII. ESTOPPEL.

208. Directors. Where the directors named

in the act of corporation met and organized the company without the limits of the state granting the charter, one who has subscribed for the stock of the corporation by its corporate name, and paid installments called for by the directors, is precluded by his own acts from denying the lawful existence of the corporation. *Ohio and Mississippi R. R. Co. v. McPherson*, 35 Mo., 13. 1864.

209. Existence of corporation. A person is estopped to deny the existence of a railway company at the time he contracted with it as such. *Ensey v. Cleveland and St. Louis R. R. Co.*, 10 Ind., 178. 1858.

210. — Should he deny its existence at a subsequent time, he must show how it ceased to exist. *Ib.*

XIV. ORGANIZATION OF CORPORATION CONTEMPLATED.

211. Power to take subscriptions before organization. A corporation may receive subscriptions to its stock, and may sue before being fully organized. *Oregon Central R. R. Co. v. Scoggin*, 3 Or., 161. 1869.

212. — A corporation authorized to be constituted under an act of assembly, cannot take a bond payable to it, until the prerequisites have been performed to give it corporate existence. *Wilmington and Manchester R. R. Co. v. Wright*, 5 Jones' Law (N. C.), 304. 1858.

213. — It is not a good reason for refusing to pay installments that the corporation was not organized until after the defendant had subscribed for his shares. *Danbury and Norwalk R. R. Co. v. Wilson*, 22 Conn., 435, 1853; *Tonica and Petersburg R. R. Co. v. McNeeley*, 21 Ill., 71. 1859.

214. — A promise to take and fill a certain number of shares in a corporation, by a subsequent organization of the company, and an acceptance of the subscription, becomes a binding contract. *Penobscot R. R. Co. v. Dummer*, 40 Me., 172, 1855; *Buffalo and New York R. R. Co. v. Dudley*, 14 N. Y., 336, 1856.

215. — An individual does not become a member and stockholder of a railway company under the general railroad act of 1848, by the act of subscribing a preliminary paper, previous to the organization of the company, agreeing to subscribe for stock. *Troy and Boston R. R. Co. v. Tibbits*, 18 Barbour (N. Y.), 297,

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1854; see *Same v. Same*, 11 Howard's Pr. (N.Y.), 168, 1855.

216. — Subscription is a mere provisional act, inoperative unless pursued through the remaining forms of the statute. *Ib.*

217. — A corporation cannot sustain an action against one who, before it was chartered, with others, signed a paper agreeing to take a certain quantity of stock and afterwards refused to do so. *Strasburg R. R. Co. v. Echter-nacht*, 21 Penn. St., 220. 1853.

218. — Such paper is only an expression of the intention of the subscriber, and is not a contract. *Ib.*

219. — An undertaking to subscribe a certain amount of stock, when books shall be opened, does not make the subscriber a stockholder. *Thrasher v. Pike County R. R. Co.*, 25 Ill., 393. 1861.

XV. CONSOLIDATION OF CORPORATIONS.

220. Consent of stockholders. After a public act had taken effect authorizing the consolidation of the charters of two railroad companies, A. subscribed five shares of stock to one of them. The consolidation having afterward taken place, A. was sued by the new company upon his subscription. *Held*, that A. was liable. *Held*, also, that the circumstance that the consolidation may have taken place without his personal knowledge or consent was of no importance. *Sparrow v. Evansville and Crawfordsville R. R. Co.*, 7 Ind., 369. 1856.

221. — An association for the construction of a railway was formed under a general law, which authorized the amendment or repeal of the law at the discretion of the legislature. The law did not authorize the consolidation of railroad companies. A. subscribed to the stock of the company. Afterward, a general act was passed authorizing such consolidation. The company was then consolidated with another. But it was apparent from the articles of association, that such consolidation was one of the purposes for which the association seemed to have been organized, and that the consolidation was only carrying out that purpose, and did not work a fundamental change of the object contemplated. *Held*, that such action of the company did not discharge A. from the payment of his

subscription. *Hanna v. Cincinnati and Fort Wayne R. R. Co.*, 20 Ind., 30. 1863.

222. — Subscriptions to the capital stock of railroad companies, made since the taking effect of the act of February 23, 1853, authorizing the consolidation of such company, will not be discharged or invalidated by the subsequent consolidation of the company in which they are made, but they will be held to have been made with reference to said law. *Bish v. Johnson*, 21 Ind., 299. 1863.

223. — Where two or more railway companies, with the consent of the legislature, granted subsequently to the subscription of stock, but without the consent of the stockholders, consolidate their separate existences into one, nonconsenting stockholders are released, and may withdraw from the corporation. *Booe v. Junction R. R. Co.*, 10 Ind., 93, 1857; *McCray v. Junction R. R. Co.*, 9 Ind., 358, 1857; *Martin v. Same*, 12 ib., 605, 1859; *Marks v. Same*, 13 ib., 387, 1859.

224. — The relation between such company and a stockholder is one of contract; and any legislative enactment authorizing a material change of powers or purposes of the corporation, not in aid of the original object, if acted upon by the corporation, is not binding upon the stockholder, without his consent. *Ib.*

225. Effect of consolidation. The consolidation of a company with another does not defeat the right of the former to collect its stock subscriptions. *Swartwout v. Michigan Air Line R. R. Co.*, 24 Mich., 389. 1872.

226. Judgment. Where the charter, under which a subscription was made provided that subscriptions should be collected without relief, etc., and suit is brought on such subscription, after a consolidation with another company, judgment is properly rendered "without relief, etc." *Hayworth v. Junction R. R. Co.*, 13 Ind., 348. 1859.

XVI. PARTNERSHIP.

227. Form of Subscription. The provision in the general railway act, requiring each subscriber to the articles of association to subscribe thereto "his name, place of residence and amount by him subscribed," does not call for an individual personal subscription by all the members of a partnership firm. *Ogdens.*

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burg, Rome and Clayton R. R. Co. v. Frost, 21 Barbour (N. Y.), 541. 1856.

228. — A subscription by a partnership name is a compliance with the act. *Ib.*

229. **Power of partner to subscribe.** One partner cannot make himself the agent of his firm to subscribe stock to a railroad company, the building of railroads not being within the scope of the partnership. *Livingston v. Pittsburg and Steubenville R. R. Co.*, 2 Grant's Cases (Penn.), 219. 1858.

230. — Where the main business of a partnership was that of dealing in oysters, but it was proved that they had formerly owned a line of wagons, and that they purchased, sold and held land in their joint names, owned vessels employed in the coasting trade, and subscribed for, purchased and sold stock in railroad and other companies; *held*, that from evidence of these facts it was competent for the jury to infer that a subscription for railway stock made by one of the partners in the name of the firm, was within the scope of the partnership authority. *Maltby v. Northwestern Va. R. R. Co.*, 16 Md., 422. 1860.

XVII. APPORTIONMENT OF STOCK.

231. **Commissioners.** By the settled practice in New York, commissioners appointed in an act of incorporation of a joint stock company, to receive subscriptions and to apportion the stock, in case of an excess of subscriptions, may themselves become subscribers and apportion a part of the stock to themselves. *Walker v. Devereaux*, 4 Paige Ch. (N. Y.), 229. 1833.

232. **Fraud.** Where the commissioners are directed to distribute the stock of a corporation, it is a fraud upon the commissioners, and upon the law, for a person to subscribe for stock in his own name, under a secret agreement to hold it in trust for another, if stock should be apportioned to him under such subscription, with the intention of deceiving and misleading the commissioners. *Ib.*

233. **Installments.** Where A, with others, subscribed for stock in a railroad company, as follows: "We do hereby subscribe to the stock of said railroad the number of shares annexed to our names respectively, on the terms, conditions and limitations mentioned in the charter;" paying, at the same time \$5,

on each share subscribed. The charter authorized the directors to require payment of installments of the stock. On a reduction and apportionment of the subscriptions, ten shares were allowed to A., who received a certificate specifying the sum paid, and declaring the residue to be payable by installments as they should be ordered by the directors. *Held*, that from the relation of stockholder and company, thus created, a promise by the defendant was implied to pay the installments. *Hartford and New Haven R. R. Co. v. Kennedy*, 12 Conn., 499, 1838; *Danbury and Norwalk R. R. Co. v. Wilson*, 22 ib., 435. 1853.

XVIII. PAYMENT OF FIRST INSTALLMENT.

234. **Agent.** Where payment of the amount required by the charter of a railroad company, to be paid at time of the subscription, is made by an agent, without the knowledge of the principal, and the principal afterwards ratifies the act, the subscription is binding. *Mississippi and Tennessee R. R. Co., v. Harris*, 36 Miss., 17. 1858.

235. — A subsequent promise to pay the remainder of the subscription amounts to a ratification of the act of the agent. *Ib.*

236. **Bank checks.** The treasurer of a corporation about to form a railway company may receive from the subscribers payment of the ten per cent., required by law to be paid him, in bank checks drawn by the subscribers, and payable *in presenti*, provided they are drawn against a sufficient fund in good faith, and with no intention to evade the law. *People v. Stockton and Visalia R. R. Co.*, 45 Cal., 306. 1873.

237. **Charter.** The fact that the subscribers to the capital stock of a company do not, at the time of subscription, pay five dollars on each share of stock subscribed, is not ground to invalidate the charter. *Commonwealth v. West Chester R. R. Co.*, 3 Grant's Cases (Penn.), 200. 1855.

238. **Claim against corporation applied on first installment.** The payment of the first ten per cent. need not necessarily be made in cash; it is sufficient if a claim against the corporation is thus applied by the consent of the parties. *Beach v. Smith*, 30 N. Y., 116, 1864; *Same v. Same*, 28 Barbour (N. Y.), 254, 1858.

Payment of First Installment.

239. Commissioner. A subscription to stock which is created by a charter, requiring a certain sum to be paid at the time of subscription, will not be invalidated, if the party subscribing does not actually pay the requisite sum; provided he is a commissioner to receive the money and procure the stock to be taken. *Ryder v. Alton and Sangamon R. R. Co.*, 13 Ill., 516. 1851.

240. Estoppel. A subscriber who transfers his stock to another, and treats it as valid, is estopped from denying that the payment necessary to give it validity, at the time of subscription, was made. *Eberhart v. West Chester and Philadelphia R. R. Co.*, 28 Penn. St., 339. 1857.

241. Failure to pay, as a defense. The failure to make the payment required by the charter, at the time of subscription, cannot be set up by the subscriber as a defense to an action upon his subscription. *Vicksburg, Shreveport and Texas R. R. Co. v. McKean*, 12 La. An., 638, 1857; *Wight v. Shelby R. R. Co.*, 16 B. Monroe (Ky.), 4, 1855; *Red River R. R. Co. v. Young*, 6 Robinson (La.), 39, 1843.

242. — The subscriber cannot take advantage of any informalities in the manner of his subscription, unless in case of fraud or error. *Mexican Gulf R. R. Co. v. Viavani*, 6 Robinson (La.), 305. 1843.

243. — A subscriber for stock in the Coosa and Chattanooga R. R. Co. is not liable upon his subscription unless he has paid \$5 per share at time of subscribing, as required by the charter, although he has acted and voted as a stockholder. *Wood v. Coosa and Chattanooga R. R. Co.*, 32 Ga., 273. 1861.

244. — Where a subscriber knowingly failed to pay the installment of \$5 per share, as required by the charter, and afterwards acted as a stockholder and voted at corporate elections, it was *held*, that he would not be permitted on that ground to file an information in the nature of a *quo warranto* attacking the organization of the company. *Cole v. Dyer*, 29 Ga., 484. 1859.

245. Pleading. Although a railway charter requires that each subscriber shall pay ten per cent. at the time of his subscription, on a suit against a subscriber to enforce payment of a subscription, it need not be averred in the declaration that such percentage was paid. Such fact is a matter of averment in defense.

Illinois River R. R. Co. v. Zimmer, 20 Ill., 654. 1858.

246. Promissory note. Where the first installment of ten per cent. was settled by note, which was afterwards transferred by the company before maturity and collected, it was *held* that the subscription was valid. *Ogdensburgh, etc., R. R. Co. v. Wooley*, 3 Abbott's Ct. of Ap. Dec. (N. Y.), 398. 1864.

247. — Where the charter of a railway company provided that each stockholder should, at the time of subscribing, pay the first installment in money, and instead thereof a stockholder gave his note, and subsequently acted as a stockholder in the organization of the company, this act was *held* to be a waiver of the irregularity, and he could not refuse to pay the other installments called for. *Greenville and Columbia R. R. Co. v. Woodsides*, 5 Richardson's Law (So. Car.), 145, 1851; *Ogdensburgh, Clayton and Rome R. R. Co. v. Wolley*, 1 Keyes (N. Y.), 118, 1864; *Same v. Same*, 34 Howard's Pr. (N. Y.), 54, 1864; *Selma and Tennessee R. R. Co. v. Tipton*, 5 Ala. N. S., 787, 1843; *Same v. Rountree*, 7 ib., 670, 1845.

248. — The charter of the Vt. Central R. R. Co. named certain persons as commissioners to receive subscriptions for stock, and it provided that "every person at the time of subscribing shall pay to the commissioners five dollars on each share for which he may subscribe, and each subscriber shall be a member of said company;" and it was further provided that when one thousand shares should be subscribed, the commissioners might issue a notice for the stockholders to meet and elect directors. The defendant subscribed for stock, and instead of paying the money required, gave his note therefor to the commissioners. *Held*, that the note was supported by a sufficient consideration. *Vermont Central R. R. Co. v. Clages*, 21 Vt., 30. 1848.

249. — A right of action may be sustained on such note by the corporation. *Id.*

250. — The corporation was capable of taking the promise at the time it was made, notwithstanding the requirements of its organization had not all been complied with. *Id.*

251. Subsequent payment. A party subscribing for stock, if he pay the required installment before the books are closed, will be *held* liable to pay the residue, although he did not pay on each share at the time of taking the

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stock. *Klein v. Alton and Sangamon R. R. Co.*, 13 Ill., 514. 1851.

252. — Where the charter of a railway company required that a certain per cent. of stock should be paid at the time of making the subscription, and stock was subscribed and no payment made at the time, but the per cent. was subsequently paid, *held*, that such payment was an affirmation of the subscription. *Fiser v. Mississippi and Tennessee R. R. Co.*, 32 Miss., 359. 1856.

253. — Such payment need not be contemporaneous with the act of subscribing. *Barrington v. Mississippi Central R. R. Co.*, 32 Miss., 370. 1856.

254. — The defendant did not, at the time of his subscription, pay the ten per cent. required by ch. 140 of 1850, § 4, but subsequently paid forty per cent. *Held*, that the subscription was thereby made valid. *Black River and Utica R. R. Co. v. Clarke*, 25 N. Y., 208. 1862.

255. — Where it was necessary to the validity of a subscription that a certain sum should have been paid at the time of the subscription, it was *held*, that it was not competent to show that shortly after the subscription one of the commissioners, since deceased, had paid over the amount of the installment to the treasurer, saying that the defendant had paid it on account of the subscription. *Western Maryland R. R. Co. v. Manro*, 32 Md., 280. 1869.

XIX. EVIDENCE.

[See *ante* 704, subdivision VIII of this title.]

256. **Application of funds.** In an action brought upon a subscription for stock, the circumstances connected with the payments, and the amount called for, and the amount paid, are proper evidence as to the application of, or intention to apply, the money paid; and the attorney of the defendant may be compelled to testify as to the contents of receipts in his possession, or the defendant may be compelled to produce them. *Andrews v. Ohio and Mississippi R. R. Co.*, 14 Ind., 169. 1860.

257. **Different kinds of evidence.** Written subscriptions may be proved by admissions of the subscribers, the testimony of persons who saw the subscriptions made, the proof of the handwriting and proof of payments made thereon. *Philadelphia and West Chester R. R. Co. v. Hickman*, 28 Penn. St., 318. 1857.

258. — The subscription books are not in themselves evidence. *Ib.*

259. — It is not error to admit in evidence a contract of subscription varying from that declared upon, where it worked no injury to defendants, who were proved liable otherwise by acts of participation in the company's affairs, such as voting, acting as directors, judges, etc., and active exertions to obtain municipal subscription on the faith of the subscriptions certified to have been made by the parties so acting. *Hays & Black v. Pittsburgh and Steubenville R. R. Co.*, 38 Penn. St., 81. 1860.

260. — Such acts amount to an estoppel, and are primary and not secondary evidence. *Ib.*

261. — Where a person subscribed for certain shares in a corporation, and the clerk entered his name on the records, and the subscriber subsequently stated that he had taken the shares, and the treasurer offered him a certificate for the same; *held*, that the evidence was competent to show him a shareholder, so far as to be liable for all legal assessments that might be made on his shares. *New Hampshire R. R. Co. v. Johnson*, 30 N. H., 390. 1855.

262. **Incorporation.** The general statutes for the incorporation of railway companies (ch. 140, Laws of 1850) require in the articles of association only such approximative estimate of the length of the proposed road as may be made in good faith without an actual survey. *Buffalo and Pittsburgh R. R. Co. v. Hatch*, 20 N. Y., 157. 1859.

263. — The affidavit of three directors that \$84,100 has been in good faith subscribed to the capital stock, annexed and referring to the articles which state the termini of the road, and that its length is about seventy-five miles, is sufficient evidence that at least \$1,000 of stock for every mile of road proposed is subscribed. *Ib.*

264. — The statement in such affidavit, that "ten per cent. has been paid in cash on said subscription" is sufficient, without adding that it was paid to the directors or in good faith. *Ib.*

265. — Where the articles of association of a railway company were in proper form, and properly authenticated and certified, and so far as such articles were concerned, all the requirements of the statute had been complied with; and the company had assumed corporate functions, built a portion of its road and gone into

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actual operation, and had been doing business some five years; the defendant being one of the directors and acting as such for several months; and the legislature had, by three several acts, distinctly recognized its corporate existence; *held*, in an action by the corporation to recover calls upon its capital stock, that it was to be deemed a legal corporation, and authorized to sue, as such. *Black River and Utica R. R. Co. v. Barnard*, 31 Barbour (N. Y.), 358. 1859.

266. — Proof of an authorized call for a subsequent installment is evidence that a former one had been made by proper authority. *Bavington v. Pittsburgh and Steubenville R. R. Co.*, 34 Penn. St., 358. 1859.

267. — The books of the corporation are competent evidence against a corporator to prove the amount of the installments as well as the calls. *Id.*

268. Location of depot. In an action on a subscription, parol evidence is admissible to show that the conditions of the subscription have been complied with; and the objection that the best evidence of the location of a depot and letting of a contract, etc., is the contract and survey, does not apply. *St. Louis and Cedar Rapids R. R. Co. v. Eakins*, 30 Ia., 279. 1870.

269. Parol evidence cannot be introduced to show the inducements held out, upon which the subscriber acted, unless such testimony will establish fraud or mistake. *Martin v. Pensacola and Georgia R. R. Co.*, 8 Fla., 370, 1859; *Johnson v. Same*, 9 ib., 290, 1860; *Wight v. Shelby R. R. Co.*, 16 B. Monroe (Ky.), 4, 1855.

270. — Parol evidence is not admissible to vary the terms of a written subscription made to the capital stock of a corporation. *Kennebec and Portland R. R. Co. v. Waters*, 34 Me., 369. 1852.

271. — Parol declarations made by officers of a company on public occasions, if admissible at all to invalidate a subscription to stock, cannot be shown as a defense unless they amount to fraud. *Vicksburg, Shreveport and Texas R. R. Co. v. McKean*, 12 La. An., 638. 1857.

272. — The defendant authorized the secretary of a meeting to subscribe for him, by putting his name to a blank sheet of paper, and the name was subsequently transferred to the

subscription books of the company, without any further authority. *Held*, that the defendant might show by parol evidence, that he authorized the subscription only on certain conditions. *Tonica and Petersburg R. R. Co. v. Stein*, 21 Ill., 96. 1859.

273. — A contract of subscription must be in writing, and cannot be established by parol evidence; and in order to let in secondary evidence, there must be some proof of an original subscription, and of the loss of the book or paper. *Pittsburgh and Steubenville R. R. Co. v. Gazzam*, 32 Penn. St., 340. 1858.

274. Pleadings. Suit was brought upon a subscription for railway stock, whereby the subscribers promised to pay the sum, etc., for each share subscribed, "in such manner and in such proportion and at such times," as the company should direct. The answer admitted the subscription as alleged in the complaint, but denied the other averments. *Held*, that personal notice of a call for stock was not requisite. *Held*, also, that it was not necessary to introduce the book containing the defendant's subscription in evidence. *Fisher v. Evansville and Crawfordsville R. R. Co.*, 7 Ind., 407. 1856.

275. Proxy. A proxy, signed by an individual as a stockholder, is *prima facie* evidence against him that he is a stockholder. *Greenville and Columbia R. R. Co. v. Smith*, 6 Richardson's Law (So. Car.), 91. 1852.

276. Subscription books. In an action brought upon a subscription to the stock of a railroad company, the subscription book into which the names and subscriptions of the defendant and other subscribers were transcribed from a memorandum or paper on which they were originally written, at a meeting held for the purpose of procuring subscriptions, is admissible in evidence, without accounting for the loss or absence of the memorandum, when it appears that the person soliciting the subscription was empowered, by the authority conferred at the meeting, to thus transcribe the subscriptions. *Iowa and Minnesota R. R. Co. v. Perkins*, 28 Iowa, 281. 1869.

277. — Nor would the objection avail, that such memorandum had not been stamped, the subscription book being properly stamped. *Id.*

278. — A suit in assumpsit was brought by a railway company on a subscription of stock and a trial was had upon the general issue

Stock Certificates-- Assignment of Stock.

The plaintiff proved by its secretary that certain books had come into his possession from his predecessor, as books of the company, one of which purported to contain subscriptions to the capital stock of the company, and another to contain its proceedings. Certain entries in these books were admitted in evidence. The subscription book contained resolutions of the directors, fixing the amount of a share, the terms, etc. To these, the declaration averred that the defendant placed his signature, with the number of shares he desired. The resolutions were specially set forth in the declaration. *Held*; I. That the proof of the identity of the instrument offered in evidence, with that declared on, was sufficient, if, indeed, such was at all necessary. II. That under the issue, proof of the execution of the instrument was not necessary. *Breedlove v. Martinsville and Franklin R. R. Co.*, 12 Ind., 114. 1859.

279. — loss. Evidence of the loss of a subscription book so as to let in secondary evidence of the fact of subscription is for the court and not for the jury: *Graff v. Pittsburgh and Steubenville R. R. Co.*, 31 Penn. St., 489. 1858.

280. — Proof of diligent search and inquiry, by the proper custodian, is sufficient to let in secondary evidence unless the book be traced to other hands. *Id.*

281. — Where the secretary of a railroad company, in response to a demand for a copy of a written contract of subscription, shown to have been in the possession of the company, answers that it has been lost, proof of his answer is, *prima facie*, sufficient to entitle the party making the demand to give oral proof of its contents, in a suit against the company. *Indianapolis and Cincinnati R. R. Co. v. Jewett*, 16 Ind., 273. 1861.

282. — It is to be presumed, from the character and ordinary duties of the officer who made the admission of its loss, that he was the custodian of such writings, and therefore his admission was competent evidence against his employer. *Id.*

XX. STOCK CERTIFICATES.

283. Installments. Where subscriptions are made, to be paid in installments, and certificates of stock are to be issued for the several installments, a readiness and willingness

to issue the certificates, at the time payment is to be made is all that can be required. *James v. Cincinnati, Hamilton, etc., R. R. Co.*, 2 Disney (Ohio), 261. 1858.

284. Limitations. Where a railroad company sued a subscriber on a balance due on his subscription, and recovered only a part of such balance, the other part being barred by statute of limitations; *held*, that the subscriber or his assignee was entitled to a certificate of the stock, after having paid the amount so recovered. *Johnson v. Albany and Susquehanna R. R. Co.*, 40 Howard's Pr. (N. Y.), 193. 1870.

285. Tender of certificate. Where the charter of a company does not require it, a certificate of stock need not be given to a subscriber to enable the company to recover upon a subscription to stock. *Chandler v. Northern Cross R. R. Co.*, 18 Ill., 190. 1856.

286. — Where there was a subscription of stock to a railway company, and when due, the payment of the amount subscribed was demanded by the company, and payment was refused; *held*, that it was not necessary for the company to show that it had issued or offered to issue the certificates of stock as a condition precedent to a right of recovery on the subscription. *Fulgam v. Macon and Brunswick R. R. Co.*, 44 Ga., 597. 1872.

287. Title of stock; registry. No tender of a certificate of stock is necessary before suit is brought. Such certificate does not constitute the title to the stock. The registry of the stockholder's name upon the stock book of the company, opposite the number of his shares, gives him his title. *New Albany and Salem R. R. Co. v. McCormick*, 10 Ind., 499. 1858.

XXI. ASSIGNMENT OF STOCK.

288. Assignment of subscriptions. A railway company whose charter gives it the general power to make all contracts which its convenience or interest may require has power, in carrying out the enterprise authorized by its charter, to assign its stock subscriptions, there being nothing in the charter forbidding it. *Downie v. Hoover*, 12 Wis., 174, 1860; *Same v. White*, *ib.*, 176; *Racine County Bank v. Ayers*, *ib.*, 512.

289. Effect of assignment of stock. When stock partially paid for is transferred by the stockholder *bona fide* to another person, and

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he is accepted by the corporation as the holder of the stock, this is a discharge of the original stockholder. *Allen v. Montgomery R. R. Co.*, 11 Ala., N. S., 437. 1847.

290. — The original subscriber to the capital stock of a railway company, incorporated under the general railroad act of Feb. 19, 1849, is not discharged from liability for the amount remaining unpaid upon such stock, by transferring it to another, whether made in good faith or not. *Pittsburgh and Connellville R. R. Co. v. Clarke and Thaw*, 29 Penn. St., 146, 1857; *Graff v. Pittsburgh and Steubenville R. R. Co.*, 31 ib., 489, 1858.

291. — Under said act, no valid transfer of the stock can be made by a person who is indebted to the company, without the consent of the board of directors. *Ib.*

292. — The liability to pay for the amount of the stock subscribed is an indebtedness, although the installments have not been called at the time of the transfer. *Ib.*

293. — The consent of the board of directors must be by recorded resolution, and cannot be proven by parol. *Ib.*

294. — The clause in the act subjecting the assignee to certain disadvantages is intended to fix his liability, and not to release the assignor. *Ib.*

295. — A transfer made without the consent of the company to avoid payment is no valid defense to an action for the purchase money of the shares. *Everhart v. Westchester and Philadelphia R. R. Co.*, 28 ib., 339. 1857.

296. Entries of credit on the books for stock assigned are of no validity if founded on a transfer which did not discharge the assignor's liability. *Hays & Black v. Pittsburgh and Steubenville R. R. Co.*, 38 Penn. St., 81. 1860.

297. Substitute of subscriber. A plea which avers that a party had refused to take certain stock for which he had subscribed, and that another person had agreed to take such stock, and that the commissioners had counted such stock to the latter person, is insufficient; the signature of the first subscriber should have been erased, and that of the other should have been substituted. *Ryder v. Alton and Sangamon R. R. Co.*, 13 Ill., 516. 1851.

Where the rights of creditors are not in question, an action will not lie against a subscriber to the capital stock of a corporation to recover his subscription or any part thereof, until he is in default after regular calls upon him pursuant to the charter. *Mann, Receiver, etc. v. Pentz*, 3 N. Y., 415, 1850; reversing *Same v. Same*, 2 Sandford's Ch. (N. Y.), 257. 1845.

299. Condition of charter. In an action for assessments, made for the legitimate purposes of the corporation, it is not necessary for the plaintiff to show compliance with the provisions of its charter, requiring that the company shall not engage in nor commence the construction of any section of its road until seventy-five per cent. of the estimated cost thereof, shall have been subscribed by responsible persons. *Penobscot R. R. Co. v. White*, 41 Maine, 512. 1856.

300. — The corporations have the right to determine as to the responsibility of the subscribers, when they do so in good faith. *Ib.*

301. Demand. Where a by-law was passed requiring all stockholders to pay up the full amount of their assessments, it was held, that the defendant being president of the company, and being present at the time of the passage of the by-law, was liable upon his subscription without a demand. *Winter v. Muscogee R. R. Co.*, 11 Ga., 438. 1852.

302. Failure of others to comply with their contracts. It is no defense to an action for assessments upon subscriptions to stock that stock has been awarded to other persons, without the payment of the required per cent. at time of subscribing. One who has received what he contracted for cannot complain that another has received an award that he could not have enforced. *Swartwout v. Michigan Air Line R. R. Co.*, 24 Mich., 389. 1872.

303. Forfeiture of charter. That which would operate to forfeit a charter granted by the legislature, cannot be taken advantage of by a stockholder of the corporation, in an action brought against him for the recovery of assessments on his stock. The state alone can claim such forfeiture. *Connecticut and Passumpsic Rivers R. R. Co. v. Bailey*, 24 Vt., 465. 1852.

304. Installments. In an action to recover the whole amount of a railroad subscription, payable in installments, the company may recover an installment payable without any pro-

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See post 723, sub-division XXV of this title.

298 Action — may be brought when.

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viso or conditions, although it should fail in proving its right to the other installments. *St. Louis and Cedar Rapids R. R. Co. v. Eakins*, 30 Iowa, 279. 1870.

305. Levy of assessment. Where a vote of the directors of a corporation, requiring installments, directed that they should be paid, at the times therein designated; but did not, in terms, make them payable to the treasurer of the corporation; it was *held*, that the import of such vote was, that said installments were payable to the treasurer, he being the proper officer to receive and keep the moneys of the corporation. *Danbury and Norwalk R. R. Co. v. Wilson*, 22 Conn., 435. 1853.

306. — Calls made by the treasurer under general authority given by the board are valid, though the resolutions did not specify the amount of each call. *Hays & Black v. Pittsburgh and Stubenville R. R. Co.*, 38 Penn. St., 81. 1860.

307. — An omission to record a call for a particular installment is supplied by the record of a call for other unpaid installments. *Ib.*

308. — In order to recover subscriptions, which are to be called for in proportions, it must appear that the installments were called for periodically, and not that the assessments therefor were all made at one time. *Spangler v. Indiana and Illinois R. R. Co.*, 21 Ill., 276. 1859.

309. — evidence. An order of the board of directors of a railway company, assessing the subscriptions of stock, certified by the secretary of the company, though not authenticated as the statute requires, is admissible in evidence in a suit upon a subscription, if no objection be made; and when so admitted, it is as conclusive of the matters contained in it, as if it had been properly authenticated. *Smith v. Indiana and Illinois R. R. Co.*, 12 Ind., 61. 1859.

310. — A resolution of the board of directors requiring the stockholders to pay an installment of 10 per cent. every thirty days on all cash subscriptions, until the whole is paid, and that due notice thereof be given, is admissible evidence to show a call for payment of an installment in thirty days from date, and every thirty days thereafter. *Heaston v. Cincinnati and Ft. Wayne R. R. Co.*, 16 Ind., 275. 1867.

311. Limit of amount of assessments. The charter of a railway corporation provided that assessments might be made on the shares of stock, but no greater amount should be levied than \$100 in the whole upon each share. *Held*, that assessments beyond that amount, levied for the payment of the debts of the corporation, were illegal. *Great Falls and Conway R. R. Co. v. Copp*, 38 N. H., 124. 1859.

312. — Where the board of directors had the right, in their discretion, to make assessments, and the subscriptions contained the proviso that no assessment should exceed \$10 on the share, it was *held*, that sixteen assessments of \$5 each on the share might be levied in one vote of the board of directors. *Rutland and Burlington R. R. Co. v. Thrall*, 35 Vt., 536. 1863.

313. — Where, by the terms of subscription, the stock was made payable at such times and in such sums as the board of directors should, from time to time require, but no assessment was to exceed 10 per cent on the subscription, and assessments were not to be laid oftener than once in sixty days. *Held*, that no personal demand of payment of installments was necessary before suit; and that it was no objection that the assessments upon different subscribers were not uniform in amount, so that they did not exceed 10 per cent. *Johnson v. Crawfordsville, Frankfort, etc. R. R. Co.*, 11 Ind., 280. 1858.

314. — Where the charter of a railway company limited the amount that should be called for on a subscription of stock to 15 per cent. per annum, and 10 per cent. had been paid, a call was *held* to be sufficiently explicit without specifying a place of payment or the per cent. to be paid — time and place being fixed by the notice. *Andrews v. Ohio and Mississippi R. R. Co.*, 14 Ind., 169. 1860.

315. Assessments. Where the charter provides that sixty days' notice of assessments shall be given by publication, such notice is a condition precedent to suit upon such assessments. *Mississippi, Ouachita and Red River R. R. Co. v. Gaster*, 20 Ark., 455, 1859; *Same v. Same*, 22 ib., 361, 1860; *Same v. Chestnut*, 20 ib., 461, 1859; *Same v. Turrentine*, 21 ib., 445, 1860.

316. — A subscription of stock to a railway company contained a provision that the stock subscribed should be paid in cash at

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such times and places as should thereafter be directed by the directors of the company, and should be applied to the construction of the road. *Held*, that the subscription could not become payable until the directors, at a regular meeting, had fixed the time and place of payment. *Held*, also, that it was not necessary to give notice to the subscriber of the time and place of payment. *Ross v. La Fayette and Indianapolis R. R. Co.*, 6 Ind., 297. 1855.

317. — Where the charter is silent upon the subject, an assessment can be recovered without notice of the call first being given. *Wilson v. Wills Valley R. R. Co.*, 33 Ga., 466. 1863.

318. — Subscribers must take notice of the acts of directors, as to calls. *Heaston v. Cincinnati and Ft. Wayne R. R. Co.*, 16 Ind., 275. 1861.

319. — In an action brought upon a subscription of stock to recover installments regularly assessed in accordance with the terms of subscription, the subscriber is not entitled to notice of assessment, or of the time and place of payment, before suit is brought. *Smith v. Indiana and Illinois R. R. Co.*, 12 Ind., 61. 1859.

320. — Actual notice of the calls and demand of payment need not be proved. *Peake v. Wabash R. R. Co.*, 18 Ill., 88. 1856.

321. — Publication of notice of calls for installments of stock may be proved by the affidavit of the bookkeeper in the employ of the publisher of the newspaper in which it was made. *Andrews v. Ohio and Mississippi R. R. Co.*, 14 Ind., 169. 1860.

322. — Such notice is sufficient if published once, sixty days before the time fixed for payment. *Ib.*

323. — Where publication of notice of assessments was required, and it did not appear that there had been any diligent search for, and inability to find, the newspapers in which it had been published, it was *held*, that secondary evidence thereof was inadmissible. *Rutland and Burlington R. R. Co. v. Thrall*, 35 Vt., 536. 1863.

324. — That where such notice of assessments was required to be published by conditions of the company's charter, it was *held*, that a recovery could not be had upon such assessments until such notice had either been published, or its publication waived by the subscribers. *Ib.*

325. — A notice requiring payments to be

made to A. B., residing in the city of Troy, is *prima facie* a sufficient compliance with the requirement of the statute that the place of payment shall be designated in the notice. *Troy Turnpike and R. R. Co. v. McChesney*, 21 Wendell (N. Y.), 296. 1839.

326. Number of shares fixed by charter. The defendant subscribed one share in a corporation, and agreed to pay the same in such assessments as the directors for the time being might order. The act of incorporation fixed the number of shares at 10,000, and before that number was subscribed for, the directors made sundry assessments to nearly the amount of the share. *Held*, that the shares not all being subscribed for, the assessments could not be recovered. *Contoocook R. R. Co. v. Barker*, 32 N. H., 363. 1855.

327. — Under an act of incorporation providing that the number of shares shall not exceed a certain limit, and shall be determined from time to time by the directors, no assessment can be laid until the number of shares is so determined. *Troy and Greenfield R. R. Co. v. Newton*, 8 Gray (Mass.), 596. 1857.

328. — When the number of shares is fixed by the charter, an assessment, made before the whole number is subscribed for, is invalid, although the remainder of the shares be subscribed for on the same day, after the dissolution of the meeting of directors at which the assessment was made. *Stoneham Branch R. R. Co. v. Gould*, 2 Gray (Mass.), 277. 1854.

329. — If the charter of a corporation does not definitely fix the number of shares which shall compose its capital stock, this must be done by the directors or stockholders before there can be any valid assessment laid upon the shares of subscribers to its stock. *Somerset R. R. Co. v. Clarke*, 61 Me., 379. 1871.

330. — Where the charter of a corporation limits the capital stock to not less than 500 nor more than 10,000 shares, and authorizes the directors to levy assessments as soon as 500 shares are subscribed for, and from time to time, to enlarge the capital up to the maximum limit, all the shares to be equally assessed, it is not necessary for the company to determine the ultimate amount of its capital within the limit of the 10,000 shares, before proceeding to make assessments upon the first 500 subscribed for. *White Mountains R. R. Co. v. Eastman*, 34 N. H., 124. 1856.

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331.—estoppel. A subscriber for shares in a corporation may, by his acts, be estopped from denying the legality of assessments upon his shares on the ground that all the shares are not taken up. *New Hampshire R. R. Co. v. Johnson*, 30 N. H., 390. 1855.

332.—preferred stock. If the charter fixes the minimum of the capital stock, assessments cannot be made until that amount is subscribed by men apparently able to pay. *Lewey's Island R. R. Co. v. Bolton*, 48 Me., 451. 1860.

333.—A subscription to "preferred stock," made to draw ten per cent. interest at once, cannot be reckoned to make up the amount of stock required. *Ib.*

334. Penalties. The statutory penalty of one per cent. a month on unpaid installments is recoverable from the time of the respective calls, until judgment; it does not cease at the institution of the suit. Act. Feb. 19, 1849, § 8. *Bavington v. Pittsburgh and Steubenville R. R. Co.*, 34 Penn. St., 358. 1859.

335.—There is no limitation of time prescribed in the act within which such statutory penalty must be sued for. *Ib.*

336. Pleading. A declaration, in an action of contract brought by a railway company, which sets forth the defendant's written subscription for a certain number of shares of its stock, and the sale of such shares, for nonpayment of assessments, for less than enough to pay the same, and that the defendant owes it the amount of the deficiency, although it does not state that the defendant became a stockholder, is a declaration upon Rev. Stats., ch. 39, § 53, and not upon the contract of subscription, and need not aver performance of the conditions precedent of the contract. *Amherst and Belchertown R. R. Co. v. Watson*, 4 Gray (Mass.), 61. 1855.

337. Sale of shares. To enforce a liability imposed by statute, the law must be strictly complied with. *Lewey's Island R. R. Co. v. Bolton*, 48 Me., 451. 1860.

338.—All the requirements of the by-laws, in selling shares for delinquent assessments, must be strictly complied with. *Ib.*

339.—Where a notice of sale is required to be posted in a conspicuous place, it is not sufficient to prove that it was posted in a public place. *Ib.*

340.—If a part of the assessment is illegal, the sale is invalid. *Ib.*

341.—Assessments for an amount beyond the sum authorized by the charter are void. *Ib.*

342.—Assumpsit may be maintained on such subscription, although the company has not exercised its chartered authority to sell the shares for the delinquency. *Kennebec and Portland R. R. Co. v. Jarvis*, 34 Me., 360. 1852.

343.—Where a subscriber for stock makes no promise to pay assessments, his shares must be sold to pay the assessments before an action can be maintained against him. *New Hampshire R. R. Co. v. Johnson*, 39 N. H., 390. 1855.

344.—A sale of shares for nonpayment of several assessments, one of which is illegal, is void. *Stoneham Branch R. R. Co. v. Gould*, 2 Gray (Mass.), 277. 1854.

345.—An action may be maintained by a corporation, upon a promise by a subscriber, for shares in its capital stock, contained in his subscription, to pay the assessments upon them as ordered, notwithstanding the charter empowers the directors to sell the shares for the nonpayment of the assessments. *White Mountains R. R. Co. v. Eastman*, 34 N. H., 124. 1856.

346.—And this will be held the law, notwithstanding the charter provides for a sale of stock only, in case of a failure to pay assessments thereon. *Connecticut and Passumpsic Rivers R. R. Co. v. Bailey*, 24 Vt., 465. 1852.

[See subdivision XXVI of this title, where the citations as to the effect of a forfeiture may be found.]

347.—notice. A by-law of a railway company provided, that in case of a sale of shares for nonpayment of assessments, the treasurer should give notice to the delinquent owner, when his residence was known, of the time and place of sale, by letter seasonably put into the mail. *Held*, that this by-law was directory to the treasurer, and not a condition precedent; and that a written notice of the time and place of sale, signed by the treasurer, and delivered to the owner of the shares, or left at his dwelling house, and received by him as soon as he was entitled to receive it by mail, was sufficient. *Lexington and West Cambridge R. R. Co. v. Chandler*, 13 Metcalf (Mass.), 311. 1847.

348. Statutes.—Under the general railroad law of 1855, no levy or assessments could be made until the whole amount of the capital

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stock specified in the articles was subscribed. *Schurtz v. Schoolcraft and Three Rivers R. R. Co.*, 9 Mich., 269. 1861.

349. Transfer of stock. The subscribers to stock held not liable to any further assessment in this particular case, they having transferred their stock to a municipal corporation, the company being insolvent. *Burke v. Smith*, 16 Wallace, 390. 1872.

350.—A stockholder in the Hartford and New Haven R. R. Co. who derived his stock by a transfer from the original subscriber, and received a new certificate from the company, is personally liable to pay the installments called for after the transfer. *Hartford and New Haven R. R. Co. v. Boorman*, 12 Conn., 530. 1838.

351.—The provision that "no transfer of stock shall exempt the party transferring it from the obligation of paying installments afterwards called for, until fifty per cent. on each share shall have been paid," exempts from liability to the company only those who have transferred their stock after the payment of fifty per cent. on each share, and before the installments have matured, and payment has been demanded. *Vicksburg, Shreveport and Texas R. R. Co. v. McKeen*, 14 La. An., 724. 1859.

XXIII. CHANGES IN CHARTER.

352. Change of name or location. It is no objection to the recovery of installments due on a subscription to the stock of a railway company that since the subscription, the name of the company has been changed, and the length and *termini* of the road materially altered. *Delaware and Atlantic R. R. Co. v. Irick*, 3 Zabriskie (N. J.), 321. 1852.

353.—Where a defendant contracted with a railway company while acting under the name given by its amended charter, in that name, he could not be heard to insist that there had been no valid acceptance of the amended charter. *Eppes v. Mississippi, Gainesville and Tuscaloosa R. R. Co.*, 35 Ala. N. S., 33. 1859.

354.—An alteration by the legislature of a company's charter, in pursuance of powers reserved, by changing its name, increasing its capital and extending its road, does not discharge a stockholder from liability on his

subscription. *Buffalo and New York R. R. Co. v. Dudley*, 14 N. Y., 336. 1856.

355.—It is no defense, that the company, subsequent to the subscription, has accepted an amendment to its charter authorizing it to extend its road, and otherwise to assume new and increased responsibilities. *Rice v. Rock Island and Alton R. R. Co.*, 21 Ill., 93. 1859.

356.—A change of the charter of a railway company authorizing a change of route, assented to by a majority of the stockholders, will not absolve a nonassenting stockholder from his subscription. *Delaware R. R. Co. v. Sharp*, 1 Houston (Del.), 149. 1855.

357.—The mere acceptance by the company of an amendment to its charter authorizing it to build a branch road, will not, without any steps being taken by the company to appropriate its funds to the building of the branch, be a ground for releasing a stockholder who had not consented to the amendment. *Hawkins v. Mississippi and Tennessee R. R. Co.*, 35 Miss., 688. 1858.

358.—A material deviation from the located line will release stockholders who have not assented to the change. *Champion v. Memphis and Charleston R. R. Co.*, 35 Miss., 692, 1858; *Kenosha, Rockford and Rock Island R. R. Co. v. Marsh*, 17 Wis., 13. 1863.

359.—There is no general rule as to what deviation will release a stockholder; each case must be determined by its own peculiar circumstances. The deviation, when relied upon as a defense, must be clearly pleaded. *Ib.*

360. Consolidation. An amendment to a railway charter, which authorizes the consolidation of the road to be built under it, with any other intersecting road, and there terminates it, is not such an alteration of the project as will excuse a stockholder from paying his subscription for stock. *Sprague v. Illinois River R. R. Co.*, 19 Ill., 174. 1857.

361. Constitutional law. An amendment of a railway charter requiring the original stockholders to waive their conditional interest in additional subscriptions authorized by the amendment is not unconstitutional. *County Judge of Shelby County v. Shelby R. R. Co.*, 5 Bush, (Ky.), 225. 1868.

362. Charter as part of the contract. Where the charter creates and defines the terms of the contract between the company and the stockholder, it is only necessary that the writ

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ing should indicate the intention to become a stockholder, and the number of shares that are taken by the subscriber. The taking of stock creates a contract to pay for it in the mode prescribed by the charter, and a stipulation to that effect in the subscription paper is not necessary. *Fry's Ex'r. v. Lexington and Big Sandy R. R. Co.*, 2 Metcalfe, (Ky.), 314. 1859.

363. Effect of amendment—subscribers released. The plaintiff, a railway company, was incorporated with a capital of \$500,000, with power "to call the first meeting of the stockholders whenever \$100,000 or more of the capital stock shall have been subscribed for, to choose directors and perfect the organization of said corporation," and "when so organized to proceed to commence the construction of the railroad." The sum of \$216,700 was subscribed, including the defendants' subscriptions, and the first meeting of the stockholders was then held and directors chosen. Subsequently an amendment to the plaintiff's charter was passed by the general assembly, authorizing the city of N. H. to subscribe \$200,000 to the capital stock, and to appoint two directors in the company, with one vote for every four shares of stock held by the city. Pursuant to the power so given, the city of N. H. subscribed \$200,000 to the stock, and appointed two directors who assumed and continued to discharge the duties of the office. No other subscriptions were made, and the directors thereupon proceeded to call in the capital stock, and to commence the construction of the railway. In a suit brought to recover subscriptions to the stock, it was held;—I. That the term "organized," as used in the charter, embraced merely the choice by the stockholders of the necessary officers for the transaction of the business of the company, and that the plaintiff, when so organized, \$100,000 having been subscribed to the stock, might legally begin the exercise of its corporate franchise. II. That the amendment to the charter, and the action of the plaintiff and the city under it, did not impair the rights of the defendants as stockholders, or relieve them from liability on their subscription. *New Haven and Derby R. R. Co. v. Chapman*, 38 Conn., 56. 1871.

364. — An act of incorporation may be amended by the legislature, and if the amend-

ment is accepted by the directors, the stockholders under the original act unless otherwise stated, will be held liable. The only question for consideration is, whether the value of the stock as an investment will probably be benefited thereby. *Illinois River R. R. Co. v. Zimner*, 20 Ill., 654. 1858.

365. — Amendments of the charter of an incorporated company which are necessary to carry into effect its main design, may be made without the consent of a shareholder. But an amendment which fundamentally changes the responsibilities and duties of the company, or which superadds an entirely new enterprise to that which was originally contemplated, may be resisted by the stockholders, unless such amendments are provided for in the charter itself, or in the general laws of the state in force at the time the act of incorporation was passed. *Fry's Ex'r. v. Lexington and Big Sandy R. R. Co.*, 2 Metcalfe, (Ky.), 314. 1859.

366. — Subscribers who do not assent to such unauthorized amendment may prevent the company from proceeding to act under it, and embarking in enterprises not contemplated by the original charter; but the mere passage of the amendment, conferring such additional powers upon the company, which it has not attempted, and may never attempt, to exercise, does not operate *per se* to exonerate a shareholder from liability to pay his subscription. *Ib.*

367. — A subscriber cannot avoid payment because the charter of the road has been so changed, as to authorize the company to purchase stock in other railway companies, even though the terminus of the road, in which the stock was first subscribed, is thereby changed. *Terre Haute and Alton R. R. Co. v. Earp*, 21 Ill., 291. 1859.

368. — A subscription to stock may be collected, although amendatory acts have been subsequently passed, affecting the original charter, by extending its powers. *Peoria and Oquawka R. R. Co. v. Elting*, 17 Ill., 429. 1856.

369. — When the charter of a railway company contains a clause authorizing the legislature to repeal or alter it, such alteration made on the application of the directors, without consulting the stock subscribers, does not absolve the latter from their subscriptions. *Northern R. R. Co. v. Miller*, 10 Barbour (N. Y.), 260. 1851.

Changes in Charter.

370. — An immaterial amendment to the charter of a railway company will not release a nonassenting stockholder. *Wilson v. Wills Valley R. R. Co.*, 33 Ga., 466. 1868.

371. — A subscriber who agrees to be subject to the rules and regulations which may from time to time be adopted by the directors, cannot avoid payment, because the charter has been amended, reducing the number of days of notice to be given, if the amendment of the charter has been accepted. *Illinois River R. R. Co. v. Beers*, 27 Ill., 185. 1862.

372. — A person who has subscribed for stock, under the original charter of a corporation, will not be discharged from his obligation to pay for it, by a subsequent legislative enactment altering the charter without his consent, the general object of the corporation remaining unchanged. *Pacific R. R. Co. v. Renshaw*, 18 Mo., 210, 1853; *Same v. Hughes*, 22 Mo., 291, 1855.

373. — subscribers not released. A radical change in the character of the enterprise in which a railroad company was engaged when it obtained a subscription to its stock, releases the subscriber from his liability. *Kenosha, Rockford and Rock Island R. R. Co. v. Marsh*, 17 Wis., 13. 1863.

374. — The fact that such change is made under an amendment of its charter does not change the rule. *Ib.*

375. — To relieve a stockholder on the ground that there has been a material alteration of the charter of the corporation, it is necessary that such stockholder should have dissented from such alteration in a reasonable time. *Martin v. Pensacola and Georgia R. R. Co.*, 8 Fla., 370. 1859.

376. — A material alteration of the charter of a railroad company will release all nonassenting stockholders from liability upon their subscriptions. *Winter v. Muscogee R. R. Co.*, 11 Ga., 438, 1852; *Everhart v. West Chester R. R. Co.*, 28 Penn. St., 339, 1857; *Sparrow v. Evansville and Crawfordsville R. R. Co.*, 7 Ind., 369, 1856.

377. Extension of time for completing road. Subscriptions to the capital stock of a railroad company will not be defeated by a subsequent amendment of the charter extending the time for the completion of the road. *Agricultural Branch R. R. Co. v. Winchester*, 13 Allen (Mass.), 29. 1866.

378. Preferred stock. Modifications and improvements in the charter, useful and beneficial to the company, do not impair the contract of subscription to the capital stock as against a non-assenting subscriber. *Everhart v. West Chester and Philadelphia R. R. Co.*, 28 Penn. St., 339. 1857.

379. — A change authorizing the issue of preferred stock for the purpose of raising means to make and equip the road as originally contemplated, which amendment is accepted by a majority of the stockholders, and such preferred stock issued, is not such a radical change as will exonerate an original subscriber who has not assented to the change. *Ib.*

380. Reduction of number of shares. Where the charter of a company requires its stock to consist of not less than a given number of shares, no action can be maintained for subscriptions to stock until the required number of shares are taken. A subsequent alteration of the charter reducing the amount of the capital will not affect prior subscribers. *Oldtown and Lincoln R. R. Co. v. Veazie*, 39 Me., 571, 1855; *Penobscot R. R. Co. v. Dummer*, 40 Me., 172, 1855.

381. — Where the defendant subscribed for two shares in the capital stock of a corporation on certain conditions named therein, none of which had reference to the number of shares subscribed for, and paid three assessments thereon; and the shares were afterwards, to pay further assessments, sold for a sum less than the assessments, it was *held*, that defendant was liable for the balance, though the minimum number of shares required by law had not been subscribed. *York and Cumberland R. R. Co. v. Pratt*, 40 Me., 447. 1855.

382. — Where, after subscribing for stock under an act of assembly which required subscriptions to a certain amount before corporate authority should be granted, a subsequent act was passed reducing the amount of subscriptions required, under which the company was organized, it was *held*, the change would not release from liability the person subscribing, who had also voted at the organization, and for election of directors, in right of his subscription; and in an action by the company against such stockholder for the sum subscribed, that it was error to instruct the jury that the defendant was relieved by the change if he did not know of it, and referring the question of his

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knowledge to them. *Bedford R. R. Co. v. Bowser*, 48 Penn. St., 29. 1864.

383. — If a statute, fixing the amount of the capital stock of a railway company, is amended by another statute providing that the capital required to build the road shall be a less sum, taking a subscription to an amount larger than the capital allowed by the last statute, but less than the capital fixed by the first statute, will not render the subscriptions invalid. *Agricultural Branch R. R. Co. v. Winchester*, 13 Allen (Mass.), 29. 1866.

384. *Steamboats purchased by railway company.* Where, in an action brought by a railway company to recover certain installments upon the stock subscription of one of its members, it appeared that, after the installments became due, but before the commencement of the suit, the charter was altered by authorizing the company, in addition to the powers originally granted, to purchase such number of steamboats to be used in connection with the road, as it might deem expedient, provided the amount did not exceed \$200,000; *held*, that neither the board of directors nor a majority of the stockholders could sanction the alteration so as to bind the defendant without his consent. *Hartford and New Haven R. R. Co. v. Croswell*, 5 Hill (N. Y.), 383. 1843.

385. *Time of making calls.* Where the articles of incorporation specify the times and amounts of installments of stock to be called for at any one time, and also provide that the articles may at any time be changed by the unanimous consent of the board of directors, the articles may be so amended as to change the times of calling for installments of stock without the consent of the stockholder. (Code, §§ 678, 679, 680.) *Burlington and Missouri River R. R. Co. v. White*, 5 Ia., 409. 1857.

subscribed shall be insufficient for the purpose aforesaid, of this act, it shall and may be lawful, etc., from time to time, to increase the said stock, by the addition of as many shares as they may deem necessary, for which they may, at their option, cause subscriptions to be received in the manner prescribed by them, or shall sell the same for the benefit of the company." That before the commencement of the suit, the company had issued stock to the amount of \$5,000,000, in shares, etc., and that said amount, etc., was sufficient, etc.; that the president, etc., have not, at any time before the commencement of this suit, increased the capital stock, etc., beyond that amount, nor was the same necessary, etc. 3. That the capital stock was limited to \$5,000,000, and no more, except, etc.; that the plaintiffs fraudulently issued stock to an amount exceeding \$5,000,000, the same not being necessary, etc., and thereby rendered the original subscription to the capital stock of the company of no value, and reduced the market price of the stock, etc. Reply to the second paragraph, that after the issue of the stock in said paragraph mentioned, to the amount of \$5,000,000, the plaintiff ordered and directed, as by the said charter was authorized, a further issue, etc., to the amount of \$1,500,000, of which \$500,000 has been issued, and that the issue of the \$1,000,000 is authorized; and that the issue of said additional stock was necessary. *Held*, that the third paragraph of the answer was bad on demurrer. That the issue formed on the second paragraph of the answer was material; and that it devolved upon the plaintiff to prove that the stock had been increased as alleged in its reply *McCord v. Ohio and Mississippi R. R. Co.*, 13 Ind., 220, 1859; *Ewing v. Same*, 23 ib., 438, 1864.

XXV. FORFEITURE OF STOCK.

387. *Assignment for benefit of creditors.*

If on the ground of notice of an assignment for the benefit of creditors, the stockholders refuse to pay assessments, it is their duty to make a tender to the assignee, and if he will not accept, they have an equity to be relieved from forfeiture. *Germantown Passenger R. R. Co. v. Fittler*, 60 Penn. St., 124. 1869.

387. *Cumulative remedy.* The plaintiff's charter provided that assessments might be called "under a penalty of forfeiture of all

XXIV. INCREASE OF CAPITAL STOCK.

386. *Pleadings.* Suit was brought by a railway company upon a subscription of stock. The answer contained, 1. A denial of the subscription. 2. That the capital stock of the company was fixed by the act of incorporation at \$5,000,000, in shares of \$50 each, and that it had no power to issue certificates for a larger sum, except in the act of incorporation which provided as follows: "Provided, that if the capital stock of said company at any time

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previous payments thereon." *Held*, that the proceeding by forfeiture was cumulative to the right to sue for the assessments; that such right of forfeiture must be exercised in a reasonable manner; that a declaration of forfeiture made Aug. 15, on all stock on which the assessments were not paid by Sept. 20, following, and requiring immediate notice thereof to be given to the delinquents, was reasonable; that under such declaration, a sale of the stock was not necessary to complete the forfeiture; that after the forfeiture, the stockholder was released from further liability. *Rutland and Burlington R. R. Co. v. Thrall*, 35 Vt., 536. 1863.

389. — Where a proviso is inserted in a charter authorizing the sales of the shares of delinquent stockholders, such remedy is cumulative only, and does not prevent the collection of assessments otherwise. *Hartford and New Haven R. R. Co. v. Kennedy*, 12 Conn., 499, 1838; *Mann v. Cooke*, 20 ib., 178, 1850; *Greenville and Columbia R. R. Co. v. Cathcart*, 4 Richardson's Law (So. Car.), 89, 1850; *Peoria and Oquawka R. R. Co. v. Elting*, 17 Ill., 429, 1856; *Gratz v. Redd*, 4 B. Monroe (Ky.), 178, 1843; *Western R. R. Co. v. Avery*, 64 N. C., 491, 1870; *Troy Turnpike and R. R. Co. v. McCheesney*, 21 Wendell (N. Y.), 296, 1839; *Buffalo and New York R. R. Co. v. Dudley*, 14 N. Y., 336, 1856; *Northern R. R. Co. v. Miller*, 10 Barbour (N. Y.), 260, 1851; *Troy and Rutland R. R. Co. v. Kerr*, 17 ib., 581, 1854; *Mann v. Currie*, 2 ib., 294, 1848; *Troy and Boston R. R. Co. v. Tibbits*, 18 ib., 297, 1854; *Ogdensburg, Rome and Clayton R. R. Co. v. Frost*, 21 ib., 541, 1856; *Beene v. Cahawba and Marion R. R. Co.*, 3 Ala., N. S., 660, 1842; *Carlisle v. Same*, 4 ib., 70, 1842; *Selma and Tennessee R. R. Co. v. Tipton*, 5 ib., 787, 1843.

390 Deficiency after sale of stock. The sale of the shares of a delinquent stockholder, in a railway company, to pay overdue assessments, upon such shares, is no defense to an action against him to recover the deficiency. *Danbury and Norwalk R. R. Co. v. Wilson*, 22 Conn., 435. 1853.

391. — The forfeiture of stock does not relieve a stockholder from the payment of a note given by him for stock, although, after such forfeiture, a material alteration in the charter may have been made. *Mitchell v. Rome R. R. Co.*, 17 Ga., 574. 1855.

392. — Where stock is declared forfeited, the stockholder is absolved from further liability to the company or its creditors. *Lexington and Ohio R. R. Co. v. Bridges*, 7 B. Monroe (Ky.), 556. 1847.

393. — When a defendant is sued as a stockholder in a railway company for the sum remaining due on an assessment on his shares, after they are sold for the nonpayment of the assessment, it is sufficient, for the purpose of showing him to be such stockholder, and liable for the assessment, to give evidence that he signed a subscription paper for shares, before the corporation was organized, that he attended and took part in the meeting of the stockholders for the organization of the corporation. *Lexington and West Cambridge R. R. Co. v. Chandler*, 13 Metcalf (Mass.), 311. 1847.

394. Judgment; estoppel. E. subscribed for twenty shares of the defendant's stock, of \$100 per share, paid ten per cent. down, and agreed to pay the balance on call of the directors. Several calls upon E. were made and payments made by him pursuant thereto to the amount of \$1,000. Other calls not being met by E., a suit was commenced against him by defendant for recovery of the balance due, and as to all but the installment due under a last call of \$200, he sustained the defense of the statute of limitations. A judgment was recovered by defendant for the balance due under the last call, which was collected from E. by execution; afterward the defendant passed a resolution forfeiting all shares of stock upon which any amount remained unpaid. The plaintiff having been appointed receiver of E.'s property, sued in this action to compel the issue to him, as such, of the shares of stock subscribed for by E., demand therefor having been made of the defendant and delivery refused. *Held*, that the defendant was not estopped by the judgment recovered against E., and payment thereof, from setting up as a defense in this action the nonpayment for and forfeiture of such shares. *Johnson v. Albany and Susquehanna R. R. Co.*, 5 Lansing (N. Y.), 222. 1871.

395. Power of forfeiture must be expressly granted. A corporation has no power to create a by-law, subjecting to forfeiture, shares owned by individuals in the stock of the company, for the nonpayment of in-

Fraud — Release.

installments due upon such shares, unless the power to pass such by-law is expressly granted by the charter of the company. *Long Island R. R. Co., In Matter of*, 19 Wendell (N. Y.), 37. 1837.

396. Resolution of forfeiture. A general resolution forfeiting stock for nonpayment of installments, which does not specify the stock forfeited, is not valid. *Johnson v. Albany and Susquehanna R. R. Co.*, 40 Howard's Pr., (N. Y.), 193. 1870.

397. Shares offered to stockholders but not taken. The provisions of the revised statutes, ch. 39, § 53, as to the mode in which shares of a stockholder in a corporation may be sold for the nonpayment of assessments, do not apply to the case of new shares offered to existing stockholders, and sold because not taken by them. *Sewall v. Eastern R. R. Co.*, 9 Cushing (Mass.), 5. 1851.

XXVI. FRAUD.

398. A secret agreement between the agent of a railway company and a subscriber, that the sum subscribed should never be collected, is a fraud on the other stockholders and cannot be interposed as a defense to an action in such subscription. *Downie v. White*, 12 Wis., 176. 1860.

399. — A secret agreement, entered into between the directors of a railway company and a subscriber for its capital stock, that he may, within a specified time, reduce the number of shares subscribed for, the subscription in the mean time being held out as *bona fide* for the full amount, in order to induce others to become subscribers, is void as a fraud on the other subscribers, and the whole subscription may be collected. *White Mountain R. R. Co., v. Eastman*, 34 N. H., 124. 1856.

400. Estoppel. If a party admit himself to be a subscriber, and on the faith of such admission, others have acted for his benefit, he will be estopped from subsequently denying that he did not in fact subscribe. *Graff v. Pittsburg and Setubenville R. R. Co.*, 31 Penn. St., 439. 1858.

401. — Such subscription is not only an undertaking with the company, but with the other subscribers also; and if fraudulent as between the parties, is to be enforced for the benefit of the others in interest. *Ib.*

402. — A subscriber is estopped from pleading that his subscription was a fraudulent one, and that the company was a party to the fraud. *Ib.*

403. Land taken on subscriptions. In an action brought by a railway company on a subscription of stock, the answer set up fraud in this, that since defendant's cash subscription, the company had taken a large land subscription at enormous price, etc. *Held*, bad on demurrer. *Hornday v. Indiana and Illinois Central R. R. Co.*, 9 Ind., 263, 1857; *Maccoun v. Same*, *ib.*, 262.

404. Stock subscribed at less than par. A railroad company cannot receive subscriptions under a private arrangement at less than the par value of the stock, as this would be a fraud on the other stockholders. *Mann v. Cooke*, 20 Conn., 178. 1850.

405. — Nor can a valid subsequent arrangement be made as against creditors discharging a stockholder on payment of half the amount of his stock. *Ib.*

XXVII. RELEASE.

406. Abandonment of undertaking. If the company abandon the undertaking and refund some of the subscriptions, the other subscribers are discharged. *McCully v. Pittsburgh and Connellsville R. R. Co.*, 32 Penn. St., 25. 1858.

407. — If the undertaking be not commenced, *bona fide*, within the time prescribed by the charter, no action can be maintained on the subscription. *Ib.*

408. — But if the refunding of some of the subscriptions and the delay in commencing work are consented to by the subscriber, as matters of corporate policy which are not to affect his liability as a subscriber, he will be estopped from setting up these matters as a defense. *Ib.*

409. — Where a subscriber has been released by the neglect of the company, he is not again made liable by signing an incomplete letter of attorney, to vote upon a question of accepting a supplement to the charter, and additional subscriptions. *Ib.*

410. Power to release. A railroad company may make, if acting in good faith, a valid and binding contract, releasing a stockholder from liability upon his subscription to the

Limitations.

stock of the corporation, either with or without the consent of the creditors and stockholders of such corporation. *Gelpcke, Winslow and Co. v. Blake*, 19 Ia., 263. 1864.

411. — If the directors of a corporation possess the power to release a subscription to the capital stock, and the release is optional with the subscriber, he must elect within a reasonable time. The claim of representing such shares long afterwards may well be considered an election to keep the shares subscribed for. *Penobscot and Kennebec R. R. Co. v. Dunn*, 39 Me., 587. 1855.

412. Release of a part of stockholders. A stockholder cannot object that the directors of the company had released other stockholders; if the release was under a power, it would be valid, if otherwise, merely void. *Hall v. Selma and Tennessee R. R. Co.*, 6 Ala., N. S., 741. 1844.

413. Unauthorized release. Where a board of directors, after reciting a condition attached to certain subscriptions by the commissioners, resolved that the condition be adopted as the act of the company; that the stock of each subscriber be purchased by the company, and the payment of the subscription assumed; that the stock be surrendered, the subscription annulled and cancelled by the secretary; such action on the part of the board was irregular and unauthorized, and the cancellation invalid. The directors are agents of the company with limited powers, and they have no power to give away its funds. *Bedford R. R. Co. v. Bousser*, 48 Penn. St., 29. 1864.

414. — The minutes of the company, showing that immediately after the election of a new board, they repealed the resolutions of their predecessors, were admissible in evidence against the subscriber as a corporator; the books were evidence unless his connection with the company had terminated, which it was not for the court to decide; and it was also competent for the company to show what took place when the first resolutions were passed, in order to show that the action of the board was fraudulent. *Ib.*

415. Waiver of release. Where a subscriber to the capital stock of a railway company, who has been released from his obligation, subsequently votes at an annual election for directors, is himself elected director, acts as

director and stockholder, and pays money to the company, his acts are evidence of a subscription of some kind, and in the absence of proof of a special contract, warrant the inference that he had assumed his original obligation. But they are shorn of their importance where a contract accounting for them is shown. *Pittsburgh and Connellsville R. R. Co. v. Stewart*, 41 Penn. St., 54. 1861.

416. — Even if the original subscription had not been released, a new contract between the company and the subscriber, authorizing him to pay in materials at a future time, instead of cash on call, would supersede the original contract. *Ib.*

XXVIII. LIMITATIONS.

417. Installments. Installments of the subscription of stockholders, fixed and required to be paid in by resolutions of the board of directors, cannot be considered as open accounts and prescribed against as such. Such installments are at least equal to accounts stated. *New Orleans, Jackson and Great Northern R. R. Co. v. Lea*, 12 La. An., 388. 1857.

418. When the statute begins to run; new promise. A person subscribed for twenty shares of the stock of a railway company in 1847, "provided that the construction of said road is prosecuted," but retained his subscription in his own hands until 1854, when the book containing it, with other subscriptions obtained by him as agent, was delivered to the company. Held, that the contract did not take effect, nor did the statute of limitations begin to run, until the delivery of the book containing it. *Pittsburgh and Connellsville R. R. Co. v. Plummer*, 37 Penn. St., 413. 1860.

419. — And where the defendant, more than six years from the date of his subscription, sent to the company a letter, submitting the names of stockholders received by him, including his own, stating the number of shares held by each, and promising to hand over the notes taken for the first installment when a certain portion of the road should be put under contract, followed a few months after by the delivery of the subscription book; held, that the defendant thereby recognized his obligation as continuing. *Ib.*

Pleading and Practice — Rights of Creditors.

XXIX. PLEADING AND PRACTICE.

420. Jury trial. Unpaid calls for railway stock are not "instruments of writing ascertaining the plaintiff's demand," within the meaning of the statute authorizing the rendition of a final judgment by default without the intervention of a jury. *Connoly v. Alabama and Tennessee Rivers R. R. Co.*, 29 Ala., N. S., 373. 1856.

421. Pleadings. In a suit brought upon a subscription of stock, the complaint made no reference to any written contract of subscription, and did not aver any assessment or call by the directors. *Held*, that the complaint did not show a good cause of action. *McClasky v. Grand Rapids and Ind. R. R. Co.*, 16 Ind., 96. 1861.

422. — A suit *in indebitatus assumpsit* for money due on installments for subscriptions, will authorize a recovery. *Peake v. Wabash R. R. Co.*, 18 Ill., 88. 1856.

423. — A recovery may be had upon the common counts, for an installment due upon a call of an incorporated company. *Gayle v. Cahawba and Marion R. R. Co.*, 8 Ala., N. S., 586. 1845.

424. — The sufficiency of the pleadings in particular cases, determined. *Mississippi, Ouachita and Red River R. R. Co. v. Gaster*, 20 Ark., 455, 1859; *Woonsocket Union R. R. Co. v. Taft*, 8 R. I., 411, 1867.

425. — corporate existence. It cannot be pleaded to a complaint upon a subscription of stock, that at the time it was made there was no such corporation, because the defendant is estopped by his contract to deny the corporation, and because, under the general railroad law, subscriptions of a certain amount of stock are necessary for the organization of a contemplated corporation. *Anderson v. Newcastle and Richmond R. R. Co.*, 12 Ind., 376. 1859.

426. — denial under oath. The act of 1854 dispenses with proof in case of a suit by a railway company upon a subscription to stock, unless the pleadings deny the subscription under oath. A plea not verified is therefore a nullity. This act is constitutional. *Thigpen v. Mississippi Central R. R. Co.*, 32 Miss., 347. 1856.

427. — name of corporation. An action for the installments due on the subscriptions

to the capital stock of a railroad company, made to commissioners named in the charter, is properly brought in the name of the company after its organization, the contract being with the commissioners, as agents of and for the benefit of the corporation. *Delaware and Atlantic R. R. Co. v. Irick*, 3 Zabriskie (N. J.) 321. 1852.

428. — notice of assessments. In an action to recover assessments, notice of such assessments must be averred and proven. A general notice published in the newspapers is not sufficient, unless so provided for in the charter. *Alabama and Florida R. R. Co. v. Rowley*, 9 Fla., 508. 1861.

429. — road constructed by divisions. Where a railway charter authorizes the construction by divisions of the road under by-laws, and a court, in an action to recover a subscription, describes it as a general subscription, and not as a subscription to aid in constructing a division, and the court does not show a division of the road by by-law, and a proper call for stock is not shown to have been made according to contract, the company cannot recover. *Tomlin v. Tonica and Petersburg R. R. Co.*, 23 Ill., 429. 1860.

430. — terms and conditions. When the terms of a subscription are prescribed by a charter, it is not necessary to state the terms in the petition; and a general averment, that all the terms and conditions necessary to authorize a demand of payment of subscriptions, is sufficient under § 149 of the Code of Practice. *Henderson and Nashville R. R. Co. v. Leavell*, 16 B. Monroe (Ky.), 358. 1855.

431. Process. Judgment cannot be taken against a defaulting stockholder, without appearance or process of any kind, by virtue of § 11 of the charter of the plaintiff in this case. *Wilmington and Raleigh R. R. Co. v. Baker*, 3 Devereux & Battles' Law (N. C.), 79. 1838.

XXX. RIGHTS OF CREDITORS.

432. Actions against stockholders. As to such stockholders who are not in default to the corporation by reason of no call having been made, but whose subscriptions to the capital stock have not been paid, a court of equity may compel payment at the instance of an execution creditor of the corporation.

Articles of Association — De Facto Corporations.

Allen v. Montgomery R. R. Co., 11 Ala. N. S., 437. 1847.

433. — In an action by a creditor of a railroad company, organized under the railroad act of 1850, against a stockholder to enforce the liability imposed by § 10 of said act (as amended by ch. 284, Laws of 1854), evidence is proper, upon the part of defendant, to show an assignment of stock, absolute upon its face, was in fact given to him as collateral security, and was held by him for that purpose only. *McMahon v. Macy*, 51 N. Y., 155. 1872.

434. Attachment. Where the sheriff for an attaching creditor, having levied upon the unpaid amount of an individual subscription to railway stock, thereupon brings an action against the stockholder for the subscription, he cannot recover at law unless the company could recover from the stockholder; his rights as against the stockholder are no greater than those of the company. *Robertson v. Sebley*, 10 Minn., 223. 1865.

435. Joinder of actions. A judgment creditor of an insolvent corporation may join, in the same action, a claim to compel payment of unpaid subscriptions for stock, and a claim to enforce the individual liability of stockholders, for the satisfaction of his judgment. *Warner v. Callender*, 20 Ohio St., 190. 1870.

XXXI. ARTICLES OF ASSOCIATION.

436. Filing. Where duplicate sets of articles of association are used for the purpose of obtaining subscriptions, and one set, signed by several persons, and accompanied by the proper affidavit, is filed in the office of the secretary of state, while the other set, subscribed by different individuals, is not so filed, the subscribers to the latter paper do not become members of the corporation, and are not liable upon their subscriptions. *Erie and New York R. R. Co. v. Owen*, 32 Barbour (N. Y.), 616. 1860.

437. Inspection of articles of association. The defendant, in an action upon a subscription to the original stock of a railway company, cannot demand inspection of the articles of association subscribed by him and sued upon, on file in the office of the secretary of

state. *Eakright v. Logansport and Northern Indiana R. R. Co.*, 13 Ind., 404. 1859.

438. Subscriptions combined with articles of association. Under the general railroad law, actions against subscribers of stock on the preliminary articles, or articles of subscription of stock, and not on the articles of association, were contemplated; but the articles of subscription and association may be combined, and where they are so, and the articles of association contain an express or implied promise to pay the sums annexed to the names of subscribers, suits may be maintained upon the latter. *Heaton v. Cincinnati and Ft. Wayne R. R. Co.*, 16 Ind., 275. 1861.

XXXII. SPECIAL CASES.

439. Macon and Augusta R. R. Co. Subscriptions to the stock of the Macon and Augusta R. R. Co., made before June, 1865, stand upon the same footing with other debts contracted before that date; and in suits against the subscribers for the amount of their subscription, the payment of taxes and the filing of the affidavit, as required by the relief act of 1870, is necessary. *Macon and Augusta R. R. Co. v. Little*, 45 Ga., 370. 1872.

440. Nashua and Rochester R. R. Co. The validity of a subscription for stock in the Nashua and Rochester R. R. Co., under special circumstances—considered. *Melvin v. Hoitt*, 52 N. H., 61. 1872.

441. New Orleans and Carrollton R. R. Co. The liability of the stockholders of the N. O. and C. R. R. Co., under their subscriptions, is not affected by the act of March 14, 1839, relieving banks from the forfeiture of their charters. *Millaudon v. New Orleans and Carrollton R. R. Co.*, 3 Robinson (La.), 483. 1843.

XXXIII. DE FACTO CORPORATIONS.

442. Estoppel. A *de facto* corporation, that by regularity of proceeding might be one *de jure*, can sue and be sued; and a party who contracts with such corporation, while it is acting under its *de facto* organization, is estopped, in a suit on such contract, from denying such organization at the date of the contract; but if an organization is completed

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when there is no law, or an unconstitutional law, authorizing such organization, as a corporation, the doctrine of estoppel does not apply. *Heaston v. Cincinnati and Ft. Wayne R. R. Co.*, 16 Ind., 275. 1861.

443. User. Where a railway company, attempting to organize under the general law, has filed papers having color of compliance with the statute, but so defective as to be incapable of supporting the incorporation as against The People, it may, as against a subscriber to its capital, be held a corporation *de facto*, upon proof of the feeblest user. *Buffalo and Allegheny R. R. Co. v. Cary*, 26 N. Y., 75. 1862.

444. — Questions of regularity in the organization of a company cannot be raised in an action on a stock subscription, where it appears that it is a corporation *de facto*, exercising its duties without objection by the state authorities, and that the public are generally dealing with it as a corporation. *Swartwout v. Michigan Air Line R. R. Co.*, 24 Mich., 389. 1872.

445. — Proof of the charter, and of user under it, is sufficient to establish a *prima facie* right in the plaintiff to sue; and this *prima facie* case the defendant cannot dispute in an action where the question comes up collaterally, and where the state, as a party chiefly concerned, cannot be heard by its counsel. *Ib.*

446. — In case of the associates in a corporation *de facto*, and those having dealings with it, there is a mutual estoppel resting upon the broad grounds of right, justice and equity, which prevents the former from denying, and the latter from disputing the incorporation. *Ib.*

447. — But the company, although a *de facto* corporation, cannot recover upon subscriptions to stock, without showing a compliance with all those acts which are by the statute made conditions precedent. *Ib.*

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448. Agreement to forbear suit. A contract to forbear suit upon a cash subscription to the capital stock of a railway company till the completion of the road is waived by a subsequent agreement, made matter of record, to confess judgment, waiving valuation and appraisal laws, and for a stay of execution

for eighteen months. *Indiana and Illinois Central R. R. Co. v. Searce*, 23 Ind., 223. 1864.

449. By-laws. The by-laws, orders and resolutions of a railway company may always be changed by a majority of the stockholders, and such change will not release the subscribers who do not assent. *East Tennessee and Virginia R. R. Co. v. Gammon*, 5 Sneed (Tenn.), 567. 1858.

450. Defect of organization; curative act. Any defect in the organization of a company under the general railroad law may be effectually cured by the legislature. *Illinois Grand Trunk R. R. Co. v. Cook*, 29 Ill., 237. 1862.

451. — Obligations and subscriptions taken before such confirmation may enure to the benefit of the company by such instrumentality. *Ib.*

452. Election of officers. The fact of an illegal election of directors, cannot be set up in resistance of payment of stock. *Eakright v. Logansport and Northern Indiana R. R. Co.*, 13 Ind., 404. 1859.

453. Foreign corporation. A contract made in Massachusetts to subscribe to shares in the capital stock of a railroad company established by the laws of another state, and having its road and treasury there, is a contract to be performed there, and is to be construed by the laws of that state. *Penobscot and Kennebec R. R. Co. v. Bartlett*, 12 Gray (Mass.), 244. 1858.

454. Insolvency. The insolvency of a railroad company is no ground for restraining collection of subscriptions for stock. *Dill v. Wabash Valley R. R. Co.*, 21 Ill., 91. 1859.

455. Lease. A lease by a railroad company of a part of its road and franchise during the continuance of its charter, and a transfer of the remainder also, for the same time, does not dissolve the corporation. *Troy and Rutland R. R. Co. v. Kerr*, 17 Barbour (N. Y.), 531. 1854.

456. — Such lease would not discharge a subscriber to the stock from his liability to pay calls on his subscription. *Ib.*

457. Number of shares. When the amount of the stock is not fixed in the charter, and the corporation has voted what the amount should be, the subscription may be collected, although the whole amount of the stock has not been subscribed. *Kennebec and Portland R. R. Co. v. Jarvis*, 34 Me., 360. 1852.

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458. Preferred stock. Where, after a subscription had been made, the legislature authorized the company to issue preferred stock, which stock was issued without the defendant's consent, it was *held*, that this was a legitimate means of raising money, and did not release defendant from his obligations. *Rutland and Burlington R. R. Co. v. Thrall*, 35 Vt., 586. 1863.

459. Receiver. It is the duty of the receiver of an insolvent corporation to call upon the stockholders to pay the balances due upon their stock, where he has reason to believe it will be needed for the payment of the creditors of the corporation, and the expenses of executing the trust. *Pentz v. Hawley*, 1 Barbour's Ch. (N. Y.), 122. 1845.

460. Records. The records of the company are competent evidence to show the number of shares that have been taken. *Penobscot R. R. Co. v. Dummer*, 40 Me., 172. 1855.

461. Restrictions as to number of shares. The commissioners named in the act of incorporation may lawfully restrict the number of shares to be taken by any one person. *Brower v. Passenger R. R. Co.*, 3 Philadelphia Rep. (Penn.), 161. 1858.

SUBSCRIPTIONS BY RAILWAY COMPANIES.

1. Baltimore and Ohio R. R. Co. Under the act of 1836, ch. 276, authorizing the B. & O. R. R. Co., according to its discretion, "to subscribe towards the construction of any lateral, continuing or connecting road, and to acquire any interest therein to an extent not exceeding two-fifths of its estimated cost," it derived the right to subscribe for or aid in the construction of any connecting road to the extent declared in the act, and under such power might lawfully loan or furnish money to aid in such construction, and take a mortgage or other security therefor. *Mayor of Baltimore v. Baltimore and Ohio R. R. Co.*, 21 Md., 50. 1863.

2. Central R. R. Co. of Georgia. The Central R. R. Co. or the Southwestern R. R. Co. cannot purchase and hold stock in other

railway corporations. *Central R. R. Co. v. Collins*, 40 Ga., 582. 1869.

3. Great Western R. R. Co. The act of April 12, 1851, authorizing the several railway companies of New York to subscribe to the capital stock of the Great Western Railroad, Canada West, was constitutional and valid. *White v. Syracuse and Utica R. R. Co.*, 14 Barbour (N. Y.), 559. 1853.

4. The Macon and Brunswick R. R. Co. cannot purchase the stock of another railroad; such purchase is illegal. *Hazlehurst v. Savannah, etc., R. R. Co.*, 43 Ga., 13. 1871.

SUBSCRIPTIONS BY STATES.

See ELECTION OF CORPORATE OFFICERS; GRANTS.

1. Baltimore and Ohio R. R. Co. The guarantee of interest on the installments of stock subscribed by the state to the Baltimore and Ohio R. R. Co. is to be provided for out of the gross profits of the company. *State v. Baltimore and Ohio R. R. Co.*, 6 Gill (Md.), 363. 1847.

2. — The subscription of the state of Maryland to the stock of the Baltimore and Ohio R. R. Co.—construed. *Baltimore and Ohio R. R. Co. v. The State*, 36 Md., 519. 1872.

3. Collaterals. The state authorized a railway company to issue bonds to the amount of \$2,500,000, secured by a first mortgage of its property, and further engaged to endorse \$1,000,000 of such bonds, provided the company would deposit with the treasurer of the state \$500,000 other such bonds as an indemnity against such indorsement. *Held*, that a creditor, owning some of the endorsed bonds, could not be said to be damaged by subsequent legislation providing that the \$500,000 should be surrendered to the company, to be used only in constructing and completing its road. *First National Bank of Charlotte v. Jenkins*, 64 N. C., 719, 1870; see *McAder v. Same*, ib., 796.

4. Constitutional law. The act of the 18th of December, 1868, requiring the treasurer of the state to subscribe for stock in the Chatham R. R. Co., and to pay for the same by issuing bonds of the state, is unconstitutional.

Rights of States.

Galloway v. Chatham R. R. Co., 63 N. C., 147. 1869.

5. — A subscription for stock in a corporation and issuing bonds to pay for such stock, is a gift of the credit of the state, within the meaning of the constitution. *Ib.*

6. — The acts of the legislature relative to the "University R. R. Co." are unconstitutional and void. *University R. R. Co. v. Holden*, 63 N. C., 410. 1869.

7. — The question of the power of a state to subscribe aid to railroads, discussed. *Ib.*

8. Lien. The state of Tennessee has a lien on the properties of railroad companies, under §§ 1097-8 of the Code, not only on the property which was in existence when the road was completed, but that which was subsequently acquired. *McGraw v. Memphis and Ohio R. R. Co.*, 5 Coldwell (Tenn.), 434. 1868.

9. — Money earned by the companies after the completion of the roads is not affected by the lien of the state. *Ib.*

10. — The legislature provided that the state should subscribe one half the stock in all incorporated turnpike and railroad companies, and that the state should have a lien on the corporate property to secure a payment of like amount by the other corporators. The state subscribed and paid half of the stock in the L. and M. R. R. Co. *Held*, that the property of the corporation could not be taken on execution until this lien was extinguished. *State v. Lagrange and Memphis R. R. Co.*, 4 Humphreys (Tenn.), 488. 1844.

11. — The lien reserved to the state by the act of 1851-2, ch. 151, §§ 3, 4, upon the property of railway companies which have received state aid in the purchase of iron for their roads, does not attach upon money paid in for stock while said roads were under construction. A debt due from a railway tax collector for taxes collected to pay a county subscription to a railway, although reduced into a judgment in a suit against such collector in the name of the state, is nevertheless the property of the railway company, and therefore the subject of garnishment at the suit of a creditor of the company at any time before said road is completed. *Hoard v. Casey*, 4 Sneed (Tenn.), 178. 1856.

12. — The clause of the state constitution (as amended April 15, 1858), which reads as follows: "And as a further security, an amount

of first mortgage bonds, on the roads, lands and franchises of the respective companies, corresponding to the state bonds issued, shall be transferred to the treasurer of the state, at the time of the issue of state bonds," does not give to the state any *exclusive lien* on the roads, lands and franchises of the respective companies to the extent of the bonds which may be received from them; and it is not necessary that the deeds of trust executed by the companies, under the amendment, shall specify a priority of lien to such bonds as the companies may deliver to the state in exchange for her bonds. *Minnesota and Pacific R. R. Co. v. Sibley*, 2 Minn., 13. 1858.

13. — The lien of the state upon the Iron Mountain Railroad lands, created by the act of 1851 (Sess. Acts, 1851, p. 266 *et seq.*), embraced land acquired by the road after the creation of the lien, and foreclosure and sale of the road under said act would carry title to such land. *Whitehead v. Vineyard*, 50 Mo., 30. 1872.

14. — The sale of the Iron Mountain Railway and its appurtenances, under the act of February 22, 1851 (Sess. Acts, 1851, p. 268, § 11), and acts pursuant thereto, embraced railroad land, although outside of the railroad and not necessary to its use. (See Sess. Acts, 1865-6, p. 107, § 6). *Ib.*

15. Mandamus: state loan. Mandamus will lie to compel the governor to perform the ministerial duty of drawing a warrant in favor of a railway company for moneys granted as a loan by the legislature. *Tennessee and Coosa R. R. Co. v. Moore*, 36 Ala. N. S., 371. 1860.

16. Right of state to sell lands held by it. The legal effect of the exchange of bonds by the state and the W. C. & R. R. Co., and of the mortgage, authorized by the acts of 1859 and 1861, was to vest the ownership of the bonds in the state, secured by the mortgage. The state had, therefore, a valuable interest in those bonds and mortgage, as a fund to dispose of in aid of other works of internal improvement, subject to existing equities. *Wilmington, Charlotte and Rutherford R. R. Co. v. Western R. R. Co.*, 66 N. C., 90. 1872.

17. Right of state to sell its stock. A state, like any other stockholder in a corporation, may sell or dispose of its interest in the corporation if it chooses to do so, and such a sale does not dissolve the corporation. *La*

Bonds.

Grange and Memphis R. R. Co. v. Rainey, 7 Coldwell (Tenn.), 420. 1870.

18. **Special grants in aid of railways.** Where the three per cent. fund in the treasury was distributed to five railway companies as a loan, and it was provided that if any of the companies should "fail or refuse for ninety days to make application for their distributive share, then the shares so neglected or refused to be applied for" should "be distributed by the auditor of public accounts to the other road or roads applying within ninety days, share and share alike;" and all the companies applied for and received their shares of the sums shown by the auditor's books, and recognized by that officer as the three per cent. fund; the S. R. R. Co. just before the expiration of the ninety days applied for a further sum, which, upon examination, was found to belong to that fund. *Held*, that the failure of the other companies to apply within ninety days for said latter sum was not a forfeiture of it, as it was occasioned by a mistake not within their control. *McAfee v. Southern R. R. Co.*, 36 Miss., 669. 1859.

19. — The acts in relation to the Chatham R. R. Co., and Raleigh and Augusta R. R. Co. — construed. *Raleigh and Augusta R. R. Co. v. Jenkins*, 68 N. C., 499, 1873; *ib.*, 502.

20. — The grants to the Northwestern N. C. R. R. Co. — construed. *Northwestern North Carolina R. R. Co. v. Jenkins*, 65 N. C., 173. 1871.

21. — The statutes granting loans to the Tennessee and Coosa R. R. Co., construed. *Tennessee and Coosa R. R. Co. v. Moore*, 36 Ala., N. S., 371. 1860.

22. **Time of payment of state loans.** A state loan, reimbursable at the pleasure of the state after twenty years, has no term of payment until the legislature has fixed it by law. *People ex rel. v. Denniston*, 23 N. Y., 247. 1861.

23. — Where such a loan was made under a law passed before the constitution of 1846, for the benefit of the Long Island R. R. Co., which was bound to redeem the stock, an act giving to its holders the option of having it made payable in 1876 is not in violation of the constitutional prohibition of the loan of the state credit to corporations. *Id*

SUBSCRIPTIONS BY TOWNSHIPS.

See SUBSCRIPTIONS BY CITIES AND TOWNS; SUBSCRIPTIONS BY COUNTIES.

1. **Bonds.** Where bonds issued by a township are required by law to be countersigned by the town clerk before being delivered, such act of countersigning is a ministerial act, and it is not the province of such clerk, to determine whether the proper steps have been taken to authorize the issuance of the bonds. *Houston v. The People ex rel.*, 55 Ill., 398. 1870.

2. — **negotiability.** The plaintiffs filed a petition, showing that under certain acts of the general assembly, and upon certain conditions prescribed in those acts, the trustees of Goshen township were authorized to subscribe stock in the Springfield and Mansfield R. R. Co. The petition stated the mode in which a subscription was in form made and paid for in bonds in the township, but alleged that these acts were not in pursuance of the law, but illegal and created no obligation on the township. It appeared that the bonds had been delivered, and had been assigned by the railway company, with a guaranty of their payment, and that the interest, accruing upon them for several years, had been paid, without objection. There was no charge of fraud against the defendants. *Held*, that under these circumstances, the plaintiffs were not in a position to ask the affirmative relief of a rescission of the contract and the cancellation of the instruments they had issued. *Goshen Township v. Springfield, Mt. Vernon and Pittsburg R. R. Co.*, 12 Ohio St., 624. 1861.

3. — The grant of power to the trustees, to borrow money for the purpose of paying the amount subscribed, carried with it the necessary incidental power of executing and delivering such evidences of indebtedness, as are sanctioned by the known usages of business, in such cases; and it was, therefore, competent for the trustees to issue the negotiable bonds of the township in payment for the stock subscribed, and it is no ground of objection that such bonds were delivered direct to the company, at par, by way of making such payment. *State ex rel. v. Goshen Township*, 14 Ohio St., 509. 1863.

4. — The bonds issued by the township were, by their terms, payable to the company

Constitutional Law — Elections.

or its assignees, and a stipulation was added reserving to the township the right to require the railroad company to take the stock so subscribed by the township, and to redeem the bonds as issued. *Held*, that this reservation was a contract between the township and the company alone, which could not effect the right of the *bona fide* assignee of the bonds, for value, to require payment of the bonds by the township. *Ib.*

5. **Conditions.** The law being silent upon the subject, it is competent for a township to impose conditions in respect to its subscription. *People ex rel. v. Dutcher*, 56 Ill., 144. 1870.

6. **Constitutional law.** Ch. 48, Acts of 1868, permitting townships, incorporated towns and cities to aid in the construction of a railway by the levy of a tax, is unconstitutional. *Hanson v. Vernon*, 27 Ia., 28. 1869.

7. — The legislature has no constitutional power to authorize the taxation of the people or property of a township, town or city, in order to raise a fund to be given as a gratuity to a railroad company to aid it in the construction of its road through that vicinity. *Ib.*

8. — Ch. 102, Laws of 1870, providing for taxation of property in townships and incorporated towns and cities, to aid in the construction of railways, is not in conflict with the constitution of Iowa. This case substantially overrules *Hanson v. Vernon*, 27 Ia., 28, which was decided under a law almost identical with the one in question in this case. *Stewart v. Board of Supervisors of Polk County*, 30 Ia., 9. 1870.

9. — The county treasurer cannot refuse to pay over a tax in his hands, petitioned, voted for and collected under the act of 1868, enabling townships and cities to aid in the construction of railroads. The act of 1868 is constitutional. *McGregor and Sioux City R. R. Co. v. Birdsall*, 30 Ia., 255. 1870.

10. — A writ of mandamus will issue to compel the treasurer to pay over such tax. *Ib.*

11. — The act of April 16, 1869, providing for the collection of interest upon town and other bonds, is constitutional. Said act construed. *Dunnovan v. Green*, 57 Ill., 63. 1870.

12. — Bonds issued by a township, under Sess. Acts 1868, p. 92, are not in any sense county bonds; and the county courts and counties named are merely made use of as agencies

to carry out the object contemplated by the act. Hence that act is not in conflict with § 14, art. XI of the state constitution. *State ex rel. North Missouri Central R. R. Co. v. Linn County Court*, 44 Mo., 504. 1869.

13. — An act of the general assembly, authorizing the trustees of a township, through which a railway was to be made, to subscribe, on behalf of the township, to the capital stock of the railway company, is not in conflict with the constitution of 1802. *Steubenville and Indiana R. R. Co. v. North Township*, 1 Ohio St., 105. 1852.

14. — The state may make internal improvements, directly or by a corporation, and for that purpose levy and collect taxes, or empower counties and townships to do so, and subscribe and pay for stock in a railway company. *John v. Cincinnati, Richmond and Ft. Wayne R. R. Co.*, 35 Ind., 529. 1871.

15. — The act, approved May 12, 1869, "to authorize aid to the construction of railways by counties and townships taking stock in," etc., contemplates a payment for stock at the time of subscription, and not the creation of a debt therefor, and is constitutional. *Ib.*

See SUBSCRIPTIONS BY CITIES AND TOWNS; SUBSCRIPTIONS BY COUNTIES.

16. **Elections.** In this case it was held that an election was sufficient where a majority of those who voted cast their ballots in favor of the subscription, although the entire vote cast at the election was not a majority of all the voters of the township. *St. Joseph Township v. Rogers*, 16 Wallace, 644. 1872.

17. — Under the act of March 21, 1850, to incorporate the Springfield and Mansfield R. R. Co. (48 O. L. 294), and the act of March 25, 1851, "to authorize special elections to decide the question of subscription to the Springfield and Mansfield Railway by counties and townships," (49 O. L. 548); the trustees of Goshen township were authorized to submit the question of a subscription by said township to the capital stock of said company, to the electors of the township, to be voted on at the time of the annual election in October, 1851; no steps having previously been taken by the commissioners of Champaign county to procure a vote of the electors of the county, on the question of a county subscription. *State ex rel. v. Goshen Township*, 14 Ohio St., 569. 1863.

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18. — An agreement among certain voters to "pair off," and absent themselves, is of no validity; and the judges of election are not required to regard it; the votes of such parties may rightfully be taken. *Piatt v. The People ex rel.*, 29 Ill., 54. 1862.

19. — The presumption is, in the absence of any provision on the subject, that the election shall be conducted in the manner prescribed by the law of the organization of the body in which it is held. *People ex rel. v. Dutcher*, 56 ib., 144. 1870.

20. — A substantial compliance with the requisitions of the law, will only be required. *Piatt v. The People ex rel.*, 29 ib., 54. 1862.

21. — A mere irregularity in conducting an election, which does not deprive any voter of his franchise, or allow an illegal vote, or change the result, will not vitiate the election. *Ib.*

22. — Although the law directs that the polls shall be closed at five o'clock, and this question is in issue, unless it is made to appear that votes were cast after that hour which changes the result, the irregularity would not be fatal. *Ib.*

23. — Under the act of 1859, if the votes shall be in favor of a subscription in aid of any railroad, the action of the supervisor is ministerial only. He is without discretion, and must make the subscription and issue the bonds. *Ib.*

24. — registry law. An election in regard to a subscription by a township being properly held at a town meeting, it is not required that voters shall be registered before the election can be properly held. *People ex rel. v. Dutcher*, 56 Ill., 144, 1870; *Dunnovan v. Green*, 57 ib., 63, 1870; see also *People ex rel. v. Ohio Grove Township*, 51 ib., 191, 1869.

25. Legalizing acts. Irregularities in holding an election may be cured by a legalizing act of the legislature. *St. Joseph Township v. Rogers*, 16 Wallace, 644. 1872.

26. Ratification. Acts of subsequent acquiescence or ratification will estop a township from objecting to the validity of its bonds, in the hands of an assignee for value who has taken them on the faith of such acquiescence, on account of any irregularity in their issue short of an absence of power to issue them, or such illegality as would render them absolutely void, and notice of such ir-

regularity to the assignee would not defeat the estoppel. *State ex rel. v. Trustees of Goshen Township*, 14 Ohio St., 569. 1863.

27. Rights of corporation. The railway company has no rights to be enforced until the stock is actually taken and paid for or the donation actually made. All prior proceedings are matters between the voters and commissioners. *Sankey v. Terre Haute and Southwestern R. R. Co.*, 42 Ind., 402, 1873; see also *Board of Commissioners v. Louisville, etc., R. R. Co.*, 39 ib., 192. 1872.

28. Where county has already taken stock. Where under the statute a county, was empowered to subscribe for stock in a railway company; and where it was further provided that if the county commissioners should not be authorized by vote of the electors of the county to subscribe under the law that then any township in such county might subscribe for such stock; and a subscription had been duly made by a county, a subsequent subscription by one of the townships in such county was held invalid, and the bonds of such township issued for such stock were held void, although in the hands of one claiming to be a bona fide holder. *Hopple v. Trustees of Brown Township*, 13 Ohio St., 311, 1862; *State ex rel. v. Trustees of Union Township*, 15 ib., 437, 1864.

SUNDAY LAWS.

1. Carriage of goods. The delivery of goods to a railway company by a steamboat company on Sunday, the goods having been shipped on Saturday, is not a violation of the Virginia "Sunday Laws," the taking care of the goods being a work of necessity. *Powhatan Steamboat Co. v. Appomattox R. R. Co.*, 24 Howard, 247. 1860.

2. — The railroad company was therefore held liable for the destruction of such goods by fire in its warehouse. *Ib.*

3. Injunction. Running cars on Sunday is not authorized by the charter of the Union Passenger R. R. Co., and is *ultra vires*; nor has the company authority to hold or execute a mail contract. Whether these acts imperil the charter can only be tried, at the suit of the commonwealth, appearing by the attorney general; a stockholder may sue by injunction,

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but it will not be granted when his bill is not *bona fide*, but only in aid of a private bill of other plaintiffs. *Sparhawk v. Union Passenger R. R. Co.*, 54 Penn. St., 401. 1867.

4. — The penal law to prevent worldly employment on Sunday has provided the machinery for punishing it, and to it the violation must be referred; courts of chancery will not interfere. *Ib.*

5. **Injury to passengers on Sunday.** Carriers of passengers having their boats in use on Sunday, and receiving persons on board, are liable for personal injuries suffered by them from the negligence of the carrier's servants, notwithstanding the statutes respecting the travel on Sunday. *Sanders v. Staten Island R. R. Co.*, 13 Abbott's Pr., N. S. (N. Y.), 388, 1872; *Carroll v. Same*, 65 Barbour (N. Y.), 32, 1873.

6. — A person cannot legally travel on Sunday from one city to another, a distance of several miles, for the purpose of visiting a stranger, if no occasion of necessity or charity is shown for him to pay such visit; and cannot maintain an action against a street railway company to recover damages for a personal injury received by him while so traveling in one of its cars, in consequence of the negligence of the company. *Stanton v. Metropolitan R. R. Co.*, 14 Allen (Mass.), 485. 1867.

7. — The facts that the exercises of a spiritualist camp meeting included a show to which an admittance fee was charged, and that some of the speakers declared that they would throw away the bible in their search after truth, are not conclusive that a person who traveled on Sunday to attend the meeting did so unlawfully. *Feist v. Middlesex R. R. Co.*, 109 Mass., 398. 1872.

8. **Injury to vessels.** That a vessel was prosecuting a voyage on Sunday is no defense to a suit against injuring her by leaving dangerous obstructions in a stream. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Philadelphia and Havre de Grace Steam Towboat Co.*, 23 Howard, 209. 1859.

SUPERSEDEAS.

See APPEAL; INJUNCTION.

1. **Act of congress.** To make a writ of error operate as a supersedeas, it is indis-

pensable that the requirements of the act of congress be strictly fulfilled; a copy of the writ must be lodged for the adverse party within ten days after the judgment, Sundays exclusive. *Railroad Co. v. Harris*, 7 Wallace, 574. 1868.

2. **Bond.** The obligor in the bond cannot object that the penalty is too small. *Jones v. Mississippi and Alabama R. R. Co.*, 5 Howard (Miss.), 407. 1841.

3. — It will be sufficient if the sheriff return the bond forfeited by indorsement on the execution. *Ib.*

4. — It is not a valid objection to the forthcoming bond, that there are not ten days stated in the condition of the bond, between the levy and sale. If the defendant is damnified thereby, his remedy is against the sheriff. *Ib.*

5. — **several defendants.** A supersedeas cannot issue in favor of all the defendants unless they all join in the bond. *Jones v. Mississippi and Alabama R. R. Co.*, 5 ib., 407. 1841.

SURETY.

1. **Action against surety.** The creditor may proceed at the same time against both principal and surety, but he can have but one satisfaction. *Muscatine v. Mississippi and Missouri R. R. Co.*, 1 Dillon (U. S. Cir. Ct.), 536. 1870.

2. **Consideration for promise.** A promise to the creditor to pay the debt is binding, and requires no consideration or foundation, but the original debt. *New Orleans and Carrollton R. R. Co. v. Chapman*, 8 La. An., 97. 1853.

3. — The assumption of liability by an indorser is sufficient consideration to support a contract of indemnity. *Williams v. Hagar*, 50 Me., 9, 1861.

4. — But where a contract was made to indemnify an individual as an indorser, the contract was held sufficient to indemnify him for moneys advanced by him. *Ib.*

5. **Extension of time.** An extension of time, by agreement with the principal, upon a promissory note, without the consent of the surety, releases the surety. *Cox v. Mobile and Girard R. R. Co.*, 44 Ala., N. S., 611, 1870; *Same v. Same*, 37 ib., 320, 1861.

Assessments.

SURFACE WATER.

See EMINENT DOMAIN; LIMITATIONS.

1. Damages. No action lies for the turning of mere surface water from one's own land upon the land of another. *Greeley v. Maine Central R. R. Co.*, 53 Me., 200. 1865.

2. Embankments. The owner of a servient heritage has no right, by embankments or other artificial means, to stop the natural flow of the surface water from the dominant heritage, and thus throw it back upon the latter. *Gillham v. Madison County R. R. Co.*, 49 Ill., 484. 1869.

SURVEYS.

See CONSTRUCTION OF RAILWAYS; EMINENT DOMAIN.

1. Constitutional law. A law which authorizes an entry upon a person's land, for the purpose of making the preliminary or final surveys for a railroad, before compensation is made, is not unconstitutional. *Polly v. Saratoga and Washington R. R. Co.*, 9 Barbour (N. Y.), 449, 1850; *Bloodgood v. Mohawk and Hudson R. R. Co.*, 14 Wendell (N. Y.), 51, 1835; *Same case*, 18 ib., 9, 1837; *Bonaparte v. Camden and Amboy R. R. Co.*, 1 Baldwin (U. S. C. C.), 205. 1830.

SWITCH.

See EMINENT DOMAIN; INJURIES TO EMPLOYES.

TAKING PRIVATE PROPERTY.

See EMINENT DOMAIN.

TAXATION.

See CHARTER; CERTIORARI; INJUNCTION; LAND GRANT; MORTGAGE.

I. ASSESSMENTS.

II. DIFFERENT KINDS OF TAX.

1. *Bond tax.*
2. *Capital stock.*
3. *Gross receipts.*
4. *Freight tax.*
5. *Passenger fares.*
6. *Net earnings.*
7. *Tolls.*
8. *Rolling stock.*
9. *Dividend tax.*
10. *Federal tax.*
11. *General tax.*

III. COLLECTION OF TAX.

IV. PLACE OF TAXATION.

V. LAND GRANTS.

VI. SPECIAL CHARTERS.

VII. EXEMPTION.

VIII. CONSTITUTIONAL LAW.

IX. MUNICIPAL CORPORATIONS.

X. FOREIGN CORPORATIONS.

XI. STREET RAILWAYS.

XII. GENERAL MATTERS.

I. ASSESSMENTS.

1. Appeals. The jurisdiction of the supreme court is restricted by the state constitution to original proceedings in *quo warranto*, *mandamus* and *habeas corpus*, and such appellate jurisdiction as may be provided by law. But such appellate jurisdiction is only judicial in its character. Hence, a law, giving the right to appeals to this court from the board of county clerks, in the appraisal of railroad property for the purposes of taxation, is unconstitutional. The power to tax is not in any sense a judicial power. *Auditor of State v. Atchison, Topeka and Santa Fe R. R. Co.*, 6 Kans., 500. 1870.

2. — A railway company cannot appeal to the circuit court from an assessment by a board of supervisors. *Ohio and Mississippi R. R. Co. v. Lawrence County* 27 Ill., 50. 1861.

3. — The provision of the constitution granting the right of appeal needs legislative action to make it available. *Id.*

4. Assessment for benefits. The imposition and confirmation of an assessment by the city of Brooklyn, in pursuance of the act of April 19, 1859, for the purpose of compensating the Long Island R. R. Co., for the relinquishment of its right to use steam power within said city, are not forbidden by the act

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relative to local improvements in the city of Brooklyn, passed April 11, 1861. (Laws of 1861, p. 462.) *People v. Lawrence*, 36 Barbour (N. Y.), 177, 1862; see *Litchfield v. McComber*, 42 ib., 288, 1864.

5. Assessors and their rights and duties.

In cases where assessors have jurisdiction, it is their right and duty to decide all questions of law as well as of fact. It is for them to determine, where there are facts calling for the exercise of their judgment, whether land is to be assessed as resident or nonresident land. Whatever may be their decision, they have the immunity of judicial officers. Both they and all persons who act upon their assessment in enforcing the tax, are protected, and the tax, after it has reached the treasury of the county, cannot be collected back. The decision of the assessors cannot be attacked collaterally. *Buffalo and State Line R. R. Co. v. Sup'rs of Erie County*, 48 N. Y., 93. 1871.

6. — Assessors are quasi judicial officers; their assessments are in the nature of judgments. Their judgments can be reversed by action for fraud, mistake or other cause, giving jurisdiction to courts of equity; but it is the parties affected by the judgment who must be brought into court to litigate, not the judges. *Western R. R. Co. v. Nolan*, ib., 513. 1871.

7. — It is ministerial, not judicial officers, whom the court has the power to restrain when proceeding illegally under a claim of right. *Id.*

8. Board of appraisers. Under § 41, ch. 25, G. L. 1868, which provides that a deputy county clerk may, in the absence of the clerk, perform the duties of the latter, such deputy may, in the absence of the clerk, act as one of the "board of appraisers and assessors" to assess railroad property, as provided by ch. 124, Laws of 1869. *Amrine v. Kansas Pacific R. R. Co.*, 7 Kan., 178, 1871; *Missouri River, Ft. Scott and Gulf R. R. Co. v. Morris*, ib., 210, 1871.

9. — Ch. 124, Laws of 1869, or so much of it as provides for the assessment of railroad property by a board of county clerks, and that the entire road shall be assessed as a whole and apportioned to the different counties, townships, etc., through which the road runs, is constitutional. *Missouri River, Ft. Scott and Gulf R. R. Co. v. Morris*, ib., 210.

10. — Such assessment will not be vitiated by mere irregularities in the board or clerks acting separately. *Id.*

11. Constitutional law. Assessors have no power beyond the districts for which they are elected. (Art. 11, Const, § 13.) The act providing for the assessment of railway property by assessors other than those in whose respective districts the property is situated, is held to be unconstitutional. *People v. Placer-ville, etc. R. R. Co.*, 34 Cal., 656. 1868.

12. Evidence. Upon the trial of the question as to the proper valuation to be put upon the property of a railway company, it is competent to give in evidence against the company, the deposition of its general superintendent, which had been taken in another case and used by the company, adopting and acting on the statements therein as facts. *Chicago and Northwestern R. R. Co. v. Supervisors of Boone County*, 44 Ill., 240. 1867.

13. — Irregularities in the assessment made by the county clerks, will not render the taxes founded upon such assessment void. *Missouri River, Ft. Scott and Gulf R. R. Co. v. Blake*, 9 Kan., 489. 1872.

14. Lists. The classified list of real estate of railway companies, required by statute to be delivered to town assessors of the towns in which the real estate lies, must be regarded by the assessors as *prima facie* evidence of value, if delivered to them any time after the first day of May, before the completion of their roll according to law, in like manner as if it had been delivered before the first day of May. *People ex rel. v. Ross*, 15 Howard's Pr. (N. Y.), 63. 1857.

15. — If not delivered until after the completion of the roll according to law, the assessors are not bound to allow it any effect. *Id.*

16. Overvaluation. An excessive valuation made by an assessor, contrary to his official judgment, and with intent to injure, is a fraud for which the law will afford relief. *State v. Central Pacific R. R. Co.*, 7 Nev. 99. 1871.

17. — The sufficiency of an assessment of the Pacific R. R. Co.—considered. *Pacific R. R. Co. v. Cass County*, 53 Mo., 17. 1873.

18. Penalty. Where there is a failure or refusal to give in a true list of the taxable property, the county court has jurisdiction to enforce the penalty and fix the value of tax-

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able estate. The circuit court of Franklin county has no jurisdiction of such a proceeding. *Louisville and Nashville R. R. Co. v. Commonwealth*, 1 Bush. (Ky.), 250. 1866.

19. — But where an assessment has been made by the agent of the auditor in the manner prescribed, and reported to the auditor, he may then proceed in the Franklin circuit court against a delinquent corporation, by motion or ordinary proceeding, to coerce the payment of the amount so assessed. *Ib.*

20. Profits. A tax upon a railway corporation can only be just and equal by a taxation of the profits. Such investments are materially different from real estate. *Paine et al. v. The Indianapolis and Bellefontaine R. R. Co.*, 6 McLean, 395. 1855.

21. — The supervisors have the power to correct the lists of real and personal property furnished by railway companies for taxation. *Chicago and Rock Island R. R. Co. v. Supervisors of Bureau County*, 25 Ill., 580. 1861.

22. Uniformity. Where the property of individuals in a county has been assessed at less than its actual value, the constitutional rule of uniformity forbids that the property of a railroad company in such county should be assessed upon any greater per cent. of its value than that of individuals. *Bureau County v. Chicago, Burlington and Quincy R. R. Co.*, 44 Ill., 229, 1867; *Chicago and Northwestern R. R. Co. v. Supervisors of Boone County*, *ib.*, 240.

23. — The constitution does not require a uniform method of valuation of property for taxation, but only "such regulations as shall secure a just valuation." In determining how this end shall be secured, the legislature must exercise its discretion, and unless the method adopted be clearly inadequate to secure the result, the courts cannot interfere. *Louisville and New Albany R. R. Co. v. The State*, 25 Ind., 177. 1865.

24. Valuation. The real estate of a railway company must be assessed in each town at the actual value, merely, of that part thereof, without reference to the income of the road. *Albany and Schenectady R. R. Co. v. Osborn*, 12 Barbour (N. Y.), 223, 1851; *Albany and West Stockbridge R. R. Co. v. Town of Canaan*, 16 *ib.*, 244, 1853.

25. — So long as the assessors confine themselves within that rule, however grossly they may err in their estimate, their valuation is

conclusive. Like the verdict of a jury, the amount is not to be questioned. *Ib.*

26. — The tax based upon the assessment is like a judicial sentence, and can only be attacked for fraud, or an excess of jurisdiction. *Ib.*

27. — The real estate of railroad companies should be assessed at its value for the purpose to which it has been adapted, and not as mere farming lands. What may be properly considered in estimating that value, discussed. *People v. Fredericka*, 48 Barbour (N. Y.), 173. 1866.

28. — In assessing a railway, the inquiry should be, what is the property worth, to be used for the purposes for which it was designed, and not for any other purposes to which it might be applied. *State v. Illinois Central R. R. Co.*, 27 Ill., 64. 1861.

29. — The act of March 4, 1859, § 6 (Acts of 1859, p. 5), providing that the appraisers, in estimating the value of the road, shall take into consideration the location of the road for business, the competition of other roads, its earnings, etc., is constitutional. *Louisville and New Albany R. R. Co. v. The State*, 25 Ind., 177. 1865.

30. — The improvements made upon the real estate must be taken into account in fixing its value for the purposes of taxation. *Chicago and Northwestern R. R. Co. v. Lee County*, 44 Ill., 248. 1867.

31. Waiver of errors. Where a city charter gives an opportunity to present objections to an assessment before the city council, where power is vested over the subject, and this opportunity is neglected, all objections are waived. *Ottawa v. Chicago and Rock Island R. R. Co.*, 25 Ill., 43. 1860.

II. DIFFERENT KINDS OF TAX.

1. Bond tax.

32. Foreign held bonds. The tax levied upon foreign held bonds is constitutional. *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Commonwealth*, 3 Brewster's Eq. (Penn.), 355, 1872; *Buffalo and Erie R. R. Co. v. Same*, *ib.*, 374, 1871.

33. — The money of a creditor loaned in Pennsylvania may be taxed there, and the money collected through the debtor. *Pitts-*

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burgh, *Fort Wayne and Chicago R. R. Co. v. The Commonwealth*, 66 Penn. St., 73. 1870.

34. — Where a railroad is extended through Pennsylvania and other states, the assessment of tax on its debt is to be in proportion to its extent in this state. *Ib.*

35. — Double taxation is not unlawful in this state. *Ib.*

36. — The commonwealth can sequester a railroad within her borders until the tax is paid. *Ib.*

37. — The officers of a corporation are personally responsible for the tax. *Ib.*

38. — The negotiable character of the coupons will not exempt them from taxation; every one receiving them was bound to know they were taxable. *Ib.*

39. — The loan for which the bonds of a railroad company chartered by Pennsylvania are given, is taxable under the acts of April 29, 1844, and May 1, 1854. *Maltby v. Reading and Columbia R. R. Co.*, 52 Penn. St., 140. 1866.

40. — Taxation is for the legislature; and while it confines itself to that which is in the nature of a tax law, its powers are not subject to judicial review. *Ib.*

41. — Property within the jurisdiction of this commonwealth, and enjoying its protection, is taxable though its owner resides elsewhere. *Ib.*

42. — Corporation loans, though debts, are like moneys at interest, taxable in this state. *Ib.*

43. — The tax laws of Pennsylvania tax corporation loans as property in that state, and appoint the corporation the collector of the tax; those laws are constitutional and valid. *Ib.*

44. — It is the right of financial officers of a corporation to retain the three mill tax under the act of April 29, 1844, without assessment of the county officers. *Delaware, Lackawanna and Western R. R. Co. v. The Commonwealth*, 66 Penn. St., 64. 1870.

45. — The act of April 30, 1864, imposed a tax on corporation bonds in the hands of non-residents. The act of 1864 provides a remedy for collecting the tax out of the resources within the legislative jurisdiction of the commonwealth. *Ib.*

46. — The foregoing cases overruled, and these statutes held to be unconstitutional.

Case of Foreign held bonds, 15 Wallace, 300. 1872.

47. — United States and state taxes on bonds are a charge on the principal, although to be collected out of the interest. The clause in a mortgage by a corporation or person, that the payment shall be "without defalcation, deduction or abatement for any taxes whatsoever," is a stipulation to pay the taxes on the land mortgaged, and not on the debt secured. *Clopton v. Philadelphia and Reading R. R. Co.*, 54 Penn. St., 356. 1867.

48. — The tax levied by the United States is a tax upon the debt secured, and not a tax on the debtor. The company is made the agent to collect the tax, but the burden is imposed upon the bondholder. *Ib.*

49. — A law of Pennsylvania, passed May 1, 1868, requiring the treasurer of a railway company of that state to retain five per cent. of the interest due upon its bonds to non-residents, is invalid. (S. C. U. S.) *Cleveland, Painesville and Ashtabula R. R. Co. v. Commonwealth*, 4 Brewster (Penn.), 183, 1873; *Case of the state tax on foreign held bonds (Railroad Co. v. Pennsylvania)*, 15 Wallace, 300. 1871.

50. — The power of taxation of a state is limited to persons, property and business within her jurisdiction. All taxation must relate to one of these subjects. *Ib.*

51. — A law, therefore, taxing foreign held bonds by a state, such bonds being held by citizens of other states, and requiring the treasurer of the company to withhold the same, is a law interfering with the relations of the company and the bondholder, and, under the pretense of levying a tax, impairs the obligation of a contract. *Ib.*

52. — The fact that the bonds are secured by a mortgage on the property of the company within the state does not change the rule, for a mortgage is not an interest in the property, but simply a lien upon it. *Ib.*

53. — A state has no power to tax the interest on mortgage bonds given by a railway company, and binding every part of a road, when a part of the road lies in another state. *Railroad Co. v. Jackson*, 7 ib., 262. 1868.

54. The Michigan Southern and Northern Indiana R. R. Co. is liable, under its charter, to the state tax upon bonds issued to the original purchasers of the road as a bonus, and also upon the full amount of its loans, with-

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out taking the discount upon the sales of its bonds into consideration; also upon its bonds issued in exchange for the bonds of another company, although the bonds taken in exchange are undisposed of. *People v. Michigan Southern and Northern Indiana R. R. Co.*, 4 Mich., 398. 1857.

55. — Nor can the company claim exemption from taxation upon so much of its bonds as were consumed in commissions and other expenses attending their sale, nor on loans made for the purpose of constructing its road, or purchasing, chartering or hiring steamboats. *Michigan Southern and Northern Indiana R. R. Co. v. The Auditor General*, 9 ib., 448. 1862.

56. — Nor can it claim exemption on money borrowed by it, and afterwards loaned on worthless securities whereby it became lost to the company. *Ib.*

57. — Whether a deduction from the taxable amount should be made of bonds of the company which were loaned, and for which worthless securities were subsequently taken in payment, *quære*, the court being equally divided. *Ib.*

58. — The ruling in case of *People v. Michigan Southern and Northern Indiana R. R. Co.*, 4 Mich., 398, was not regarded as conclusive as to the question of taxation upon the amount of discounts upon loans, the court being equally divided as to sustaining its former ruling. *Ib.*

59. — The act authorizing the consolidation of the Michigan Southern and Northern Indiana Railroad Companies does not change the principle of taxation fixed by the original charter of the former company. *Ib.*

60. — No deduction can, therefore, be made from the amount taxable; for the cost of steamboats destroyed by accident, or lying idle within the limits of another state and taxable there. *Ib.*

2. Capital stock.

61. **Assessment.** An assessment of stock of a railroad company in the name of the shareholders, instead of that of the corporation, is irregular. But the action of the assessor is judicial, and where it appears that the assessor had jurisdiction over the property, the collector would not be liable to the tax payer for the amount collected under the assessment,

notwithstanding the irregularity. In such case, the tax bill certified to the collector is his sufficient warrant. *North Missouri R. R. Co. v. Maguire*, 49 Mo., 482. 1872.

62. — In computing the true value of the corporate franchise of a railway company for the purposes of taxation under the St. of 1865, ch. 28, § 4, the tax commissioner was not in error in estimating the fair cash valuation of all the shares of the capital stock by adding the actual market value of the old shares to that of the new shares, the old shares being of a higher value than the new, without making any deduction on account of the dividend that had been declared upon the old shares, but not paid and not to be paid for six years. *Boston and Lowell R. R. Co. v. Commonwealth*, 100 Mass., 399. 1868.

63. **Capital invested in real estate.** A railway company is not liable to taxation upon its capital, as personal estate, for that part thereof which is invested in the lands over which the road runs, and in railways and other fixtures connected therewith; but that part of the corporate property is to be taxed as real estate. *Mohawk and Hudson R. R. Co., v. Clute*, 4 Paige Ch. (N. Y.), 384. 1834.

64. **Nonresident holders.** The interest represented by the shares of stock in a railway company organized under the laws of Iowa, is within the jurisdiction of the state, even when the owners are nonresidents, and the shares may be taxed therein. Code of 1851, § 462. Acts of 1858, ch. 152, § 7. *Faxton v. McCosh*, 12 Ia., 527. 1861.

65. **Place of taxation.** The capital stock of a railway company which is not invested in the railway, or other real estate, is to be taxed as other personal property, in the town or ward where the principal office or place for transacting the financial concerns of the company is situated. *Mohawk and Hudson R. R. Co. v. Clute*, 4 Paige Ch. (N. Y.), 384. 1834.

66. **Railways; street.** The commissioners of taxes and assessments in the city of New York, in estimating the value of the capital stock of the street railway companies, should deduct from the actual value of such stock, the assessed value of its real estate. *People ex rel. v. Commissioners of Taxes, etc.*, 46 Howard's Pr. (N. Y.), 227. 1873.

67. — The commissioners of taxes, etc., in assessing the capital stock of a street railway

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company, valued such stock at the actual value; deducted therefrom the cost price of the real estate of the company and returned the balance as the sum in which the company should be assessed, refusing to deduct the amount of indebtedness of the company from such valuation. *Held*, that the rule of assessment adopted was correct. *People ex rel. v. Commissioners of Taxes, etc.*, 1 N. Y. Sup. Ct., 685. 1873.

68. What the term stock includes. Where it is provided by law that the stock of a railway company shall not be taxed, the term stock is held to include all property that is necessary and proper for the purpose of laying, building and sustaining such railroad. *Ordinary of Bibb County v. Central R. R. Co.*, 40 Ga., 646. 1869.

69. — The term "stock" where it occurs in § 32 of an act providing for the assessment of property, 1 R. S., p. 113, includes not subscriptions of stock, but the actual tangible property of the railway company. *Auditor of Floyd County v. New Albany and Salem R. R. Co.*, 11 Ind., 570, 1858; *State v. Hamilton*, 5 ib., 310. 1854.

3. Gross Receipts.

70. Constitutional law. A statute of a state imposing a tax upon the gross receipts of railroad companies is not repugnant to the constitution of the United States, though the receipts are, in part, made up from freights received from the transportation of freights from one state to another. Such a tax is not a regulation of interstate commerce, nor is it a tax on imports or exports. There is a distinction between a tax upon freights carried between the states and a tax upon the fruits of such transportation after they have become mingled with the other property of the carrier. *State Tax on Railway Gross Receipts (Reading R. R. Co. v. Pennsylvania)*, 15 Wallace, 284, 1872; *Philadelphia and Reading R. R. Co. v. Commonwealth*, 4 Brewster (Penn.), 222, 1873; *Buffalo and Erie R. R. Co. v. Commonwealth*, 3 Brewster's Eq. (Penn.), 386, 1871; *Kneeland v. City of Milwaukee*, 15 Wis., 454, 601. 1862.

71. Construction of statute. The property of railroad companies is not exempt from taxation by cities, under ch. 196, acts of 1868,

providing for a tax upon the gross earnings of all railroads "in lieu of all taxes." The exemption was intended to apply to state and county taxes. *Dunleith and Dubuque Bridge Co. v. Dubuque*, 32 Ia., 427. 1871.

72. — A railroad company that has paid the required percentage on its gross earnings in any year, holds its real estate exempt from special assessments for local improvements as well as all other taxes. R. S., ch. 18, § 183. *Brightman v. Kirner*, 22 Wis., 54. 1867.

73. What the tax on gross receipts covers. Under § 462, Code of 1851, and § 7, ch. 152, Laws of 1852, the property of railway companies was only taxable for state and county purposes through the shares of the stockholders. *Iowa Homestead Co. v. Webster County*, 21 Ia., 221, 1866; *Dubuque and Pacific R. R. Co. v. Same*, ib., 235.

74. — Ch. 45, Rev. 1860, was general, treating all property of all persons alike, and taxing lands of railway companies the same as the lands of private persons; and this act governed for the levy of the taxes of 1861. *Ib.*

75. — The act of April 8, 1862, referred only to the taxation of the track, rolling stock and buildings, the taxes on gross earnings therefore do not cover taxes on other lands. *Ib.*

4. Freight tax.

76. Constitutional law. The transportation of freight, or of subjects of commerce, is a constituent part of commerce itself, and a tax upon freight transported from state to state is a regulation of commerce among the states. Hence, a tax of this nature levied by a state is in conflict with the constitution of the United States. *Case of the State Freight Tax (Reading R. R. Co. v. Pennsylvania)*, 15 Wallace, 232, 1872; *Erie R. R. Co. v. Pennsylvania*, ib., 282, 1872.

77. — Whenever the subjects in regard to which a power to regulate commerce is asserted, are in their nature national, or admit of one uniform system or plan of regulation, they are exclusively within the power of congress, and the transportation of freight and passengers from one state to another, or through a state, is of this nature. *Ib. Philadelphia and Reading R. R. Co. v. Commonwealth*, 4 Brewster (Penn.), 202. 1873.

78. — A clause in the charter of a railway

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company, providing that all tonnage of whatsoever kind or description, except the ordinary baggage of passengers, carried or conveyed on said railway, in each county and every year, shall be subject to a toll or duty for the use of the commonwealth of three mills per ton per mile, is simply a mode of taxing the company according to the magnitude of its business, and is not intended as a tax on commerce. *Pennsylvania R. R. Co. v. Commonwealth*, 3 Grant's Cases (Penn.), 128. 1860.

79.—In a question whether a state law is against the constitution of the United States, a simple doubt should determine it in favor of the state. *Tonnage Tax Cases*, 62 Penn. St., 286, 1869; *Commonwealth v. Erie R. R. Co.*, ib.

80.—The tonnage tax law of 1864 is solely a revenue law, and is constitutional. *Ib.*

81.—Eminent domain is one of the reserved rights of the states, and directly connected with the enactment of revenue laws. *Ib.*

82.—Internal improvements by states have been under the power of eminent domain; not under any authority to regulate or aid in the execution of federal powers over interstate commerce, but under the power to improve their own resources and regulate their internal affairs. *Ib.*

83.—For her internal improvements, the state has the right to compensation from all who use them, as a necessary consequence of her power to construct them. *Ib.*

84.—The state may take compensation by a direct tax on the tonnage using the road, or a tax on the corporations using her franchises. *Ib.*

85.—Carriage, not destination, gives the right of toll, tax or charge. *Ib.*

86.—The right to demand tolls, etc., is derived from the state's grant, and the power to determine the extent is subject to her discretion, except so far as she may be limited to use it, so as not to interdict or ruinously affect the commerce of another state. *Ib.*

87.—Taxation is an independent power of the state, unlimited except by the express prohibitions of the federal constitution or by implication, when it infringes directly on the exercise of federal power. *Ib.*

88.—There is a substantial difference between an act which is simply a burthen on commerce, and one which attempts to regulate it. *Ib.*

89. **Legal rates.** Grain bought in another state, shipped to and stored for sale at Pittsburgh, by a dealer there, and afterwards re-shipped by him to Philadelphia, by the Pennsylvania R. R. Co., is local freight within the meaning of Act of March 7, 1861, for commutation of tonnage duties. *Pennsylvania R. R. Co. v. Canfield*, 46 Penn. St., 211. 1868.

90.—Hence where the rate paid, under protest was for through freight, the shipper could recover the excess over the local freight rate in an action against the company. *Ib.*

91. **Tonnage duty.** The duty of one cent per ton, imposed by ordinance of the city of Charleston upon vessels performing voyages from North Carolina and Georgia to that port, is a tonnage duty, and is in violation of the 10th section of the 1st article of the constitution of the United States. *Alexander v. Wilmington and Raleigh R. R. Co.*, 3 Strobbart's Law (So. Car.), 594. 1847.

5. Passenger fares.

92. **Constitutional law.** The acts of assembly (1832, ch. 175, 1836, ch. 261, 1844, ch. 103, 1845, ch. 370, and 1852, ch. 328), in so far as they provide that the Baltimore and Ohio R. R. Co. shall pay semi-annually to the treasurer of the state, for its use, the one-fifth of the whole amount that may be received by the company for the transportation of passengers over its road between Washington and Baltimore, are not in conflict with the constitution of the United States. *State v. Baltimore and Ohio R. Co.*, 34 Md., 344. 1871.

6. Net earnings.

93. **Constitutional law.** The tax upon the net earnings of the Philadelphia, Wilmington and Baltimore R. R. Co., held, not to be in conflict with the terms of its charter. *Minot v. Philadelphia, etc., R. R. Co.*, 7 Philadelphia Rep. (Penn.), 555. 1870.

7. Tolls.

94. **Constitutional law.** The tolls imposed at the time of the adoption of the constitution of 1846 on freight carried on railroads, were not, within the meaning of that instrument, part of the revenues of the state canals, though pay-

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able to the commissioners of the canal fund. *People v. New York Central R. R. Co.*, 24 N.Y., 485, 1862; *Same v. Same*, 34 Barbour (N. Y.), 123, 1861.

95. — The act (ch. 497 of 1851) repealing the laws imposing such tolls is, therefore, consistent with article 7 of the constitution, which irrevocably pledges the revenues of the canals to the payment of certain debts, and to their completion, and the act is valid. *Ib.*

96. Tolls. A railway company, furnishing its own conveyances, carrying nothing but passengers, and charging a certain price as fare, cannot be considered a toll collecting company. *State v. Haight*, 1 Vroom (N. J.), 447, 1864.

8. Rolling stock.

97. Constitutional law. A tax upon the use of locomotives, cars, etc., is unconstitutional, as being a regulation of commerce. *Minot v. Philadelphia, etc., R. R. Co.*, 7 Philadelphia Rep. (Penn.), 555. 1870.

98. Place of taxation. Rolling stock is personal property, and as such is taxable in the county where the corporation has its legal residence. *Pacific R. R. Co. v. Cass County*, 53 Mo., 17. 1873.

99. Taxed as realty. The rolling stock of a railway is intimately connected with the purposes and uses of the track and superstructure, and it is within the power of the legislature to treat such machinery as real property for purposes of taxation. *Louisville and New Albany R. R. Co. v. State*, 25 Ind., 177. 1865.

9. Dividend tax.

100. Charter. The charter of a railway company provided that when the dividends exceeded six per cent. per annum on the capital stock, six per cent. on the dividends should be paid to the city of Philadelphia. *Held*, that the capital stock paid in, and not authorized, was intended. *Philadelphia v. Philadelphia and Gray's Ferry R. R. Co.*, 52 Penn. St., 177, 1866; *Second and Third Street R. R. Co. v. Philadelphia*, 51 ib., 465.

101. — The payment to the city was to be on the whole dividend, and not merely on the surplus over six per cent; and the sums due the city would draw interest after they fell due. *Ib.*

102. — A supplement provided that the tax on dividends should be so construed as to apply to the authorized capital. *Held*, that this provision was prospective. *Ib.*

103. Credit Mobilier. The proof arising from settlement for taxes on dividends made by the trustees under a deed of trust for stockholders of a corporation, when made from the books of the trustees, is answered by showing that the corporation did not own the contract out of which the profits arose. *Credit Mobilier v. Commonwealth*, 67 Penn. St., 233. 1870.

104. — The stockholders, instead of shielding themselves from personal liability by vesting the contract on the company, having personally undertaken to do the work, the commonwealth has no claim for taxes on the profits. *Ib.*

105. — A railway contract entered into by Oakes Ames, and by him assigned to trustees to execute and divide the profits among certain persons, rendered Ames and the trustees and the persons receiving the profits, with notice of the trust, personally liable as partners. *Ib.*

106. — Profits made by persons described as shareholders in a corporation in a business in which they are personally liable are not the subject of taxation as profits of the corporation, although the corporation agrees to advance funds to conduct that business and agrees to guarantee the individuals from loss. *Ib.*

107. — Where a deed does not in legal effect vest title in a corporation, but the commonwealth seeks to prove that the title did vest in the corporation, the latter can prove that the intent of the parties was in accordance with the legal effect of the words used. *Ib.*

108. — To rebut the claim of the state, the defendant had the right to prove that the parties did not consent to the transfer until they had obtained an opinion of counsel that the transfer would not vest the title in the corporation. *Ib.*

109. Foreign corporations. A railway incorporated under the laws of Ohio, and afterwards authorized to extend its road into this state by purchasing a road already built therein, falls within the class of "companies incorporated under any law of this commonwealth," and is subject to the tax imposed on such companies by the act of April 29, 1844. *Com*

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monwealth v. Cleveland, Painesville and Ashtabula R. R. Co., 29 Penn. St., 370. 1857.

110. — Though previously incorporated in Ohio, so far as it is a corporation existing and acting under the laws of this commonwealth, it is subject to the taxes imposed upon similar companies on the proportion of its capital stock used in this state. *Ib.*

111. — Dividends paid in stock are equally liable to taxation with those paid in cash. *Ib.*

112. **Interest.** Where by a mutual mistake between payer and receiver, the whole tax has not been paid, or too much has been received, interest is not recoverable on the sum so withheld or received, unless it has been done unjustly. *Second and Third Street R. R. Co. v. Philadelphia*, 51 Penn. St., 465. 1866.

113. — After demand and refusal to pay such sum, interest is payable from the demand; if there were concealments or design to withhold interest, it would be recoverable for the whole time. *Ib.*

114. — In receiving such tax the city authorities and the company treated the authorized capital as the basis of calculation by mutual mistake; *held*, that that company was not liable for interest on the amount underpaid until demand. *Ib.*

115. **Street railways.** The dividends of street railway companies are distributable to paid stock, and are liable for city taxes; and the annual official reports made to the auditor general of the state by the company, are the best evidence of the amount of such stock. *Citizen's Passenger R. R. Co. v. Philadelphia*, 49 Penn. St., 251. 1865.

10. Federal tax.

116. **Bonds held by cities.** The city of Baltimore issued its bonds and borrowed money, and loaned the same to the Baltimore and Ohio R. R. Co., taking the bonds of the company for the amount loaned. The company, under the excise law of 1862, having notified the city, paid the income tax of 3 per cent. to the government on its bonds given to the city, the money being paid under protest, and the company retained that sum out of the interest due the city. On a suit brought by the city to recover from the defendant the money paid under the excise law, it was *held*, that the city did not, under the arrangement

between it and the company, stand in the position of a surety in such a way that the company was bound to prevent its being prejudiced by events not anticipated when the arrangement was entered into. That the city could not recover the tax off of the company. *Baltimore v. Baltimore R. R. Co.*, 10 Wallace, 543. 1870.

117. **Dividends.** Under the circumstances of this particular case, it was *held*, that stock certificates issued to the stockholders were not dividends, and hence, not subject to the three per cent. tax, under the act of congress of July 1, 1862. *Chicago, Burlington and Quincy R. R. Co. v. Page*, 1 Bissell (U. S. C. C.), 461. 1864.

118. **Duties.** By act of congress of June 30, 1864, § 94, a duty of \$2 per ton is laid on pig iron, and \$3 per ton on railroad iron, with the proviso that iron advanced beyond pig iron, on which no duty has been paid, shall pay, in addition, \$3 per ton. The meaning is that pig iron shall pay \$2, railroad iron, made of pig iron that has paid duty \$3, and railroad iron made of pig iron which has not paid duty, \$6. By the same section pig iron is taxable if "used by the manufacturers thereof;" a manufacturer "uses" his pig iron when he advances it into railroad iron. *Philadelphia and Reading R. R. Co. v. Waterman*, 54 Penn. St., 337. 1867.

119. **Execution.** Where a debt due on a mortgage is collected on execution, the court may order a deduction of two and one-half per cent.—the government tax—if it shall satisfactorily appear that such tax has been paid by the company to the government subsequent to entering the judgment, and that the sheriff, having the same in hand, shall refund the same. *Beardsley v. New Jersey West Line R. R. Co.*, 6 Vroom, (N. J.), 479. 1872.

120. **Gross receipts.** Where the proportionable amount of the tax on gross receipts of a railway company, imposed by the U. S. Internal Revenue Law, which is allowed by the statute to be added to and collected with the fare of each passenger, is a fractional part of one cent;—*held*, that the company is limited to such fractional amount, and there being no coin in which it can be paid, the loss must fall on the company, and not on the passengers. *Black v. Sixth Avenue R. R. Co.*, 1 Daly, (N. J.), 536. 1866.

Different Kinds of Tax.

121. Income. The internal revenue act of June 30, 1864, does not lay a tax upon the income of a nonresident alien, arising from bonds held by him of a railroad company incorporated by states of the union and situated in them. *Railroad Company v. Jackson*, 7 Wallace, 262. 1868.

122. — Interest or dividends accruing prior to January 1, 1870, were taxable under the act of June 30, 1864, though payable or declared on or after the date named. *Barnes v. The Railroad Companies*. 17 Wallace, 294. 1872.

123. — A dividend declared payable after December 31, 1869 is not liable to the income tax although it is for earnings prior to its declaration. *Philadelphia and Reading R. R. Co. v. Barnes*, 7 Philadelphia Rep., (Penn.), 543. 1870.

124. — The internal revenue tax upon coupon bonds is payable by the holder and not by the debtor. *Haight v. Railroad Co.*, 6 Philadelphia Rep., (Penn.), 449. 1867.

125. — The corporation is made use of but as a convenient means of collecting the tax. *United States v. Railroad Co.*, 17 Wallace, 322. 1872.

126. Repairs. Under § 122 of the act of June 30, 1864 (13 U. S. Stat., at large, 284), moneys used by a railway company to replace an old and worn out bridge, by another of like materials and dimensions, are not "profits used for construction," and, as such, liable to a tax of five per cent. *Hartford and New Haven R. R. Co. v. Grant*, 9 Blatchford, (U. S. C. C.), 542. 1872.

127. State railroads. A railroad owned and operated by a state is not subject to taxation under the internal revenue law, (U. S. D. C.) *State v. Atkins*, 35 Ga., 315. 1866.

11. General tax.

128. Court house tax. The act of June 3, 1865 (Myers' Sup. 376), authorizing county courts, where the court house, etc., have been destroyed, "to levy on the property of said counties, listed for taxation for revenue purposes, an *ad valorem* tax of not exceeding fifteen cents to each one hundred dollars of property so listed, did not authorize the Warren county court to levy a tax upon the depot grounds and other property of the Louisville and Nashville R. R. Co. in said county, to aid

in rebuilding the court house. *Louisville and Nashville R. R. Co. v. Warren County Court*, 5 Bush. (Ky.), 243. 1868.

129. — The railroads of Kentucky are not listed with the assessor of any county, nor do they enter into the assessed property of any county, even for revenue purposes. *Ib.*

130. Depots. R. S., ch. 6, § 4, providing, "that the track of the road and the land on which it is constructed shall not, for the purpose of taxation, be deemed real estate," does not apply to depots and other erections of such corporations upon land owned by them. *Portland, Saco and Portsmouth R. R. Co. v. Saco*, 60 Me., 196. 1872.

131. — The Western R. R. Co. is not liable to be taxed for the land, not exceeding five rods in width, over which it is authorized to lay out its road, nor for buildings and structures thereon erected by it, if such buildings and structures are reasonably incident to the support of the road or to its proper and convenient use for the carriage of passengers and property, such as houses for the reception of passengers, engine houses, car houses and depots. *Worcester, Inhabitants of v. Western R. R. Co.*, 4 Metcalf (Mass.), 564. 1842.

132. Logs and lumber. For purposes of taxation, wood, timber, logs and lumber owned by a railroad corporation and distributed along its line for present use in operating and repairing such road, are to be deemed a part of the railroad, and subject to be taxed in that form by the justices of the supreme judicial court. *Fitchburg R. R. Co. v. Prescott*, 47 N. H., 62. 1866.

133. Manner of taxation. Railroads in Kentucky are taxed at the rate of \$20,000 per mile of road, including depot grounds, etc., and all the paraphernalia of such roads. By act of February 20, 1864 (Myers' Sup. 480), the length of such roads is required to be reported to the auditor, and the tax paid to the treasurer. *Louisville and Nashville R. R. Co. v. Warren County Court*, 5 Bush. (Ky.), 243. 1868.

134. — If a railroad company owns any property in any county in this state which is not included in the above act as part of the necessary paraphernalia of the road, such property is liable to taxation for revenue and county purposes. *Ib.*

135. — Railway companies are not liable

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to taxation upon their capital, but upon the valuation of their real estate in the several towns through which the road passes; and *semble*, they are liable to be so taxed, though not in the receipt of any profits or income. R. S., 414. *People ex rel. v. Supervisors of Niagara*, 4 Hill (N. Y.), 20. 1842.

136. — A railroad company incorporated before the revision of the statutes, whose charter is silent on the subject of taxation, is liable to pay the specific tax imposed by R. S., ch. 21, § 5. *The People v. Detroit and Pontiac R. Co.*, 1 Mich., 458. 1850.

137. — The revenue laws apply equally to both persons and corporations, subject to certain specified exemptions. *Louisville and Nashville R. R. Co. v. Commonwealth*, 1 Bush (Ky.), 250. 1866.

138. — The rails, ties and bridges, etc., of a railroad company, together with its easement in the lands, within the located limits of the road, are real estate, and as such, liable to taxation in the towns where they are situated. *Providence and Worcester R. R. Co. v. Wright*, 2 R. I., 459. 1853.

139. Real estate not used for railway purposes. A railway company should be taxed under the law as it now stands, for its "road" as an entirety, including all property in any way used by it in running and operating the road. But the real estate owned or held by it in trust, and not used in running or operating the road, should be taxed in the same manner as the real estate of private individuals. *Toledo and Wabash R. R. Co. v. City of La Fayette*, 22 Ind., 262. 1864.

140. Road tax. Under § 1 of the act of 1837, which directs commissioners of highways, in apportioning the residue of the highway labor to be performed in their town, after assessing one day's work upon each male inhabitant of full age, "to include among the inhabitants of such town, among whom such residue is to be apportioned, all moneyed or stock corporations which shall appear on the last assessment roll of their town to have been assessed therein," the commissioners must follow the previous action of the assessors. They are to take the last assessment roll for their guide. *People ex rel. v. Hudson River R. R. Co.*, 31 Barbour (N. Y.), 138. 1860.

III. COLLECTION OF TAX.

141. Distress. Rolling stock is personal property, and as such is liable to be seized and sold for the collection of a tax against the company. *Randall v. Elwell*, 52 N. Y., 521. 1873.

142. — The act of Feb. 14, 1855, amendatory to the revenue law, which directs that the track or superstructure of a railroad shall be denominated "fixed and stationary personal property," was intended to create a species of personal property before unknown to the law. For nonpayment of taxes upon this property, the collector may levy upon the rails and remove them from the track, for the purpose of selling them. *Maus v. Logansport, Peoria and Burlington R. R. Co.*, 27 Ill., 77. 1862.

143. Injunction. The court will not interfere by injunction, to prevent the collection of taxes irregularly assessed. *Chicago, Burlington and Quincy R. R. Co. v. Frary*, 22 Ill., 34. 1859.

144. — A person against whom illegal taxes have been assessed or levied cannot, by injunction, restrain the collection of an illegal tax against another person. *Missouri River, Ft. Scott and Gulf R. R. Co. v. Wheaton*, 7 Kan., 232, 1871.

145. — The general rule that equity will not restrain the sale of personal property for illegal taxes is adhered to in the case of a threatened levy upon the rolling stock of a railroad company. *Chicago and Northwestern R. R. Co. v. Borough of Ft. Howard*, 21 Wis., 44. 1866.

146. — An injunction to restrain the sale of property assessed as omitted property refused, it appearing that the property was taxable, and that if the taxes were paid, the complainant would pay no more than its share of the public burdens. *Union Pacific R. R. Co. v. Lincoln County*, 2 Dillon (U. S. C. C.), 279. 1872.

147. — Injunction will not lie to restrain the commission of a pure, simple and naked trespass. If an officer holding a warrant for the collection of taxes assessed against R., levy said warrant on the property of B., the latter has his remedy by action of replevin against the officer, or by action for damages. *Missouri River, Ft. Scott and Gulf R. R. Co. v. Wheaton*, 7 Kan., 232. 1871.

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148. — That property advertised for sale for the payment of taxes is so vaguely and indefinitely described in the notice of sale, that a purchaser thereof could take no perfect title, does not constitute sufficient cause for enjoining the sale. *Burlington and Missouri River R. R. Co. v. Mt. Pleasant*, 12 Ia., 112. 1861.

149. — A court of equity will not set aside a tax nor grant an injunction to restrain its collection, unless its collection would be inequitable and unjust; and the party seeking such a remedy must be prepared to do equity. *Missouri River, Ft. Scott and Gulf R. R. Co. v. Morris*, 7 Kan., 210. 1871.

150. — The rule denying the right to interfere by injunction to restrain the collection of a tax, is one of public policy, and it is equally applicable to the case of an assessment. *Western R. R. Co. v. Nolan*, 48 N. Y., 513. 1872.

151. — Where a tax is sought to be levied without authority, several property owners having a common interest in the subject, may join in a bill to restrain its collection. *Mt. Carbon Coal and R. R. Co. v. Blanchard*, 54 Ill., 240. 1870.

152. — A railway company against which taxes were assessed, and the assessments removed into the supreme court and affirmed, may be required to pay them by a *mandamus*, if there is no other adequate remedy for collecting them. *Person v. Warren R. R. Co.* 3 Vroom. (N. J.), 441. 1868.

153. — Under act of April 29, 1853, taxes should be collected in the same manner as other taxes. The mandate issued by the district judge will not authorize the collection by the sheriff. *Vicksburg and Shreveport R. R. Co. v. Caddo Parish*, 10 La. An., 587. 1855.

154. Payment under protest. The plaintiff having paid certain taxes under protest to the collector of the town of B., can only recover back from such town the amount of the taxes collected for its benefit, and not the state, county and other taxes which the defendant collected only as an agent and paid over as directed by the statute. *Vermont Central R. R. Co. v. Burlington*, 28 Vt., 193. 1855.

155. Penalty. The exaction of ten per cent. for nonpayment of the assessed tax within a prescribed time, is not a penalty for enforcing which an indictment or other judicial process is necessary; but it is only a provis-

ional and valid increase *pro rata* of the assessment, like the assuring provision in a bond for the payment of a debt on a particular day, prescribing the additional payment of ten per cent. in the event of failure to pay on that day. *Louisville City R. R. Co. v. Louisville*, 4 Bush (Ky.), 478. 1868.

156. — The ten per cent. penalty required by law to be added to taxes in case of failure to pay by the tenth day of January, becomes, when added, a part of the taxes due. *Kansas Pacific R. R. Co. v. Amrine*, 10 Kans., 318. 1872.

157. Personal property. Under the laws of Missouri, back taxes on real estate cannot be collected from the personal property of a subsequent purchaser of such real estate. *Atlantic and Pacific R. R. Co. v. Cleino*, 2 Dillon (U. S. C. C.), 175. 1873.

158. Replevin. The laws of Michigan, Comp. L., § 5008, provide that no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment or fine in pursuance of any law of the state. *Held*, that said law applied only to cases where a valid tax might possibly have been imposed; that the law exempting a corporation from certain taxes, being a general law, the collector was bound to take notice of it, and he could not plead that the tax roll did not show that the party taxed was a corporation. *Leroy v. East Saginaw City R. R. Co.*, 18 Mich., 233. 1869.

159. — The question of the validity of a tax cannot be considered in an action of replevin. *Mount Carbon Coal and R. R. Co. v. Andrews*, 53 Ill., 176. 1870.

160. Tax sales. A sale of land in the city of Kenosha for unpaid taxes of 1857 was not invalid on the ground that railroad property within the city was intentionally omitted from the tax list. *Bond v. City of Kenosha*, 17 Wis., 284. 1863.

161. — The sale of the land of a defaulting tax collector, by a warrant from the county commissioners, is not a sale for taxes, and the laws relating to sales of unseated lands are inapplicable. Act April 11, 1799. *Schuylkill and Dauphin R. R. Co. v. McCreary*, 58 Penn. St., 304. 1868.

162. — Where the property of a railway company has been sold by the tax collector for the nonpayment of taxes which had been remitted by act of the legislature before the

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sale, and the purchaser makes no attempt to assert his right to the property, but allows the company to retain possession, a court of equity will entertain a bill by the railroad company to annul the sale, cancel the deed made to the purchaser and enjoin him from asserting any claim to the property. *Mobile and Girard R. R. Co. v. Peebles*, 47 Ala., N. S., 317. 1872.

163. Warrant. The fact that an illegal tax warrant was regular, upon its face, and disclosed no illegality, cannot afford protection to the collector in an action of replevin. It protects him from personal responsibility as a trespasser, but it cannot be made the foundation of a right or claim against others, nor confer any right of property which alone is in issue in an action of replevin. *Leroy v. East Saginaw City R. R. Co.*, 18 Mich., 233. 1869.

164. — The warrant does not authorize the seizure and sale of the property of a person not named, or whose name it is apparent from the face of the papers the assessor had no right to set down. *New York and Harlem R. R. Co. v. Lyon*, 16 Barbour (N. Y.), 651. 1853.

IV. PLACE OF TAXATION.

165. Legislative power. The legislature may create a district for the purpose of taxation or assessment, without reference to existing civil or political districts. *County Judge of Shelby County v. Shelby R. R. Co.*, 5 Bush (Ky.), 225. 1868.

166. Personal property belonging to a railway company, but not comprising any part of its capital stock, is liable to be taxed where the corporation has its place of business. *Portland, Saco and Portsmouth R. R. Co. v. Saco*, 60 Me., 196. 1872.

167. — Where an action was brought against a town to recover back money paid for taxes on wood, upon the grounds that its place of business was not in defendant's town, the *onus* is upon the plaintiffs to show where it was. *Ib.*

168. — Such an action will fail unless it appear that its place of business was not in said town. *Ib.*

169. Place of business. A tax, under the act of 1862, held, rightly assessed on the Warren R. R. Co., in the town of Belvidere, where

the office of its secretary was. *Sate v. Person*, 3 Vroom (N. J.), 134. 1866.

170. Railway passing through two or more counties. A railway company should be regarded as a resident of the several towns and wards through which its road extends, within the meaning of the tax laws, and assessed therein for its real estate. The real estate of railroad companies which is occupied and used by them for railroad purposes, is not required to be assessed as "nonresident lands." *People v. Fredericks*, 48 Barbour (N. Y.), 173, 1866; *Buffalo and State Line R. R. Co. v. Supervisors of Erie County*, 48 (N. Y.), 93, 1871.

171. — That portion of a railroad which lies within a county is taxable there, and the valuation of the road must be of that specific part, without reference to the value of the whole road. *Sangamon and Morgan R. R. Co. v. Jacksonville*, 14 Ill., 163. 1852.

172. — The law treats a railway and all its appurtenances as one entire thing, not legally subject to coercive dislocation. In such consolidated character, it must be taxed for state revenue, and cannot be a fit subject for local taxation by separate counties through which it passes. *Applegate v. Ernst*, 3 Bush (Ky.), 648. 1868.

173. — A railroad, passing through a parish, is liable to an assessment of a parish tax, unless excepted by a special law. *Bakewell v. Police Jury*, 20 La. An., 334. 1868.

V. LAND GRANTS.

174. Des Moines river grant. The lands granted to the state of Iowa for the improvement of the Des Moines river, by act of congress of August 8, 1846, and certified by the register of Des Moines River Improvement to the Des Moines Navigation and R. R. Co., were not subject to taxation before the title was conveyed by patent, as prescribed by law. The certificate of the register did not pass the title. *Des Moines Navigation and R. R. Co. v. Polk County*, 10 Ia., 1. 1859.

175. — Property acquired from the government, after the completion of the assessment for the current year, is exempt from taxation until the following assessment. *Ib.*; *Tallman v. Treasurer of Butler County*, 12 Ia., 531. 1861.

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176. Lands granted to the state. Lands granted to the state to aid in the construction of railways are not liable to taxation while they remain the property of the companies to which they have been granted by the state. They are taxable only through the shares of the stockholders. *Ib.*

177. — Property can only be taxed when authorized and required by the lawmaking power, and then only in the manner prescribed by law. *Ib.*

178. — Lands included in the grants for the construction of railways in Iowa, under act of congress of May 15, 1865, are liable to taxation by the state after the railroad companies to which they were granted became possessed of the unconditional title in fee and before they have been alienated by the companies. *Burlington and Missouri River R. R. Co. v. Hayne*, 19 Ia., 137. 1865.

179. — Where under the act of congress of May 15, 1856, and the acts of assembly of Iowa of July 14, 1856, a railway company is legally entitled to lands, the certificates of the governor and from the land department are only evidence of a title already existing; and the lands are subject to taxation from the time the company becomes legally entitled to them. *Iowa Homestead Co. v. Webster County*, 21 Ia., 221, 1866; *Dubuque and Pacific R. R. Co. v. Same*, *ib.*, 235.

180. — *Hannibal, etc. R. R. Co.* The lands granted by the state to the Hannibal and St. Joseph R. R. Co. by the act of Sept. 20, 1852, are not taxable for state and county purposes under the general revenue law. (Laws 1863-4, p. 65). The property of the company is represented by its shares of stock, and there cannot be any other property over and above the stock held by the stockholders. *State v. Hannibal and St. Joseph R. R. Co.*, 37 Mo., 265. 1866.

181. Lands not certified or patented. Lands held by a railroad company under land grant acts of congress, which have never been certified or set apart, and which are incapable of identification, are not taxable. The present case distinguished from *Iowa Homestead Co. v. Webster County*, 21 Ia., 221, and *Dubuque and Pacific R. R. Co. v. Same*, *ib.*, 235. *Cedar Rapids and Missouri R. R. Co. v. Woodbury County*, 29 Ia., 247. 1870.

182. — Although lands sold by the United

States may be taxed before the government has issued a patent, this principle is to be understood as applicable only to cases where the right to the patent is complete, and the equitable title fully vested without anything more to be paid, or any act done going to the foundation of the right. *Railroad Company v. Prescott*, 16 Wallace, 608. 1872.

183. — Where land is granted to a corporation for the sole purpose of aiding in the construction of a railway and telegraph lines, and such lines are constructed to the approval of the government, the company acquires such an interest in the land as renders it subject to taxation, even though it has not received a patent, and has not paid the costs of surveying, selecting and conveying the same, and the fees of the register and receiver of the land office, required by law to be paid before the issue of the patent. *Kansas Pacific R. R. Co. v. Culp*, 9 Kans., 38, 1872. This case was reversed on appeal to the supreme court of the United States, in March, 1873.

VI. SPECIAL CHARTERS.

184. Baltimore and Ohio R. R. Co. The liability of the Baltimore and Ohio R. R. Co. to the payment of taxes — determined. *Baltimore and Ohio R. R. Co. v. Marshall County*, 3 W. Va., 319, 1869; *Same v. Wheeling*, *ib.*, 372.

185. Bangor and Piscataquis R. R. Co. Under the wording of the charter of the Bangor and Piscataquis R. R. Co., it was held that its real estate should be considered as personal property for the purpose of taxation. *Bangor and Piscataquis R. R. Co. v. Harris*, 21 Me., 533. 1842. Overruled; ch. 313 of the acts of 1838, must have escaped the observation of the court. *Cumberland Marine R. R. Co. v. Portland*, 37 Me., 444. 1854.

186. Central Pacific R. R. Co. The state of California has no authority to impose taxation for state purposes upon that portion of the Central Pacific Railroad, and the telegraph lines in connection therewith, lying within its limits. *The People v. Central Pacific R. R. Co.*, 48 Cal., 398. 1872.

187. Erie Railway. The Erie Railway Company (of N. Y.), is subject to general taxation, notwithstanding its annual tax for the right of way through the state and the tax on

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its stock. *Erie R. R. Co. v. The Commonwealth*, 66 Penn. St., 84. 1870.

188. — A surrender of the general taxing power by any legislative act cannot be implied. *Ib.*

189. — The payment for a charter does not imply a surrender of power to tax the corporation by a general tax law. *Ib.*

190. The Louisville and Nashville R. R. Co. was subject to assessment and taxation, according to the value of its corporate estate, ever since it owned such estate, until the specific tax at the rate of \$20,000 per mile of road was substituted by the act of February 20th, 1864. *Louisville and Nashville R. R. Co. v. Commonwealth*, 1 Bush (Ky.), 250. 1866.

191. Morris and Essex R. R. Co. The Morris and Essex R. R. Co., in 1865, was taxable under the supplement to its charter, approved March 23d, 1865, and not under the general tax law of 1862. *McGavisk v. The State*, 5 Vroom (N. J.), 509. 1869.

192. — The charter of the Morris and Essex R. R. Co. — construed. All the property of the company in actual use is exempt from taxation except the tax of one-half of one per cent. on the cost of the road. *State v. Haight*, 6 ib., 40. 1870.

193. Orange and Newark R. R. Co. The Orange and Newark R. R. Co. is taxable under its charter, and not under the general tax law of 1869. *State v. Douglas*, 5 ib., 82. 1869.

194. Rome R. R. Co. The property of the Rome R. R. Co. in Rome, which is necessary to conduct the business of the company, is a part of its capital stock, and not liable to taxation by that city as property. *Rome R. R. Co. v. Rome*, 14 Ga., 275. 1853.

VII. EXEMPTION.

195. Baltimore and Ohio R. R. Co. The shares of stock of the Baltimore and Ohio R. R. Co. are exempt from taxation by the terms of its charter. The property of the corporation is an ingredient making up the value of the shares, and is also exempt. *Mayor of Baltimore v. Baltimore and Ohio R. R. Co.*, 6 Gill (Md.), 288. 1848.

196. Boston and Maine R. R. Co. The flats lying between the channels of the Charles and Miller's rivers, outside of the location of the road of the Boston and Maine R. R. Co., and

filled up by such company, pursuant to the authority given by St. 1845, ch. 224, § 1, for the location of engine-houses and wood houses and for other purposes for the use of its road, and used, when so filled up, exclusively for such purposes, are not exempt from taxation. *Boston and Maine R. R. Co. v. Cambridge*, 8 Cushing (Mass.), 287. 1851.

197. Branch roads. A branch road, built from the main track of the New Jersey R. R. Co. one and three-quarters of a mile to a gravel pit, for the purpose of obtaining the gravel more cheaply for its track, is liable to ordinary taxation. *State v. Hancock*, 4 Vroom (N. J.), 315. 1869.

198. Camden and Amboy R. R. Co. The tax of, or stipulation to pay, \$30,000 to the state annually, by the Camden and Amboy R. R. Co., is not merely a tax on its franchises; and not only those franchises, but all other property of said company, are exempted by its charter from any other tax. *Camden and Amboy R. R. Co. v. Commissioners*, 3 Harrison (N. J.), 71. 1840.

199. — An impost for county and township purposes is a state tax; it can be imposed by no other authority. *Ib.*

200. — The charter of a railway company provided for the payment to the state treasurer of ten cents for each passenger, and fifteen cents for each ton of merchandise transported on the road, and declared "that no other tax or impost shall be levied or assessed upon the company;" *held*, that the company was exempt from any tax, for state, county or township purposes. *Camden and Amboy R. R. Co. v. Hillegas*, 3 Harrison (N. J.), 11. 1840.

201. Camden and Burlington R. R. Co. The charter of the Camden and Burlington R. R. Co. — construed, and the company held exempt from assessment. *State v. Cook*, 3 Vroom (N. J.), 338, 1867; see also *Cook v. State*, 4 ib., 474, 1868.

202. Chartered method is exclusive. A corporation whose charter provides a certain mode of taxation in lieu of other taxes is not liable to be assessed in the ordinary manner prescribed in the tax law of 1866. *Douglas v. The State*, 5 Vroom (N. J.), 485. 1869.

203. Consolidation of railways. Where a railroad company was by its charter granted an exemption for a limited period, and was afterwards merged in another company, which became invested with all its property, rights

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and privileges, the exemption and its limitation accompanied the property, and a perpetual exemption from taxation in the charter of the latter company would not be extended to the property so acquired, without express words, or necessary intendment to that effect. *Tomlinson v. Branch*, 15 Wallace, 460, 1872; *City of Charleston v. Same*, ib., 470, 1872.

204. — Where two railway companies are consolidated, the two united lines will be respectively held with the privileges and burdens originally attaching thereto, unless the contrary is expressed. *Ib.*

205. **Constitutional Law.** — A railroad company was incorporated, subject to the provisions of the railroad law of 1849, with a provision that it should not be taxed until its dividends amounted to six per cent. per annum. A subsequent law subjected all corporations to a tax on each one per cent. of dividend. *Held*, that the company was taxable under the latter act, on a dividend less than six per cent. per annum. The right to amend charters contained in the former act authorizes the imposition of this tax by a subsequent act. *Commonwealth v. Fayette County R. R. Co.*, 55 Penn. St., 452. 1867.

206. — A railway company was in 1851 incorporated by the legislature of South Carolina, with the usual powers. At that time, a law of 1841 was in force, providing that the charters of corporations subsequently chartered might be amended, if no provision to the contrary was inserted in its charter. In 1855, an act was passed exempting the company from taxation, but there was no clause excepting the amendment from the provisions of the act of 1841. In 1868, the constitution was adopted requiring the taxation of such corporations, except in certain cases not affecting this case. The said railway was subsequently taxed. *Held*, that by virtue of the act of 1841, the taxation was legal and constitutional. *Tomlinson v. Jessup*, 15 Wallace, 454. 1872.

207. — The reservation of 1841 affected the entire relation between the state and the corporation, and placed under legislative control all rights, privileges and immunities derived by its charter directly from the state. *Ib.*

208. — Conceding a law exempting railways from a just proportion of taxation to be unconstitutional, yet the omission to levy against railway companies their due propor-

tion of taxation will not render void a tax levied upon other property subject to taxation. *Muscatine v. Mississippi and Missouri R. R. Co.*, 1 Dillon (8 U. S. C. C.), 536. 1870.

209. — The constitution of the state of Iowa provides that all taxation shall be uniform. Whether a law taxing the earnings of railways while it taxes other property upon its value, is in conflict with the constitution, *quære?*

210. — Under the constitution of 1857, a revenue law exempting the property of railway companies and like corporations from taxation would be invalid. *Iowa Homestead Co. v. Webster County*, 21 Iowa, 221, 1866; *Dubuque and Pacific R. R. Co. v. Same*, ib., 235.

211. — The charter of the R. & D. R. R. Co. provides that "all machines, wagons, vehicles or carriages belonging to the company, with all its works, and all the profits which may accrue from the same, shall be vested in the respective shareholders forever, in proportion to their respective shares, shall be deemed personal estate, and exempt from any charge or tax whatever." *Held*, that the real estate owned and used by the company for the purposes of its business is embraced in the provision, and is personal estate. The exemption from taxation of the real estate of the company in the city of Richmond is not unconstitutional as being in conflict with the charter of the city previously granted, giving the city the power to tax real estate for the purposes stated in the city charter, the city having ample means of taxation left for the payment of her expenses and debts. *Richmond v. Richmond and Danville R. R. Co.*, 21 Grattan (Va.), 604. 1872.

212. — Stipulations in the charter of a railway company, fixing the extent at which it will be liable to taxation, may be subsequently changed. Such limit is an estimate rather than a contract. *Raleigh and Gaston R. R. Co. v. Reid*, 64 N. C., 155, 1870; see also, *Wilmington and Weldon R. R. Co. v. Reid*, ib., 226; *St. Joseph v. Hannibal and St. Joseph R. R. Co.*, 39 Mo., 476, 1867.

213. — No irrevocable contract creating a limitation of taxation can result from provisions of a charter, made by its terms subject to amendment; so *held* in regard to the taxation of the Morris and Essex R. R. Co. *State v. Miller*, 1 Vroom (N. J.), 368, 1863; *Same v. Same*, 2 ib., 521, 1864.

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214. — The same doctrine applies to the Jersey City and Bergen R. R. Co. *State v. Mayor of Jersey City*, 2 Vroom (N. J.), 575. 1865.

215. **Construction of statutes.** It is true that laws conferring the power of taxation upon municipal corporations are to be construed strictly; it is also true that exemptions from taxation are to be construed strictly; but where the power has once been conferred, it is not to be crippled or destroyed by strained interpretation of subsequent laws. *Orange and Alexandria R. R. Co. v. Alexandria*, 17 Grattan (Va.), 176. 1867.

216. — The act of 1854 exempts all railway companies from municipal as well as other taxation. (Sess. Laws, ch. 354, 1854.) *Southern R. R. Co. v. Mayor of Jackson*, 38 Miss., 334. 1860.

217. — The exemption extends twenty years from the date of each charter of companies subsequently incorporated. *Ib.*

218. — The act of March 18, 1856, § 25, imposing taxes for the support of the state government, does not extend to exempt railway companies complying with said section from taxation by a city government. *Orange and Alexandria R. R. Co. v. Alexandria*, 17 Grattan (Va.), 176. 1867.

219. — The rule that statutes exempting property from taxation are to be most strictly construed against the party benefited thereby, and in favor of the public, cannot properly be applied to the provision exempting the "track, right of way, etc., and all other property necessarily used in operating any railroad in this state," inasmuch as the taxation upon annual income of such companies, as required by law, must be regarded as, in the judgment of the legislature, a fair equivalent for such other taxes. The statute, therefore, should receive a fair and liberal construction in favor of such companies. *Milwaukee and St. Paul R. R. Co. v. Supervisors of Crawford County*, 29 Wis., 116. 1871.

220. — A railway inn or boarding house it seems, might, if used exclusively for railway travelers or employes, be exempt under such statute, but where such inn is kept for the use of all persons applying to become guests, the property will be liable to taxation. *Ib.*

221. — The court cannot in such case hold distinct portions of the buildings taxable and other portions exempt. *Ib.*

222. — The intention to exempt from taxation must appear from the law to be clear and unequivocal, or it will not be recognized. *Pacific R. R. Co. v. Cass County*, 53 Mo., 17. 1873; *Baltimore and Ohio R. R. Co. v. Marshall County*, 3 W. Va., 319. 1869; *Same v. Wheeling*, *ib.*, 372.

223. **Corporation created by the federal government.** The principle upon which the business of a corporation created by the federal government, as an agent in the execution of its powers, is exempt from state taxation, does not apply to the real property of the corporation lying within the limits of a state. *People v. Central Pacific R. R. Co.*, 43 Cal., 398. 1872.

224. — A railway company organized under the laws of a state, cannot claim an exemption of its property, lying within the limits of a state, from state taxation because the corporation thus created has been subsequently adopted by the federal government, and is employed in the service of the general government, in the carriage of mails, munitions of war, etc. *People v. Central Pacific R. R. Co.*, 43, Cal., 398. 1872.

225. **Delaware and Maryland R. R. Co.** The Delaware and Maryland R. R. Co., is not liable to taxation upon its stock, works and machinery; but it is liable to taxation upon its, rails road bed and other property connected with the road in Hartford county. *Philadelphia, Wilmington etc., R. R. Co. v. Bayless*, 2 Gill, (Md.), 355. 1844.

226. **Depot grounds.** The property of railway companies is not exempt from taxation in Iowa, and grounds held by a company on condition that they shall be used for depot purposes, are subject to taxation as the property of such company. *Burlington and Mo. R. R. Co. v. Mt. Pleasant*, 12 Iowa, 112. 1861.

227. — Such property belonging to the corporation as is necessary to the preparation of the road for use is not taxable; hence water stations, depots and such buildings as are indispensable are not taxable, but warehouses, coal lots, coal shutes, machine shops and the like are taxable. *Railroad v. Berks County*, 6 Penn., 71. 1847.

228. **Franchise.** A statute exempting all the property of a railway company from taxation, exempts not only the rolling stock and real estate owned by it and required by the company for the successful prosecution of its

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business, but its franchise also. *Wilmington R. R. Co. v. Reid*, 13 Wallace, 264. 1871; *Raleigh and Gaston R. R. Co. v. Same*, ib., 269.

229. — A charter containing such an exemption is a contract and cannot be impaired by a law subsequently passed levying a tax upon such property. *Ib.*

230. Franklin R. R. Co. The Franklin R. R. Co., is not exempt from taxation. *Commissioners of Washington County v. Franklin R. R. Co.*, 34 Md., 159. 1870.

231. Georgia R. R. Co. The banking part of the capital of Ga. R. R. Co., is exempt from taxation to the same extent as the other stock. *City Council of Augusta v. Georgia R. R. Co.*, 26 Ga., 651. 1858.

232. Gross income. A charter of a railroad company exempting the "stock" of the company from taxation, exempts also its "gross income," such income being but an accessory of the stock. *State v. Hood*, 15 Richardson's Law (So. Car.), 177. 1868.

233. Hannibal and St. Joseph R. R. Co. The exemption of the stock of the Hannibal and St. Joseph R. R. Co., from all state and county taxes, contained in the original charter of said company, is modified by the acceptance on the part of said company of the act of September 20, 1852 (Railroad Laws, p. 115; Sess. Acts 1853, p. 15); and the corporate property of said company, although representing the stock, is subject to taxation at the time and in the manner specifically provided for in § 8 of said last mentioned act. *Hannibal and St. Joseph R. R. Co. v. Shacklett*, 30 Mo., 550. 1860.

234. — The roadbed, machinery and depots of the Hannibal and St. Joseph Railroad, and the other property used by said company in operating its road, are to be considered as part of and represented by the capital stock of said company, and are not liable to taxation under that provision of the general revenue law subjecting to taxation "all property owned by incorporated companies over and above their capital stock." (R. C. 1855, p. 1322.) *Ib.*

235. Illinois Central R. R. Co. The act to incorporate the Illinois Central R. R. Co., which declares certain exemptions of the property of the company from taxation, is a contract between the state and the company, which cannot be changed or annulled without the consent of both parties. *Neustadt v. Illinois*

Central R. R. Co., 31 Ill., 484, 1863; *Illinois Central R. R. Co. v. McLean County*, 17 Ill., 291, 1855.

236. — Under the act of February 10, 1851, incorporating the Illinois Central R. R. Co., no city or town authority can impose a tax for municipal purposes on the property of that company which may be within its limits. *Neustadt v. Illinois Central R. R. Co.*, 31 Ill., 484. 1863.

237. Kickapoo treaty. Under the Kickapoo treaty of 1862, which provides that none of the lands sold under its provisions "shall be taxable until the patents are issued therefor," after said lands were sold to the A. and P. R. R. Co., and by that company sold to an individual, who has made improvements thereon, before patents had been issued therefor, it was held, that neither said lands nor improvements were taxable. *Parker v. Winsor*, 5 Kan., 362. 1870.

238. Minnesota and Pacific R. R. Co. The territory of Minnesota had authority to exempt the Minnesota and Pacific R. R. lands from taxation. When the state became purchaser of the property of that company under foreclosure, this right passed to the state, and when the state transferred the same property and franchises to the St. Paul and Pacific R. R. Co., the same right of exemption was also transferred. *St. Paul and Pacific R. R. Co. v. Parcher*, 14 Minn., 297. 1869.

239. Mortgage to federal government. The fact that a railway was mortgaged to the United States, and bound to perform certain duties for the general government, and ultimately to pay a portion of its net earnings thereto, will not exempt it from local taxation. *Thomson v. Pacific R. R. Co.*, 9 Wallace, 579. 1869.

240. New Jersey R. R. Co.; ferry boats. The exemption from tax of the property of the New Jersey R. R. Co., provided in its charter, extends to ferry boats used by it in transportation of freight and passengers from the city of New Brunswick to New York city. *State v. Haight*, 5 Vroom. (N. J.), 319. 1870.

241. New Orleans and Carrollton R. R. Co. The exemption of the N. O. & C. R. R. Co. from state taxation does not exempt it from municipal taxation. Act March 1, 1836, § 10. *Second Municipality of New Orleans v. New*

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Orleans and Carrollton R. R. Co., 10 Robinson (La.), 187. 1845.

242. Non-resident corporation. By the acts authorizing a railway company, incorporated by another state, to locate a part of its road within this commonwealth, it was required to pay to this state annually a certain sum for the privilege, and also a certain corporation tax on a portion of its capital stock, equal to the amount of the cost of the construction of its road and appurtenances within the state. *Held*, that the machine shops, foundries and depots, and the expense of their erection, charged to the cost of construction, were not subject to assessment and taxation for state and county purposes under prior acts *New York and Erie R. R. Co. v. Sabin*, 26 Penn. St., 242. 1856.

243. — Where all the property of a corporation is taxed by special law in a specified manner, and no intimation is made by the taxing power of subjecting it to further burthens, its property will be exempt from taxes imposed under general laws. *Id.*

244. Pacific R. R. Co. The Pacific R. R. Co. of Missouri is not exempt from the tax of ten or fifteen per cent. imposed on it by the ordinance of April 8, 1865; nor does the act of Feb. 10, 1864, amount to such a contract as limits the right of the state to impose the tax. *North Missouri R. R. Co. v. Maguire*, 49 Mo., 490, 1872; *Pacific R. R. Co. v. Same*, 51 ib., 142, 1873.

245. Paterson and Hudson River R. R. Co. The charter of the Paterson and Hudson River R. R. Co. provides for the payment of certain taxes to the state, and then enacts, "that no further or other tax or impost shall be levied or assessed upon said company." *Held*, that the tax paid was a commutation for all taxes on such property as might necessarily be held for purposes reasonably incident to the enjoyment of the franchise. *Gardner v. The State*, 1 Zabriskie (N. J.), 557, 1845; see *Paterson and Hudson R. R. Co. v. Jersey City*, 1 Stockton's Ch. (N. J.), 434, 1853.

246. — That the charter exempts the company and its property held for such purposes from all other taxes, whether assessed for state, or for city or township purposes. *Id.*

247. Pennsylvania R. R. Co. The act of May 16, 1857, for the sale of the Main Line of public improvements, provides that upon the

payment by the P. R. R. Co. of \$1,500,000 to the state for said public property, the company shall, in consideration thereof, be forever released from certain taxes. *Held*, that the act, so far as it provides for a discharge from taxation, is unconstitutional. The legislature has no power to alienate any of the rights of sovereignty, such as that of taxation, so as to bind future legislatures. *Mott v. Pennsylvania R. R. Co.*, 30 Penn. St., 9. 1858.

248. — The canal commissioners, as public officers, and any loan creditor of the state, or taxpayer, have such an interest in the question as will authorize them to maintain a bill for an injunction to prevent the execution of such unconstitutional act. *Id.*

249. — The act provides that the sale shall be made by the governor; *held*, that as this was not a part of his official duty, as executive of the state, but merely ministerial, an injunction might issue against him. *Id.*

250. — A dissenting stockholder of the P. R. R. Co. cannot have a preliminary injunction to prevent the company from becoming the purchasers under authority of the act. His rights can only be determined on the final hearing. *Id.*

251. Preferred stock. A railway company was chartered with a capital of \$1,000,000, with a provision in its charter that its capital stock should be exempt from taxation until the tolls collected by the company should be sufficient to afford a dividend of six per cent. per annum on its capital stock. Its capital was subsequently increased by authority of the legislature by adding to it at one time \$300,000, at another \$200,000, and at another \$500,000. It was again increased afterwards by the creation of \$425,000 of additional stock, to be called "preferred stock," and upon which dividends were first to be paid, the holders of the old stock to be entitled to the new, and being authorized, on paying for a certain proportion of the new stock, to surrender their old stock and take a fixed equivalent in the new. Under the authority of this provision, nearly the whole of the old stock had been surrendered, and the preferred stock had become substantially the whole stock of the company. *Held*, 1. That the original exemption of the capital from taxation applied to the increased capital, upon every authorized increase of the same, without any

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express provision to that effect in the resolve authorizing the increase. II. That the capital in its new form of "preferred stock" was equally exempt. III. That the provision as to the tolls received, affording a dividend of six per cent., was not satisfied by their affording that dividend upon the original capital of \$1,000,000, but that it was necessary that they should afford such a dividend upon the entire capital, including the original amount and all the increase. IV. That it was not enough if the receipts of the road amounted to six per cent. per annum on the entire capital, but that they must be such as to afford a dividend of that amount after taking out all the reasonable and necessary expenses of the road for the year. *State v. Norwich and Worcester R. R. Co.*, 30 Conn., 290. 1861.

252. Real estate owned by a railway company which is not used or occupied for its necessary purposes, is liable to taxation, notwithstanding the corporation pays a tax on its capital stock, and is exempted by its charter from further taxation. *State v. Newark*, 1 Dutcher (N. J.), 315. 1855.

253. — A charter of a railway company provided that the company should be subject to a certain specified tax, and that no other tax should be imposed; *held*, that such exemption extended to a tract of gravel land purchased to provide materials for the repair of its road, and also to a branch road connecting said gravel pits with its tramway. *State v. Hancock*, 6 Vroom (N. J.), 537. 1871.

254. *Somerville and Easton R. R. Co.* A supplement to the charter of the Somerville and Easton R. R. Co., provides that the company shall pay annually to the state treasurer "a tax of one-half of one per centum upon the cost of said road, as shown by the annual report of such cost made the year preceding." The report included, as required by law, the cost of the road and equipments. *Held*, that the company is only required to pay tax upon the cost of its road and its appendages, and is not bound to pay tax upon its engines, cars, boats, or other personal property. *State Treasurer v. Somerville and Easton R. R. Co.*, 4 Dutcher (N. J.), 21. 1859.

255. *Union Pacific R. R. Co.* The interest of the federal government in the Union Pacific R. R. Co. is not such as to exempt it from taxation by a state through which it is located.

Union Pacific R. R. Co. v. Lincoln County, 1 Dillon (8 U. S. C. C.), 314. 1871.

256. *Vermont Central R. R. Co.* The provision in the charter of the Vt. Cent. R. R. Co., that its property and effects shall be exempt from taxes is limited in its application to real estate, to such as the company was authorized to take by proceedings *in invitum*. *Vermont Central R. R. Co. v. Burlington*, 28 Vt., 193. 1855.

VIII. CONSTITUTIONAL LAW.

(See subdivision, VII of this title p. 751.)

257. **Change of rate.** The act of 1846, § 6 (Nix. Dig. 152), providing that every charter thereafter passed shall be subject to alteration, was, in legal effect, incorporated into the charter of the Warren R. R. Co., passed since, and § 8 of the act of 1862, altering the rate of taxation, was neither had faith or breach of contract. *State v. Person*, 3 Vroom (N. J.), 566. 1867.

258. — As a general proposition, there can be no doubt of the power of the legislature to repeal a temporary rate of taxation and impose another and higher rate, or additional taxes, by virtue of the state sovereignty over the whole subject of taxation, unless there has been some express contract in limitation of the power, upon a consideration deemed to be a part of the value of the grant or the charter. *State to use of Pacific R. R. Co. v. Dulle*, 48 Mo., 282. 1871.

259. **Double taxation** is not unconstitutional. *State v. Newark*, 1 Dutcher (N. J.), 315. 1855.

260. **Rolling stock.** A tax for the use of locomotives and cars being not merely a police regulation but an expedient for raising revenue involves a tax upon the passengers and freight transported and is unconstitutional as interfering with commerce between the states. *Minot v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 2 Abbott (U. S. C. C.), 323. 1870.

261. **Uniformity.** A state revenue law is not unconstitutional merely because there is a want of uniformity between the particular laws prevailing in the several counties, with regard to the enforcement of the payment of delinquent taxes. *People v. Central Pacific R. R. Co.*, 43 Cal., 398. 1872.

Foreign Corporations -- Street Railways.

IX. MUNICIPAL CORPORATIONS.

262. Depot grounds. The depot grounds of the plaintiff, being used for business purposes, and bounded in part by the streets of Mt. Pleasant, though not a part of any addition, or a subdivision of any addition to said city, and though not in the map referred to in § 1 of the act incorporating the city, are within the limits of the corporation and subject to taxes for the improvement of its streets and sidewalks. *Burlington and Missouri River R. Co. v. Mt. Pleasant*, 12 Ia., 112. 1861.

263. Rolling stock. The city of Davenport has no power under § 1, article 5 of its charter, to levy taxes for municipal purposes upon the rolling stock of a railway company, which has its principal place of business and a portion of its road within the corporate limits of the said city, such rolling stock being used by the corporation along the line of the road beyond as well as within the limits of the city. *Davenport v. Mississippi and Missouri R. R. Co.*, 16 ib., 348, 1864; *Dubuque and Sioux City R. R. Co. v. Dubuque*, 17 ib., 120.

264. — The court being equally divided on the question as to the power of the city to levy taxes upon the real estate of the company within its limits, the judgment of the court below in favor of such right stands affirmed. *Ib.*

X. FOREIGN CORPORATIONS.

(See *ante* 738, subdivision II of this title.)

265. Constitutional law. A law for revenue, laying a distinctive tax on the business of foreign corporations habitually doing business in New Jersey, such business consisting of the transportation of goods *in transitu*, from state to state, and the tax being graduated by the weight of the goods and the number of the passengers carried, is an infringement of the clause of the constitution of the United States giving to congress the regulation of commerce between the several states. *Erie R. R. Co. v. The State*, 2 Vroom (N. J.), 531, 1864; overruling *State v. Delaware, Lackawanna, etc., R. R. Co.*, 1 ib., 473, 1864.

266. Effect of authority to hold real estate. A foreign corporation upon which has been conferred by the legislature of New Jersey the power to purchase and hold lands in

that state, does not, by reason of such legislative action, lose its foreign and acquire a domestic character. *State v. Delaware, Lackawanna, etc., R. R. Co.*, 1 Vroom (N. J.), 473. 1864.

267. Ferry boats belonging to a New York railroad corporation engaged in plying between New York and Jersey City, are not subject to taxation in New Jersey. *State v. Haight*, ib., 428. 1863.

268. Lands owned by nonresidents. Assessors have no authority, by the statute, to insert in the assessment rolls the names of nonresident owners of real estate. In the case of a nonresident the land is to be assessed without naming the owner. *New York and Harlem R. R. Co. v. Lyon*, 16 Barbour (N. Y.), 651. 1853.

269. — The collector cannot levy a tax upon any personal property of nonresidents; inasmuch as his warrant only authorizes him "in case any person named in the assessment roll shall refuse or neglect to pay his tax, to levy the same by distress and sale of the goods and chattels of such person." *Ib.*

270. Stock. Where a foreign railway company, under a contract with a company, chartered in Indiana, constructs, equips and operates a portion of the line of the latter company, in said state, the stock in the road, so constructed, must be regarded as vested in the company under whose charter it was built, and cannot be assessed against the foreign corporation for taxation; nor can the road bed, in such case, be assessed as real estate against the foreign corporation, and the rolling stock as personal property, since the statute requires it all to be assessed as corporation stock. *Michigan Central R. R. Co. v. Porter*, 17 Ind., 380. 1861.

XI. STREET RAILWAYS.

271. License. An ordinance imposing a license duty upon city cars, for revenue purposes only, is not an ordinance for police and internal government. *Mayor, etc., of N. Y. v. Third Avenue R. R. Co.*, 33 N. Y., 42, 1865; *Mayor, etc. of N. Y. v. Second Avenue R. R. Co.*, 32 N. Y., 261, 1865; see *Same v. Same*, 12 Abbott's Pr. (N. Y.), 364, 1861; *Same v. Same*, 31 Barbour (N. Y.), 41, 1861; see *Same v. Same*, 21 Howard's Pr. (N. Y.), 257, 1861; 28 ib., 582, 1865.

General Matters.

272. — The imposition of an annual tax by such city upon a railroad company, for purposes of revenue merely, is void. *Ib.*

273. — Under the act of April 2, 1850, the city of Philadelphia may impose a license tax upon street railway cars. *Railway Co. v. Philadelphia*, 6 Philadelphia Rep. (Penn.), 238. 1867.

274. — The payment of a tax or license of \$25 on each car employed by the Louisville City R. R. Co., to the city, as required by the contract between the company and the city, in which certain franchises are secured to said company, does not exonerate the company from the payment of an *ad valorem* tax on its property for municipal purposes. *Louisville City R. R. Co. v. Louisville*, 4 Bush (Ky.), 478. 1868.

275. Personal Property. A street railroad company is not liable to tax for horses or other personal property used in and necessary for the prosecution of its business. *Middlesex R. R. Co. v. Charleston*, 8 Allen (Mass.), 330. 1864.

XII. GENERAL MATTERS.

276. Equalization. The statutes of Nevada in relation to the equalization of taxes — construed. *Virginia and Truckee R. R. Co. v. Ormsby County*, 5 Nev., 341. 1870.

277. Indian Reservation. Where a railroad company, under the acts of 1836, ch. 316, contracts with the chiefs of a nation of Indians, for the right to construct its road upon the land of such Indians; the contract giving the company the right to make and use its road upon such land, without any limitation of time as to the enjoyment of the right; although the fee of the land is not vested in the company, yet such land is "owned" by the company, within the contemplation of the section of the revised statutes touching taxation. *People v. Beardsley*, 52 Barbour (N. Y.), 105, 1868; *Same v. Same*, 41 N. Y., 619, 1860.

278. Jurisdiction. Where a portion of the stockholders are citizens of other states, they may seek relief against illegal state taxation from the circuit court of the United States. *Paine v. Wright and the Indianapolis and Bellefontaine R. R. Co.*, 6 McLean, 395. 1855.

279. — And in such case, the corporation doing business in the state may be made defendant. *Ib.*

280. Lease. Where a railway company occasionally runs its trains under a mere easement or license from another company over the road of the latter company, the former company will not thereby become liable for taxation in the county in which the road thus used is situated. *Cook County v. Chicago, Burlington and Quincy R. R. Co.*, 35 Ill., 460. 1864.

281. — It seems that a railway company cannot lease its property and make a provision for the entire rents and profits to go to its creditors and corporators without making any provision for the payment of taxes. *Silverthorne v. Warren R. R. Co.*, 4 Vroom (N. J.), 173. 1868.

282. — There is no legal magic whereby a corporation can turn over the earnings of its property to its stockholders in the shape of dividends, leaving its debts unpaid. *Same v. Same*, 4 ib., 372. 1869.

283. Limitations. The right to assess or coerce assessments is not affected by the statute of limitations. *Louisville and Nashville R. R. Co. v. Commonwealth*, 1 Bush (Ky.), 250. 1866.

284. Mortgage; nonresident. A mortgage executed by a railway company on its depot grounds, road and rolling stock situated in this state, is not subject to taxation when the holder or owner of the mortgage is a non-resident. Ch. 152, laws of 1854. *Davenport, City of, v. Mississippi and Missouri R. R. Co.*, 12 Iowa, 539. 1861.

285. — Mortgages before foreclosure are choses in action, and attach to the person of the holder, and are taxable at the place of his domicile. *Ib.*

286. Proceedings against collector; pleading. A petition by a railroad company against a city collector for wrongfully levying on plaintiff's property to satisfy a tax, when the pleading only attacks the form and manner of making the assessment, but sets out no facts showing that the assessment was void, is bad on demurrer. If the city had jurisdiction over the subject matter, that would amount to a protection of the officer in executing his process. *Mayor of Jefferson to use of Pacific R. R. Co. v. Opel*, 49 Mo., 190. 1872.

287. Recovery of taxes erroneously paid. Taxes paid with a knowledge of all the facts, and without protest, cannot be recovered back by the party making the payment. *New York*

Miscellaneous.

and *Harlem R. R. Co. v. Marsh*, 12 N. Y., 308. 1855.

288. — In an action brought against the ordinary of a county for taxes alleged to have been illegally collected from the plaintiff, the declaration must set forth the facts showing such illegality. *Montgomery and West Point R. R. Co. v. Duer*, 46 Ga., 272. 1872.

289. **Repeal of law.** A statute authorizing the laying of a tax was repealed after an assessment of such tax, but before its collection; *held*, that the repeal did not prevent the collection of such tax—such collection being regulated by the general tax law, which remained unrepealed. *Belvidere v. Warren R. R. Co.*, 5 Vroom (N. J.), 193, 1869; *Warren R. R. Co. v. Belvidere*, 6 ib., 584. 1871.

290. **Special tax.** The levy of a special tax for purposes not authorized by the legislature, is void. *Allen v. Peoria and Bureau Valley R. R. Co.*, 44 Ill., 85. 1867.

291. **Subscriptions to stock by counties.** A railroad cannot, to any extent, be liable to be taxed by a county to pay the subscription of such county for the purpose of completing the construction of the road. The object of such a county tax would be inconsistent with the obligation of the county to pay a specific sum for stock in the railroad, to aid other stockholders to make and equip the road. *Applegate v. Ernst*, 3 Bush (Ky.), 648. 1868.

TELEGRAPHIC DISPATCHES.

See CONTRACTS.

1. **Contracts by telegraph.** Where a telegraphic communication is relied on to establish a contract, it must be proved as other writings are by the production of the original. If that is lost, then it may be proved by a copy, or, if there is none, then by oral testimony. *Durkee v. Vermont Central R. R. Co.*, 29 Vt., 127. 1856.

2. — The original, where the person to whom it is sent takes the risk of its transmission, or is the employer of the telegraph, is the message delivered to the operator. But where the person sending the message takes the initiative, so that the telegraph is to be regarded as his agent, the original is the message actually delivered at the end of the line. *Id.*

TELEGRAPH LINES.

1. **Constitutional law.** The act of the general assembly of Georgia, approved August 26, 1872, entitled "an act to empower and authorize telegraph companies in this state to construct their lines upon the right of way of several railroad companies in this state" is unconstitutional and void, for the reason that it fails to provide any compulsory process for the enforcement of the payment of just compensation for private property taken under its provisions. *Southwestern R. R. Co. v. Southern, etc., Telegraph Co.*, 46 Ga., 43. 1872.

TENANTS IN COMMON.

1. **License.** Although a corporation have a license from one tenant in common, ejectment will lie by the other tenant for land occupied by it for a purpose not authorized in its charter. *Cumberland Valley R. R. Co. v. McLanahan*, 59 Penn. St., 23. 1868.

TENDER.

See INJURIES TO DOMESTIC ANIMALS.

1. **Amount of tender.** If a party tender less than is due, he does so at his peril, though he may honestly believe that the amount tendered is all that is due the plaintiff. *Helphrey v. Chicago and Rock Island R. R. Co.*, 29 Ia., 480. 1870.

2. **Pleading.** If an answer setting up a tender has been accepted and treated as part of the pleadings, it will be held as sufficient, although the money has not been paid into court. *Roosevelt v. New York and Harlem R. R. Co.*, 45 Barbour (N. Y.), 554, 1866; *Same v. Same*, 30 Howard's Pr. (N. Y.), 226, 1866.

TERMINUS.

1. **Charter.** The charter of a railway company authorized it to construct its road "from Charleston," etc.; *held*, that the company had

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no authority to enter the city, but that the boundary of the city was the *terminus a quo*. *Northeastern R. R. Co. v. Payne*, 8 Richardson's Law (So. Car.), 177. 1855.

TEXAS CATTLE LAW.

1. Statute. The prohibition of the Texas cattle act is against driving through the state, at any time, such Texas cattle as have been brought into the state between the first days of March and December, and not against driving through the state between the first days of March and December, any Texas cattle, no matter when they were brought into the state. *Kansas Pacific R. R. Co. v. McCoy*, 8 Kan., 538. 1871.

THEFT.

See BAGGAGE; CARRIAGE OF MERCHANDISE.

TICKET AGENT.

See TICKETS.

1. Conversion. Where the intestate before his death deposited with the defendants as brokers, \$675.75 as ticket agent of a railway company, which money was mingled with that of the defendants and became undistinguishable, and the defendants, a few days subsequent to the death of the intestate, paid over to the company an equivalent amount, taking an indemnity, it was *held*, on an equitable accounting, by which a balance of \$150 only was found to be due the company, that the payment over to the extent of the remainder was in law a conversion of the money by the defendants; and the company, having no just right, either legal or equitable, to it, could give no valid discharge on its receipt. *James v. Adams*, 22 Howard's Pr. (N. Y.), 409. 1859.

TICKETS.

See BAGGAGE; CONDUCTOR; COUNTERFEITING; INJURIES TO PASSENGERS.

1. Checks. The effect of a stipulation that a check should be invalid if detached from the

ticket—considered. *Hamilton v. New York Central R. R. Co.*, 51 N. Y., 100. 1872.

2. Classes of tickets. A rule of a railway company, restricting to special trains the holders of a class of tickets which nevertheless purport to entitle them to passage on any regular train, does not warrant the exclusion from a regular train of the holder of such a ticket taking passage thereon by virtue of it, without notice of the rule. *Maroney v. Old Colony and Newport R. R. Co.*, 106 Mass., 153. 1870.

3. Commutation. Holders of commutation tickets may be required to show their tickets, and if the ticket is not shown, fare may be exacted without rendering the company liable to refund it. *Bennett v. Railroad Co.*, 7 Philadelphia Rep. (Penn.), 11. 1868.

4. — A person buying a commutation ticket and giving his receipt therefor, is bound by the terms of his contract, and in case of the loss of his ticket, he may be compelled to pay the regular fare, the terms of his contract requiring that he should show his ticket. *Ripley v. New Jersey R. R. Co.*, 2 Vroom (N. J.), 388. 1866.

5. Coupons. Where a city railway company is authorized, under the United States revenue act, to issue tickets in multiples of twenty, to the price of which an amount equal to the revenue tax is added; and where they issue a main ticket signed by their principal officers, to which is attached twenty coupon tickets, the main ticket containing a notification that each ticket attached entitles the owner to one ride in the company's cars, and that the conductor alone is authorized to tear off the tickets; *held* that this regulation being a reasonable one, no passenger having such a main ticket, with coupon tickets attached, is authorized to detach the latter from the main ticket and present it to the conductor, and at the same time refuse to show the main ticket. In such case, he may be properly ejected from the cars. *Walker v. Dry Dock, etc., R. R. Co.*, 33 Howard's Pr. (N. Y.), 327. 1867.

6. Excursion tickets. An excursion ticket good upon its face for a certain day, will not entitle the holder to travel upon a different day, and a refusal to pay fare in such case will justify the expulsion of the passenger. *McElroy v. Railroad Co.*, 7 Philadelphia Rep. (Penn.) 206. 1870.

7. Extra charge for failure to buy ticket

Freight Trains—Over Separate Roads.

It is a reasonable regulation for a railway company to charge ten cents more fare for those persons who fail to buy tickets, than for those who procure tickets before entering the cars. But the company must give reasonable facilities for the purchase of tickets. *Du Laurans v. St. Paul and Pacific R. R. Co.*, 15 Minn., 49, 1870; *St. Louis, Alton and Chicago R. R. Co. v. Dalby*, 19 Ill., 353, 1857; see *St. Louis, Alton and Terre Haute R. R. Co. v. South*, 43 ib., 176, 1867.

8. — Railway companies are required to keep open their office for the sale of tickets to passengers for a reasonable time before the departure of each train, and up to the time fixed by its published rules for its departure, and not up to the time of actual departure. *St. Louis, Alton and Terre Haute R. R. Co. v. South*, 43 Ill., 176. 1867.

9. — A passenger on the N. Y. Central Railroad, who applies at the ticket office just in time to buy his ticket and get on board of the train in safety before its actual departure, and who fails to procure a ticket in consequence of the temporary absence of the ticket agent, cannot be charged an extra rate of fare. *Porter v. New York Central R. R. Co.*, 34 Barbour (N. Y.), 353. 1861.

10. — The good faith of the conductor in demanding the extra fare will not relieve the company from the penalty of extortion. *Ib.*

11. — Passengers who neglected to purchase tickets at stations, before embarking on cars, may be charged additional fare, if proper conveniences and facilities are furnished them for procuring tickets. *Chicago, Burlington and Quincy R. R. Co. v. Parks*, 18 Ill., 460, 1857; see *St. Louis, Alton and Terre Haute R. R. Co. v. South*, 43 ib., 176, 1867; *Chicago and Alton R. R. Co. v. Flagg*, 43 ib., 364.

12. — If a passenger pays only from one station to another, without a ticket, he may be compelled to pay an extra charge at each station. *Ib.*

13. — So long as a passenger upon a railway shall comply with the reasonable regulations of the company, he has the right to remain there, and to be carried over the road. *State v. Chovin*, 7 Iowa, 204. 1858.

14. — If, while thus complying with the regulations, the conductor, officers and agents, or servants of the company shall eject him from the cars, they will be liable to a crimi-

nal prosecution, and the company will be answerable for all damages sustained. *Ib.*

15. — The company has the right to make all reasonable regulations to guide and govern its agents in the discharge of their duties, and for the conduct of passengers. *Ib.*

16. — The company may charge one rate of fare to those passengers who purchase tickets before entering the cars, and exact an additional sum of those who neglect to do so, and such regulation is reasonable. *Ib.*

17. — A passenger who has not purchased his ticket before entering the cars, and who refuses to pay the additional fare exacted on the train, may be expelled from the cars with no unnecessary violence. *State v. Gould*, 53 Me., 279. 1865.

18. — Under ch. 228, laws of 1857, a railway company must keep its ticket offices open during a specified time, and if it fails to do this, it cannot demand extra fare on account of the failure of a passenger to purchase a ticket. If in such a case, the extra fare is demanded and received, the company is liable to the penalty provided by the statute in case of illegal charges. *Nellis v. New York Central R. R. Co.*, 30 N. Y., 505. 1864.

19. — It is a reasonable regulation for a railway company to fix its rates of fare by a tariff posted at its stations, and to allow a uniform discount on these rates to those who purchase tickets before entering the cars. *State v. Gould*, 53 Me., 279. 1865.

20. Freight trains. A passenger who knowingly disregards the rule requiring tickets to be purchased before taking passage upon a freight train is upon the same footing with one who refuses to pay fare, and may be expelled at any regular station. *Chicago and Alton R. R. Co. v. Flagg*, 43 Ill., 364, 1867; *Illinois Central R. R. Co. v. Nelson*, 59 ib., 110, 1871.

21. Over separate roads. Where a passenger bought tickets of a railroad agency in Buffalo, one from Buffalo to Stratford in Canada over the B. and L. H. R. R., and the other from Stratford to Detroit over the defendant's road, and after a delay of two months, from the time of using the former ticket commenced his journey from Stratford to Detroit on the second, it was held that, although printed on the same piece of paper, yet, as they contained no restrictions, they were distinct contracts and

 Passengers must show Tickets — Stopping Off.

vouchers for separate journeys, and the validity of the last ticket was not affected by the delay. *Brooke v. Grand Trunk R. R. Co.*, 15 Mich., 332. 1867.

22. — A through ticket on three several distinct lines of passenger transportation, issued in the form of three tickets on one piece of paper, and recognized by the proprietors of each line, is to be regarded as a distinct ticket for each line. *Knight v. Portland, Saco and Portsmouth R. R. Co.*, 56 Maine, 234. 1868.

23 — The rights and obligations with reference to such ticket are the same as if three separate and distinct tickets had been purchased from the respective lines. *Ib*; *Milnor v. N. Y., and New Haven R. R. Co.*, 4 Daly (N. Y.), 355. 1873.

24. **Passengers must show tickets.** A railway company has the right to require a passenger to purchase his ticket, and present it when demanded, as evidence of his title to a seat, and the conductor is justified in compelling him to leave the cars whenever he refuses so to do. *Baltimore and Ohio R. R. Co. v. Blocker*, 27 Md., 277. 1867.

25. **Rules.** Passengers being obliged to conform to the regulations prescribed by carriers, so far as to enable them to avoid imposition, a corresponding duty is imposed upon the latter to show all becoming courtesy towards the former, in demanding the evidence of their compliance with such rules. *Ib*.

26. **Stopping off.** A passenger having purchased a "through ticket" has no right without the assent of the company, to stop at a way station and demand a check for the continuation of his journey by a subsequent train. *State v. Overton*, 4 Zabriskie, (N. J.), 435. 1854.

27. — A railway ticket stating on its face to be from one station named to another station named, does not import a right to make the journey between the stations, by different trains. *Oil Creek and Allegheny R. R. Co. v. Clark*, 72 Penn., St., 231. 1872.

28. — Where the rules of a railway company require that its conductors shall tear off from the passengers' tickets a letter off the corner indicating the division of the road, and if the passenger desires to stop over at an intermediate station, the conductor is required to endorse a permission to that effect upon the ticket, and a passenger stopped off at an inter-

mediate station without such indorsement upon his ticket, it was *held*, that such passenger presenting such ticket upon a subsequent train might be lawfully compelled to pay fare and to be ejected from the cars upon a failure to do so. *Beebe v. Ayers*, 28 Barbour, (N. Y.), 275. 1858.

29. — A passenger having a "stop-off" ticket cannot require a train to be stopped at a station not on its time table. *Dietrich v. Pennsylvania R. R. Co.*, 71 Penn. St., 432. 1872.

30. — A passenger bought a "drover's ticket, on a railway, at half the regular price," good only in his hands, for one seat from Philadelphia to Pittsburgh, from March 11th to 16th. He went to Lancaster on the train, got off there, got on another train the next day; a conductor put him off, and afterwards allowed him to proceed; was put off by another who had afterwards taken charge of the train; at Altoona he entered again, paid his fare to prevent being put off, and proceeded to Pittsburgh. *Held*, that the face of the ticket did not import a right to stop off, and the passenger had no cause of action against the company for his ejection. *Dietrich v. Pennsylvania R. R. Co.*, 71 Penn. St., 432. 1872.

31. **Surrender of tickets.** A passenger who exhibits his ticket, need not surrender it until he has been furnished with a seat. But where A. bought a ticket at W., and upon entering the cars, could not obtain a seat, and refused to surrender his ticket, and at F., he obtained a seat and tendered his fare from F. to his place of destination, which was refused, and he was ejected from the train, it was *held*, that as he had brought suit upon the undertaking to be carried from W., he could not recover; although it might have been otherwise if he had based his action upon the new contract based upon the tender at F. *Davis v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 53 Mo., 317. 1873.

32. — A rule requiring passengers to surrender their tickets to the conductor, when called for, is a reasonable one, and may be enforced. *Illinois Central R. R. Co. v. Whittemore*, 43 Ill., 420, 1867; *Northern R. R. Co. v. Page*, 22 Barbour (N. Y.), 130, 1856.

33. — His refusal to deliver up his ticket or pay his fare to the conductor, when it is demanded, will justify his expulsion from the

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cars. *Northern R. R. Co. v. Page*, 22 Barbour (N. Y.), 130, 1856.

34. — And where the passenger, with knowledge of such rule or custom, purchases a ticket, the law will presume that he does so in reference to the custom. *Ib.*

35. — And if he leaves the cars without giving up his ticket, or paying for his passage, an action will lie against him for the amount of his fare. *Ib.*

36. — The contract, on the part of the railroad company is, that it will carry the passenger over its road, provided he surrenders his ticket to the conductor when it is demanded. *Ib.*

37. **Time.** A common carrier of passengers may, by contract, provide that a passage shall be made within a time specified, and in one continuous trip. *Barker v. Coffin*, 31 Barbour (N. Y.), 556. 1860.

38. — A ticket, indorsed as good for a certain day only, will be held good only for that date, and the employés of a railway company may lawfully expel a passenger who after that date presents such ticket and refuses to pay fare. *Elmore v. Sands*, 54 N. Y., 512, 1873; *Boice v. Hudson River R. R. Co.*, 61 Barbour (N. Y.), 611, 1872.

39. — Any verbal declaration of the company's ticket agent, made subsequent to the purchase of such ticket, is not admissible in evidence. *Boice v. Hudson River R. R. Co.*, 61 Barbour (N. Y.), 611. 1872.

40. — A railway passenger ticket which is dated and bears upon its face a printed statement, "good only two days after date," has no validity after the expiration of the two days. *Boston and Lowell R. R. Co. v. Proctor*, 1 Allen (Mass.), 267. 1861.

41. — The words, "good this trip only," upon a railway ticket, will not limit the undertaking of the company to any particular day, or any specific train of cars. They do not relate to *time*, but to a *journey*; and if the ticket has not been used, it entitles the holder to a passage on a subsequent day, as well as on the day it bears date. *Pier v. Finch*, 24 Barbour (N. Y.), 514. 1857.

42. — The condition — "good for this day and train only," upon a ticket, *held*, under the circumstances of this case, to justify a railroad company in refusing to carry a passen-

ger on such ticket after the expiration of the time limited by such condition; the ticket being good over more than one road, and having been purchased at a lower rate than separate tickets over such road could have been purchased, *Shedd v. Troy and Boston R. R. Co.*, 40 Vt., 88. 1868.

43. — A railway ticket is good for six years by the statutes of Maine. The Grand Trunk R. R. Co. of Canada is a foreign corporation, and its charter imposes no restrictions upon the legislative authority of Maine. Therefore it is liable, under the lease of the A. and St. L. R. R. Co., not only to the laws in force at the time the lease was made, but also to such as might be subsequently enacted. The company cannot issue a ticket which shall be good for one day only. *Dryden v. Grand Trunk R. R. Co.*, 60 Me., 512. 1872.

TIDE WATER.

See CHARTER, INJUNCTION.

TIME.

1. **Change of time.** Railway companies, by advertising the hours when trains will start, agree with holders of tickets that trains shall start at the hours named; but with an implied reservation of power to change the hours, upon giving reasonable notice. *Sears v. Eastern R. R. Co.*, 14 Allen (Mass.), 438. 1867.

2. — If the hours at which such trains will start have been advertised in public newspapers, it is not giving reasonable notice of a change of the hour of any particular train, to post up hand bills announcing it at the stations and in the cars of the company; and if no other notice is given, one who has bought tickets by the package, in advance, and in accordance with the advertisement, has present-ed himself at the station to be carried before the appointed hour for a train to start, without knowledge of the change, may recover damages for the injury sustained by him from the delay. *Ib.*

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TIME TABLE.

1. Evidence. The time at which trains should be run, may be proved otherwise than by the time table. *Chicago, Burlington and Quincy R. R. Co. v. George*, 19 Ill., 510. 1858.

TITLE.

See CONVEYANCE; EJECTMENT; EMINENT DOMAIN; REAL ESTATE; MORTGAGE.

1. Evidence. The record of a town meeting, held in 1802, in which it appeared that the town had of E. S. certain lands used as a town landing, and the mode in which the town "had the land of E. S.," not appearing, it was *held*, that there was not sufficient evidence of title to sustain trespass. *Inhabitants of Vassalborough v. Somerset and Kennebec R. Co.*, 43 Me., 337. 1857.

2. Particular case. The question of title determined upon the facts of the case. *Jackson v. Boston and Worcester R. R. Co.*, 1 Cushing (Mass.), 575. 1848.

TORTS.

See AGENCY; ASSAULT AND BATTERY; INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; PLEADING.

1. Joint torts. Suit may be brought against joint tortfeasors, either jointly or severally, but there can be but one satisfaction. *North Pennsylvania R. R. Co. v. Mahoney*, 57 Penn. St., 187. 1868.

2. Pleading. In an action for torts by incorporated companies, the correct mode of pleading is, to show a case in the declaration to all appearance standing aloof from the statutory right of the company, but if a color of right to do the act in question is shown in the company, then the abuse of such right must be laid. *Stephens and Condit Transportation Co. v. Central R. R. Co.*, 4 Vroom (N. J.), 229. 1869.

TRANSFER OF CORPORATE PROPERTY.

1. Gift. A corporation cannot give away its effects to the prejudice of its creditors. A court of equity will follow the trust fund into the hands of others than *bona fide* creditors and purchasers. *Powell v. North Missouri R. R. Co.*, 42 Mo., 63. 1867.

2. Stockholders' rights. A single stockholder has no right to object to a transfer of all property of the corporation to another company, under the authority of an act of assembly. *Lauman v. Lebanon Valley R. R. Co.*, 30 Penn. St., 42. 1858.

3. — He cannot, however, in any way be compelled to take stock in the company to which the property is transferred, in lieu of his stock in the former company. *Ib.*

4. — Such transfer cannot be made without giving security for the interest of the dissenting stockholder. *Ib.*

TRANSPORTATION COMPANIES.

See CARRIAGE OF MERCHANDISE.

TREASURER.

1. Bond. The condition of a bond given by the treasurer of a railway company that he "shall faithfully discharge the duties of the office, and well and correctly behave therein," does not bind him to keep the money of the company safely against all hazards. Hence where the treasurer deposited the money of the company to his credit as such, in a bank which was at the time in good standing and credit, and was considered by the community a safe place of deposit for moneys, it was *held*, that he and his sureties were not responsible for its loss by the sudden and unexpected failure of the bank. *Atlantic and North Carolina R. R. Co. v. Cowles*, 69 N. C., 59. 1873.

2. The duty of a treasurer is to keep the moneys of his principal distinct from his own, unless it is otherwise agreed, and to pay any balance due, on demand. *Second Avenue R. R. Co. v. Coleman*, 24 Barbour (N. Y.), 300. 1857.

Blasting Rocks — Right of Way Proceedings.

TRESPASS.

See CONTRACTORS; EMINENT DOMAIN; EJECTMENT; FENCES; FORCIBLE ENTRY AND DETAINER; HIGHWAY; INJURIES TO DOMESTIC ANIMALS; WHARVES.

1. Blasting rocks. Where a railway company caused stones to be thrown upon plaintiff's land by blasting, and failed to remove the same within a reasonable time, *case* and not *trespass* is the proper remedy. *Sabin v. Vermont Central R.R. Co.*, 25 Vt., 363. 1853.

2. Breach of condition. A mere trespasser cannot defend against the grantee of an estate by invoking a supposed right of the United States to enter for a breach any condition in the conveyance of the estate. *Kennett v. Plummer*, 28 Mo., 142. 1859.

3. Color of title. One who enters upon land in good faith, and makes permanent improvements, believing himself to be the owner of the land, is not a trespasser, and he is entitled to all legal protection to improvements and property placed upon the premises, given by the statute to parties in possession under color of title. *Mississippi and Tennessee R. R. Co. v. Devaney*, 42 Miss., 555. 1869.

4. Consent. When an individual consents that a railway may be constructed through his land, it is not a trespass for the company to enter, and any instruction to that effect is erroneous. *Louisville and Nashville R. R. Co. v. Thompson*, 18 B. Monroe (Ky.), 735. 1857.

5. Conversion. The wrongful possession and conversion of the property of a corporation does not differ from any other trespass or tort, for which the sufferer has a remedy at law. *York and Cumberland R. R. Co. v. Myers*, 41 Maine, 109. 1856.

6. Damages. In an action of trespass for damages for wrongfully entering upon lands and taking and carrying away the soil, etc., the proper measure of damages is not the actual damage sustained, but the value of the land removed. *Mueller v. St. Louis and Iron Mountain R. R. Co.*, 31 Mo., 262. 1860.

7. Exemplary damages. Whether the plaintiff can in any case recover exemplary damages in an action for trespass to real property, *quære?* *Armstrong v. Iowa Falls and Sioux City R. R. Co.*, 34 Ia., 502. 1872.

8. — Exemplary damages may be given in an action of this character. *Greenville and*

Columbia R. R. Co. v. Partlow, 14 Richardson's Law (So. Car.), 237. 1867.

9. Former recovery. Where, in an action against a railway company for trespass, "resulting from the construction of the road," the parties agreed to "submit to the jury to find the full amount of the past, present and future damages from matters charged in the declaration," and agreed that, "no further action should be brought for the continuance of the matters mentioned in the declaration," and the proof was that a judgment had been rendered and paid; *held*, that this was a bar to any suit, for injuries by the washing of mud and sediment, brought by the party making this agreement. *Illinois Central R. R. Co. v. Allen*, 39 Ill., 205. 1866.

10. Joint trespasses. The rule of the common law, that, in an action of trespass against several defendants, a verdict and judgment might be rendered against one or more of them, has not been narrowed by the statute. *Louisville, etc. R. R. Co. v. Duvall*, 40 Ind., 246. 1872.

11. Pleading. An allegation of trespass to several closes is allowable. A single trespass may be committed on several closes. *Halligan v. Chicago and Rock Island R. R. Co.*, 15 Ill., 558. 1854.

12. — A corporation may maintain this action. *Greenville and Columbia R. R. Co. v. Partlow*, 14 Richardson's Law (So. Car.), 237. 1867.

13. — Trespass *quære clausum fregit* may be maintained against a railroad company or other private corporation. *Main v. Northeastern R. R. Co.*, 12 Richardson's Law (So. Car.), 82, 1859; *Dater v. Troy Turnpike and R. R. Co.*, 2 Hill (N. Y.), 629, 1842.

14. — This action is strictly personal, and may be brought anywhere, regardless of the place where the supposed injury happened. *Hannibal and St. Joseph R. R. Co. v. Mahoney*, 42 Mo., 467. 1868.

15. Right of way proceedings. In an action of trespass, the proceedings of the company procuring the condemnation for right of way are competent evidence, and cannot be impeached collaterally. All presumptions are in favor of the regularity of the proceedings. *Galena and Chicago Union R. R. Co. v. Pound*, 22 Ill., 399. 1859.

16. — A railway company is liable for trespass in entering upon and building its road

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upon the land of an individual without first making compensation. *Missouri, Kansas and Texas R. R. Co. v. Ward*, 10 Kan., 352, 1872; *Buffalo Bayou, Brazos, etc., R. R. Co. v. Ferris*, 26 Tex., 588, 1863; *Evansville, Henderson and Nashville R. R. Co. v. Grady*, 6 Bush (Ky.), 144, 1869.

17. — Ch. 76, laws of 1870, giving to the land owner the right to have his damages assessed where the railway has been built through his land, does not take away the remedies that the owner had before, *Atchison, Topeka and Santa Fe R. R. Co. v. Weaver*, 10 Kan., 344, 1872.

18. — In proceedings for taking land for railway purposes, the reception by the owner of the land of the money allowed by the commissioners on the condemnation, is not a waiver of a trespass committed by the unauthorized entry and occupancy by the agents of the road before the condemnation of the land had been perfected. *Powers v. Hurmert*, 51 Mo., 136, 152. 1872.

19. — In an action of trespass, brought by the owner of land against a railway company for entering upon his land and there constructing its road, the burden of proving a justification, that the land is covered by the authorized location of its road, is upon the defendant. *Hazen v. Boston and Maine R. R. Co.*, 2 Gray (Mass.), 574. 1854.

20. — A railway company which enters upon land for the purpose of constructing its road, before the expiration of the time limited by statute for filing its location, is liable as a trespasser, if the written location, subsequently filed, does not cover the land so entered upon. *Id.*

21. Subsequent purchasers of the land. Where the company takes possession of the land, and uses it without the consent of the owner, or payment of damages, it is liable to an action of trespass; but if a trespass is committed, it is against the owner of the land at the time it is taken, and an action of trespass will not lie in favor of a subsequent owner. *Central R. R. Co. v. Hetfield*, 5 Dutcher (N. J.), 206. 1861.

22. — A cause of action founded in tort, such as an entry into the lands of another, and the unlawful withholding from him the possession thereof, is personal to the tortfeasor, it dies with his person, and cannot at common

law be continued against his grantee by a transfer of his interest in such real property. *Mosely v. Albany Northern R. R. Co.*, 14 Howard's Pr. (N. Y.), 71, 1856.

23. Timber. A railroad company cutting trees upon the land of another, without the consent of the owner, is liable to the statutory penalty. *Mississippi Central R. R. Co. v. Whitehead*, 41 Miss., 225. 1866.

24. — Treble damages for trespass in carrying away railroad ties can only be recovered by the owner of the land. *Missouri, Kansas and Texas R. R. Co. v. Arnold*, 10 Kan., 473. 1872.

25. — The H. and St. J. R. R. Co. having entered upon the land of plaintiff to cut timber, under the provisions of its charter, the timber to be used in the construction of its road, held, that the company was not liable for treble damages, under the "act to prevent trespasses." *Lindell v. Hannibal and St. Joseph R. R. Co.*, 25 Mo., 550. 1857.

26. Venue. An action of trespass must be brought against a railway company in the county where its principal office is situated. *Georgia R. R. Co. v. Kirkpatrick*, 35 Ga., 144. 1866.

27. Willful act. An employer is not liable for the willful trespass of his servant. *Wesson v. Seaboard and Roanoke R. R. Co.*, 4 Jones' Law (N. C.), 379. 1857.

TRESPASSING ANIMALS.

See INJURIES TO DOMESTIC ANIMALS.

TRIAL.

See EMINENT DOMAIN; INSTRUCTIONS; JURY.

1. Instructions. The judge who tries a cause has no right to intimate in any manner his opinion as to the weight of the evidence. *Powell v. Wilmington and Weldon R. R. Co.*, 68 N. C., 395. 1873.

2. Interest of judge. A circuit judge having been of counsel in a cause pending in his court, set the same for trial before a judge of the supreme court, who appeared at the

Attached Property — Mistake.

time designated, being in regular term time, heard some arguments and made some orders therein as to making new parties, etc. The supreme judge not having appeared further in said cause, the same was again set for trial by the judge of the circuit court before a judge of another circuit. This was done by agreement of the parties, entered of record. The cause was accordingly heard before the judge last designated, who, after repeated adjournments, from time to time, and not within any regular term of said court, decided the same, and rendered judgment for plaintiff, over a motion for a new trial by defendants. *Held*, that the judgment thus rendered was valid and binding; that said judge last designated had full power under the act of March 1, 1855 (Acts 1855, p. 61), to adjourn the hearing of said cause from time to time, although some of said adjournments might have been to a day beyond the regular term of said court. *Cincinnati and Chicago R. R. Co. v. Rowe*, 17 Ind., 568. 1861.

TROVER.

See BAILMENTS; CARRIAGE OF MERCHANDISE; LAT-
ERAL RAILWAYS; MORTGAGE.

1. **Attached property.** The plaintiff caused a lot of lumber to be attached as the property of P., upon a writ against him, and had left a copy of the writ and return with the town clerk in the town where the lumber was situated. Afterward, P. employed the defendant company to transport this lumber for him, but before it was moved, the plaintiff notified the company of his attachment, and forbade it from moving the lumber. But the company moved it according to the contract with P. *Held*, that the company was liable to the plaintiff in trover for the lumber. *Johnson v. Grand Trunk R. R. Co.*, 44 N. H., 626. 1863.

2. **Bonds.** The plaintiff deposited with the defendant certain of the former's bonds, payable to bearer, to be held by the defendant upon the performance of a certain condition, for a specified purpose. This condition was not performed, but defendant, in good faith, claimed to hold the bonds for another purpose, and refused to surrender them, on demand. These bonds were never worth above par, but,

after their conversion by the defendant they greatly depreciated. The plaintiff brought trover for the bonds, alleging as damages the depreciation of the bonds; that it had been deprived of the means of negotiating them, and that it had been put to expense to raise means to relieve its property from attachment. Defendant offered to deliver the bonds to plaintiff after suit was brought, and to pay costs, and the court permitted the costs and bonds to be brought into court, and notified plaintiff that defendant would not be liable for subsequent costs unless a recovery of more than nominal damages was had above the face of the bonds. *Held*, that the court, under the circumstances, properly exercised its discretion in making such order. *Rutland and Washington R. R. Co. v. Bank of Middlebury*, 32 Vt., 639. 1860.

3. **Change of form.** Where property tortiously taken and converted can be identified, and a delivery can be had, the original owner is entitled to recover it, whatever change of form or addition to its value may have been made by the labor of the wrongdoer. *Weymouth v. Chicago and Northwestern R. R. Co.*, 17 Wis., 550. 1863.

4. **Demand.** A demand upon a director for ties, converted to the use of a railway company by the order of such director, is sufficient. *Dunham v. Troy Union R. R. Co.*, 1 Abbott's Ct. of Ap. Dec., 565. 1867.

5. **Fences.** Where railway contractors had control of a railway for the purpose of building it, and they took fence posts belonging to a third party and used them in erecting fences on the land of the railway company, it was *held*, that the company was liable for the value of the posts. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Kaulbrumer*, 59 Ill., 152. 1871.

6. **Mistake.** Through mistake of the plaintiffs, a lot of hides were carried by the defendant's servants to his tannery, and there appropriated and used for his benefit. Before the conversion, the defendant was notified that the hides were claimed as the property of another person; but no proof of the ownership was produced. In an action of trover for the hides, it was *held*, that this amounted to a conversion, and that the defendant was not entitled to an instruction to the effect that he was not liable unless before the conversion, he

Bills and Notes — Bonds.

had reasonably satisfactory proof that the hides were not his. *Cheshire R. R. Co. v. Foster*, 51 N. H., 490. 1871.

7. — An action of trover will lie against a carrier, who, through mistake, delivers goods to a wrong person. *Illinois Central R. R. Co. v. Parks*, 54 Ill., 294. 1870.

8. Pleading. Where the plaintiff sues for the unlawful taking and conversion of property, he cannot at the trial recover as upon an implied contract of sale and delivery. *Singleton v. Pacific R. R. Co.*, 41 Mo., 465. 1867.

9. Title. In trover by the party from whose possession property was taken, the defendant cannot defeat a recovery by showing title in a third person without connecting himself with that title. *Weymouth v. Chicago and Northwestern R. R. Co.*, 17 Wis., 550. 1863.

TRUST.

See MORTGAGE.

1. Bills and notes. If a person whose own note is deposited in trust for others, amongst whom its proceeds are to be divided, obtain possession of it without the consent of the *cestuis que trust*, an action for money had and received, brought against him in the name of the depository, by and for the benefit of one of those entitled to a share of the amount due on the note, is maintainable; nor can the suit be discontinued by the nominal plaintiff, or his assignee without the assent of the party in interest. *Penobscot R. R. Co. v. Mayo*, 60 Me., 806. 1872.

2. Bonds. The plaintiff loaned to defendant \$20,000, for which it gave its obligations payable at its office in New York; and to secure the payment of the same at maturity, according to agreement, forwarded to the plaintiff thirty-four "Land Grant Construction Bonds," of said defendant, of one thousand dollars each, to be held by the plaintiff as collateral security for the payment of the money loaned. The obligations of defendant were not paid but were protested. The plaintiff then sent the bonds to New York with directions to have them sold at the stock exchange at public outcry to the highest bidder, and directed a friend to look after plaintiff's interest. Upon due

notice to the defendant, the bonds were sold, as directed, and the whole of them bid in for plaintiff for the sum of \$5,477.86. In an action on the obligations to recover the balance due, after deducting the amount realized on the sale of the bonds; *held*, that the plaintiff had a right to sell the bonds. That the plaintiff could not become a purchaser at such sale. That the bonds must still be considered as held by plaintiff as collateral security only. That the defendant had a right to have the property resold. *Bank of the Old Dominion v. Dubuque and Pacific R. R. Co.*, 8 Iowa, 277. 1859.

3. — A party receiving from a president of a railway company, a bond given to the company, with an assignment in blank upon it, by such president, which purports to have been done by him as president by order of the board of directors, as collateral for an antecedent debt due from such president individually, is not such *bona fide* holder for value, without notice, as can hold the bond against the company. *Garrard v. Pittsburgh and Connellsville R. R. Co.*, 29 Penn. St., 154. 1857.

4. — A person purchasing with notice that the sale is a breach of trust, is *particeps criminis*, and is not a *bona fide* holder. *Ib.*

5. — Constructive notice is such evidence of notice, the presumption of which is so violent that the courts will not allow of it being contradicted. *Ib.*

6. — The onus of proving a new consideration is upon the party claiming to hold the bonds, and it is error to submit the question to the jury where there is no evidence given which would justify them in finding the fact. *Pittsburgh and Connellsville R. R. Co. v. Barker*, 29 Penn. St., 160. 1857.

7. — Where such bonds were pledged as collateral security for money previously deposited with the president as a banker, and no further time was given for the payment of the deposit, the certificates being retained by the depositor, and no change made upon the books of the banker — it was strong evidence that the deposits remained after the pledge of the bonds as before subject to immediate withdrawal. *Ib.*

8. — A railway company conveyed by deed forty-four tracts of land, each described, numbered and valued, to trustees, to secure the payment of bonds, issued by the former, and

Equity — Trustee Process.

put upon the market to raise money, reserving the power to sell any portion of the land at its valuation; and, upon the surrender by the company to the trustees of bonds equal in amount to the land sold, the latter were empowered to convey in fee. *Held*, that this was a power coupled with an interest, and required only a substantial compliance with its terms. *Roue v. Beckett*, 30 Ind., 154. 1868.

9. Equity. A court of chancery will take jurisdiction of a conventional trust, and direct its administration, on an application of the trustee or a party in interest, where there is any difficulty or complication likely to arise in the execution of the trust, or any question of dispute as to the powers or duties of the trustee, or as to the rights of the parties beneficially interested in the trust. *Northern Central R. R. Co. v. Keighler*, 29 Md., 572. 1868.

10. Fraud. If a *cestui que trust* be induced by fraud to discharge the trust, it must be considered as extinguished, so far as an innocent purchaser of the trust property is concerned, who buys relying on the discharge. *Penobscot R. R. Co. v. Mayo*, 60 Me., 306. 1872.

11. Lien upon trust fund. Where a railway company has assigned unpaid subscriptions to its stock to its president, in trust for certain purposes which have been fulfilled, and the company being insolvent, one of its judgment creditors brought an action under § 458 of the code, to subject the amount due on such unpaid subscriptions to the payment of his judgment, it was *held*, that as to the amount due on such subscriptions after the fulfillment of that trust and the payment of all costs and expenses of its administration, the trustee was not entitled to retain from such fund the amount of indebtedness of the company to him for his salary as president thereof, the plaintiff by his action having established a specific lien on the fund as against less diligent general creditors, and being entitled in equity to a preference over them in the distribution. *Dunbar v. Harrison*, 18 Ohio St., 24. 1868.

12. Mortgage. A contract to secure, by pledge or mortgage, will be enforced in equity. *Thornton v. St. Paul and Chicago R. R. Co.*, 45 Howard's Pr. (N. Y.), 416. 1873.

13. — All persons taking the property agreed to be given as such security, take it impressed with the trust. *Id.*

14. Pleadings. In an action by a creditor

to reach trust property in the hands of administrators or trustees, who have control of, and whose duty it is to protect, the property, the *cestuis que trust* need not be made parties. *Winslow v. Minnesota and Pacific R. R. Co.*, 4 Minn., 313. 1860.

15. — Trustees, in whom is vested the title to a trust fund, are the proper parties plaintiff in an action to maintain and defend the fund against wrongful attack or injury, tending to impair its safety or amount. Neither the *cestui que trust* nor beneficiaries can maintain such action against a third person, except in case the trustees refuse to perform their duty, and then the trustees should be made parties defendant. *Western R. R. Co. v. Nolan*, 48 N. Y., 513. 1872.

16. Purchasers with notice. Property to which a trust has attached will be subjected to the trust in the hands of a purchaser for value who has constructive notice of the trust. *Heth v. Richmond, Fredericksburgh and Potomac R. R. Co.*, 4 Grattan (Va.), 482. 1848.

[See *ante* 767, paragraphs 3, 4, 5, 6 and 7 of this title.]

17. Resulting trust. C., having been appointed the commissioner of construction, by the Buffalo, Corning and N. Y. R. R. Co., with power to negotiate for lands for the use of the company, entered into written contracts with the owners of five several parcels of land, for the purchase thereof by the company. He subsequently paid the purchase money out of funds furnished by the company, but, without the knowledge or consent of the company, took deeds from such owners, conveying the several parcels to L., a director of the company, which deeds he subsequently delivered to L. L. took no part in the negotiations for the purchase of the lands, nor did he know that he was the grantee in the deeds, until a considerable time after their delivery. L., having refused to convey the lands to the plaintiff, the successor to the rights of the railroad company, this action was brought to compel such conveyance. *Held*, that the railroad company, upon the execution of the five deeds to L., became seized of a legal estate in fee in the lands described in those deeds. *Buffalo, New York and Erie R. R. Co. v. Lampson*, 47 Barbour (N. Y.), 533. 1867.

18. Trustee process. No person can be charged as a trustee of a debtor if he is chargeable in equity to a third person as *ces-*

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tui que trust, whether he holds the property by right or by wrong. *Richards v. Merrimack and Connecticut River R. R. Co.*, 44 N. H., 127. 1862.

19. **Unborn beneficiaries.** Where lands are conveyed in trust for the benefit of third persons and their unborn children, the trustees and all beneficiaries living cannot reconvey the lands to the donor free of the trust. *Isham v. Delaware, Lackawanna, etc., R. R. Co.*, 3 Stockton's Ch. (N. J.), 227. 1856.

TRUST DEED.

See MORTGAGE.

1. **Money deposited to pay coupons.** The conveyance of a railway in trust to secure bondholders, with authority to the trustee, on default of the company in paying coupons, to take possession and run the road and collect the income, does not give title to money voluntarily deposited to the credit of the trustee for the payment of coupons, by the officers of the railway company, when the trustee has not taken possession of, or run the road, nor taken any action against the company by virtue of the trust deed. *Coe v. Beckwith*, 31 Barbour (N. Y.), 339, 1860; see *Same v. Same*, 19 Howard's Pr. (N. Y.), 398, 1860; 10 Abbott's Pr. (N. Y.), 296, 1860.

2. **Power of sale.** A power contained in a deed of trust to sell the trust property, "either for a price or consideration to be paid out and out in money, or upon the reservation of a ground rent," extinguishable or otherwise, is not well executed by a sale on credit, the purchase money to be secured by mortgage upon the premises. *Philadelphia and Reading R. R. Co. v. Lehigh Coal and Navigation Co.*, 36 Penn. St., 204. 1860.

3. — The parties having contracted a sale on credit, the purchase money to be secured by mortgage, payable by installments, a court of equity will not decree a conveyance reserving a ground rent, extinguishable at the times and in the proportions specified for the payment of the installments contracted to be secured by mortgage. Nor will the payment of the whole of the purchase money in cash be decreed. *Id.*

4. — Equity regards compensation in case

of defective execution, if the contract can be substantially executed, as equivalent to performance, but will not enforce a different contract from that entered into by the parties. *Id.*

5. — In case of the death of one of several trustees, a power of sale may be executed by the survivors. Act of May 3, 1855. *Id.*

6. — *Semble*, that trustees in such case are joint tenants, and on the death of one of them, the estate survives to the others. *Id.*

TRUSTEE PROCESS.

See GARNISHMENT.

TRUSTEES.

See MORTGAGE; QUO WARRANTO; TRUST; TRUST DEED.

1. **Railway stocks.** Where a trustee holds a fund which he is required to invest "according to his best skill and judgment," it is his duty to invest it in safe and productive securities, whose market value depend upon their income and not upon contingencies. Railway stocks in a contemplated railway are not such. *Kimball v. Reding*, 31 N. H., 352. 1855.

2. **Trustees operating a railway,** which they have bid in under a mortgage, are liable as common carriers. *Rogers v. Wheeler*, 43 N. Y., 598. 1871.

TUNNELS.

See BERGEN TUNNEL; HIGHWAY.

TURN OUT.

1. **Right to maintain switch.** The mere existence and use, for seventeen years, of a turn out from the main track of a railway company, chartered for general railway purposes, and the receipts by the company from the owner of the turn out for mending the same, do not give him an irrevocable right to maintain a frog and switch on such railway.

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Heyl v. Philadelphia, Wilmington and Baltimore R. R. Co., 51 Penn. St. 469, 1866.

2. — An incorporated company is only the trustee of the right of way for the commonwealth for the use of her citizens, and a permissive privilege from such company differs entirely from a privilege on private property by individuals, where the expenditure of money is to be attributed to a mutual understanding that the privilege should remain unaltered. *Ib.*

TURNPIKES.

See EMINENT DOMAIN; STREET RAILWAYS.

1. The Baltimore Turnpike Road Co. cannot recover in a special action on the case against the Baltimore and Ohio R. R. Co. for diversion of trade and travel from the turnpike, caused by the construction and operation of the railroad. *Washington and Baltimore Turnpike Co. v. Baltimore and Ohio R. R. Co.*, 10 Gill & Johnson (Md.), 392. 1839.

2. Crossing by railway. The legislature, in the exercise of the right of eminent domain, can empower a railway company to cross another railroad or turnpike road, on making compensation; and, whatever damage may result therefrom, the exercise of such a right cannot be considered as the condemnation of a franchise, nor the impairment of a contract within the meaning of the constitution of the United States. *Baltimore and Havre de Grace Turnpike Co. v. Union R. R. Co.*, 35 Md., 224. 1871.

3. Use of locomotives near turnpikes. The charter of the Camden and Amboy R. R. Co., authorizing the use of steam engines upon its road, the company is not responsible for the injury or disturbance resulting from the ordinary use of such engines near the road of a turnpike company previously incorporated. *Bordentown, etc., Turnpike Co. v. Camden and Amboy R. R. Co.*, 2 Harrison (N. J.), 314. 1839.

TURN TABLE.

See INJURIES TO EMPLOYEES.

USURY.

See MORTGAGE.

1. Bonds. A sale by a corporation of its bonds is a contract for the loan of money. It matters not what the form of a transaction may be where one party advances money to another, to be repaid at a future day, it is a loan; and if the sum to be repaid be greater than the sum advanced, with lawful interest, the contract is usurious, and will not be enforced, either at law or equity. *McGregor v. Covington and Lexington R. R. Co.*, 1 Disney (Ohio), 509. 1857.

2. — The law of Ohio, authorizing railroad companies to sell their bonds at a discount, is extended by comity to companies of other states authorized to transact business in Ohio. *Junction R. R. Co. v. Bank of Ashland*, 12 Wallace, 226. 1870.

3. — A corporation cannot plead usury to a bond payable in New York. Statute law there forbids it. *Ib.*

4. — Under the interest law of 1853, a corporation cannot interpose the defense of usury in any action in the state of Illinois. *American Central R. R. Co. v. Miles*, 52 Ill., 174. 1869.

5. — If a bond be not usurious by the law of the place where payable, a plea of usury cannot be sustained in an action thereon, unless it alleges that the place of payment was inserted as a device to evade the law of the place where the bond was made. *Junction R. R. Co. v. Bank of Ashland*, 12 Wallace, 226. 1870; *Butler v. Myer*, 17 Ind., 77. 1861.

6. — A. sold to B. two railway bonds of the Cincinnati and Chicago R. R. Co., payable at Cincinnati Ohio, bearing 10 per cent. interest. A. guaranteed the payment of the bonds, and subsequently took them up and gave in their place his own obligation to pay the principal and interest of the bonds. *Held*, that as 10 per cent. interest upon the bonds was not usurious in the state of Ohio, the guaranty of A. was also valid; and the subsequent agreement, being merely substituted as a security, was not tainted with usury. *Butler v. Edgerton*, 15 Ind., 15. 1860.

7. — Usury laws will not prevent the sale of securities at any price that the parties may agree upon. *Junction R. R. Co. v. Bank of Ashland*, 12 Wallace, 226. 1870.

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8. — Though the negotiation of one's own bond is ordinarily a loan, a sale thereof may be authorized by law, and it then becomes a question of fact whether the transaction was a loan or a sale. *Ib.*

9. — The giving of collateral security at the time of the negotiation is not inconsistent with the transaction being a sale. *Ib.*

10. — A clause in the charter of a corporation authorizing the company to borrow money "on such terms as might be agreed upon between the parties," empowers it to borrow at a rate of interest beyond that established by the general law. *Morrison v. Eaton and Hamilton R.R. Co.*, 14 Ind., 110. 1860.

11. Sureties. The "act to prohibit corporations from interposing the defense of usury in any action," passed April 6, 1850, is to the effect that as to the corporation, the statute of usury is *quasi* repealed; but not as to the contract of individual indorsers or sureties for such corporation. They are not necessarily restricted by their relation to the principal, to the defense which may be made available to the maker of a note. *Hungerford's Bank v. Potsdam and Watertown R. R. Co.*, 19 Howard's Pr., (N. Y.), 39, 1859; *Same v. Same*, 9 Abbott's Pr., (N. Y.), 124, 1858; 10 *ib.*, 24. 1859.

VALUE.

See BAGGAGE; CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; EVIDENCE; INJURIES TO DOMESTIC ANIMALS.

VENDOR AND VENDEE.

See CARRIAGE OF MERCHANDISE.

VENDOR'S LIEN.

1. Innocent purchasers. When a party sells goods to another, and delivers them, under circumstances which would authorize him to rescind the sale as against the vendee, yet, if before its rescission, the purchaser pledges them to an innocent party, as security

for an advance of money, such party will hold them, as against the vendor. *Ohio and Mississippi R. R. Co. v. Kerr*, 49 Ill., 458. 1869.

2. Possession. So long as the vendor does not part with the possession of the goods, his lien for the purchase money remains. *Thompson v. Baltimore and Ohio R. R. Co.*, 28 Md., 396. 1867.

3. — real property. Where a vendor of land continues in possession of the premises, such possession will constitute constructive notice to a subsequent purchaser from his vendee, of the rights and equities of the vendor in the land. *Illinois Central R. R. Co. v. McCullough*, 59 Ill., 166. 1871.

4. Title. Where the vendor sells property at public auction without title to even a small part of it, the vendee cannot be required to complete the sale. *Pontchartrain R. R. Co. v. Durrell*, 6 La. (O. S.), 431. 1833.

5. — The purchaser need not wait for eviction. He is entitled to a good title to every part of the land purchased before he can be compelled to complete the purchase. *Ib.*

VENUE.

1. Change of. The court of common pleas has the power, on motion, to change the venue in civil actions. But before such motion will be granted, it must be made conclusively to appear that a fair and impartial trial cannot be had in the county where the suit is commenced. *Cocheco R. R. Co. v. Farrington*, 26 N. H., 428. 1853.

2. — An appeal cannot be taken to the supreme court from an order remanding a cause to a court from which there has been an attempt to change the venue, at the costs of the party taking the change. *Hamrick v. Danville and North Salem R. R. Co.*, 30 Ind., 147. 1868.

3. Constitutional law. The act of the general assembly of 1868-9, ch. 251, requiring that "the venue in actions against railway companies shall be laid in some county wherein the track of said railway, or some of it, is situated," does not conflict with the constitution. *Kingsbury v. Chatham R. R. Co.*, 66 N. C., 284. 1872.

4. Foreign corporations. A corporation is not amenable to process, except in the state

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where its business is done. *Northern Indiana R. R. Co. v. Michigan Central R. R. Co.*, 5 McLean, 444. 1853.

5. **Local actions.** A local action against a corporation must be brought in the county in which the cause of action arises, notwithstanding the Rev. Stats., ch. 90, § 16, cl. 3; Gen. Stats., ch. 123, § 5, cl. 3. *Vermont and Massachusetts R. R. Co. v. Orcutt*, 16 Gray (Mass.), 116. 1860.

6. — When a subject is essentially local, as trespass on real estate, etc., the action must be brought in the state where the injury was done. *Northern Indiana R. R. Co. v. Michigan Central R. R. Co.*, 5 McLean, 444. 1853.

7. **Residence of corporation.** The place of residence of a corporation, created by the laws of New York, must be ascertained by its place of business. If it have several places of business, it must also be deemed to have several places of residence. *Pond v. Hudson River R. R. Co.*, 17 Howard's Pr. (N. Y.), 543. 1858.

8. — In a suit brought against a corporation, the venue should be laid in the county where its principal office is located, that being considered its place of residence; the rule applies to a railroad company where its road runs through, and its franchises are exercised in different counties. *Thorn v. Central R. R. Co.*, 2 Dutcher (N. J.), 121. 1856.

9. — The residence of a railway company, for the purpose of bringing actions in its favor, is in the county or town upon the line of its road, where its principal office and the centre of its business operations are situated. *Connecticut and Passumpsic Rivers R. R. Co. v. Cooper*, 30 Vt., 476. 1858.

10. — The residence of the corporators has no bearing upon the question. *Ib.*

11. — The residence of a railway company is limited to the line of the legally defined route of its road. *Ib.*

12. **Torts committed abroad.** The jurisdiction of our courts as to torts committed in foreign countries is undoubted, but its exercise is only a matter of comity; and where it appears that our courts are resorted to for the purpose of adjudicating upon mere personal torts, committed abroad, the court may properly decline to proceed further. *Great Western R. R. Co. v. Miller*, 19 Mich., 305. 1869.

13. **Various statutes.** Where a railway

passes through two counties, the company may maintain an action of assumpsit in that county wherein it has an office, "which is made the depository of the books and records of the company, by a vote of the directors, and a place where a large share of the business is transacted," although the company may have another office at the same time in the other county where the residue of its business is transacted, and in which the treasurer and clerk reside. *Androscoggin and Kennebec R. R. Co. v. Stevens*, 28 Me., 434. 1848.

14. — A railway company may be sued in any county through which the road passes, or in which the corporate powers of the company are exercised. *Baldwin v. Mississippi and Missouri R. R. Co.*, 5 Ia., 518. 1857.

15. — The Code, § 1727, prescribing the manner of service upon a corporation, and specifying the officers upon whom service may be made, does not require that suit shall be brought in the county where service is to be made. *Ib.*

16. — The venue in an action against a railway company, can be laid only in some county wherein the track of its road, or some part thereof, is situated; actions brought otherwise are to be dismissed. *Graham v. Charlotte and South Carolina R. R. Co.*, 64 N. C., 631. 1870.

17. — By § 796, 2 R. S., p. 222, an action may be brought against a corporation in any county where it has an office or an agent upon whom process may be served; and § 30 of the same act (2 R. S., p. 34), is not in conflict with § 796. *New Albany and Salem R. R. Co. v. Haskell*, 11 Ind., 301. 1858.

18. — Such corporations are residents of each county in which they have an office or agency, or an officer or agent upon whom process may be served. *Ib.*

VERDICT.

See EMINENT DOMAIN; JURY.

1. **Affidavits of jurors.** The affidavits of jurors will not be received for the purpose of showing that a juror read a part of a pleading that had been held bad on demurrer, and that his consent to the verdict had been obtained thereby. *Cowles v. Chicago, Rock Island and Pacific R. R. Co.*, 32 Ia., 515. 1871.

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2 Casting lots. Where a jury agree in advance to be bound by a verdict arrived at by each marking down a separate amount and dividing the aggregate thereof by twelve, the verdict will be invalid and will be set aside. *Fuller v. Chicago and Northwestern R. R. Co.*, 31 Ia., 211. 1871.

3. — Affidavits of jurymen are admissible to show such fact. *Ib.*

4. — Where the verdict arrived at is void only in part, the valid portion will be permitted to stand, on the defendant's entering a remittitur as to the excess. *Ib.*

5. New trial. Where there is evidence tending to support every proposition necessary to uphold a verdict, and there have been two trials with the same result, the supreme court will not reverse an order of the district court refusing to grant another new trial, even though the weight of the evidence may be opposed to the verdict. *Pacific R. R. Co. v. Nash*, 7 Kan., 280. 1871.

6. Right of way proceedings. The authority of the court of common pleas to set aside the verdict of the sheriff's jury, for good cause, is only to be exercised for some cause affecting the legality, justice or merits of the case. *Fitchburg R. R. Co. v. Boston and Maine R. R. Co.*, 3 Cushing (Mass.), 58. 1849.

7. — Where a jury, summoned to reassess damages for land taken for a railroad, rendered a verdict, in which the damages were assessed at a certain sum, "with interest thereon from the time when the said company took possession of the land," it was held that the verdict was void for uncertainty, and that the court of common pleas had no authority to alter the same, or to supply any defect therein. *Connecticut River R. R. Co. v. Clapp*, 1 Cushing (Mass.), 559. 1848.

8. Sealed verdict. A jury having been authorized so to do, brought in a sealed verdict for plaintiff, for \$6,000, which was entered upon the clerk's minutes. Upon polling the jury, they did not agree, and were directed by the court to return to their room. They retired, but returned for instructions as to whether they could increase their verdict. The court instructed them that they might render such verdict as they thought proper, whereupon the jury brought in a verdict for \$7,000. Held, not to be error. *Warner v. New York Central R. R. Co.*, 52 N. Y., 437. 1873.

9. Special verdict. A general verdict will not be overcome by special findings of the jury, if both can be made to harmonize. *St. Louis and Cedar Rapids R. R. Co. v. Eakins*, 30 Iowa, 279. 1870.

10. — Where the jury return special findings, without any general verdict, the court may render judgment on such special findings when the amount to which plaintiff is entitled is clear therefrom. *Helphrey v. Chicago and Rock Island R. R. Co.*, 29 Ia., 480. 1870.

11. — The action of the court below in refusing to return the jury to their room to find specially upon certain questions which they had failed, and signified their inability to answer, will not be disturbed when it is not apparent that there was an abuse of discretion on the part of the trial court. *Greenleaf v. Illinois Central R. R. Co.*, 29 Iowa, 14. 1870.

12. — It is essential to a special verdict that it contain all the facts upon which the judgment of the court is to rest. Whatever is not found in it is supposed not to exist; nothing is taken by implication. *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Evans*, 53 Penn. St., 250. 1866.

13. — In railway cases, special verdicts are better than to leave to the jury the application of the law to the facts; the whole question of negligence should not be submitted to the jury. *Ib.*

14. — In an action against a railway company for injuries to the plaintiff while crossing the track, the jury did not find that he was crossing on his lawful business. Held, that there was not sufficient in the finding on which to enter judgment. It is not sufficient that the verdict found that the defendant was guilty of negligence, if it did not find that the plaintiff was lawfully on the road, and not guilty of negligence. *Ib.*

VESSELS.

1. Collision. Whenever a sailing vessel and a steamer are proceeding in such directions as to involve risk of collision, it is the duty of the steamer to keep out of the way of the sailing vessel, and of the sailing vessel to hold her course. *Philadelphia, Wilmington, etc. R. R. Co. v. Kerr*, 33 Md., 331. 1870.

Miscellaneous.

2.—damages. In such cases, net freight only is recoverable and not gross freight. *Egbert v. Baltimore and Ohio R. R. Co.*, 2 Benedict (U. S. D. C.), 223. 1868.

VISITORIAL POWERS.

1. A court of equity has no visitorial power over corporations, except those expressly conferred by statute. *Belmont v. Erie R. R. Co.*, 52 Barbour (N. Y.), 637. 1869.

WAGER.

1. When not illegal. A wager that a railroad will be completed within a certain time, is not prohibited by the common law or by the statutes, and a recovery can be had upon it. *Beadles v. Bliss*, 27 Ill. 320. 1862.

WAGER CONTRACT.

See STOCK AND STOCKHOLDERS.

WAREHOUSEMEN.

See CARRIAGE OF MERCHANDISE; FIRES; FORMER ADJUDICATION.

1. Burden of proof. A warehouseman who fails to deliver property bailed to him is bound to show that the loss occurred without the want of ordinary care or diligence on his part, but not necessarily the precise manner in which the loss occurred. *Lichtenhein v. Boston and Providence R. R. Co.*, 11 Cushing (Mass.), 70. 1853.

2. Charter. The right to construct a warehouse will not be included in an act of incorporation by implication. *Cumberland Valley R. R. Co. v. McLanahan*, 59 Penn. St., 23. 1868.

3. Duty of warehouseman. It is no part of the duty of a warehouseman to make inquiry for, or go in pursuit of, property intrusted to his keeping, after he has once ceased to

have possession of it. *Sessions v. Western R. R. Co.*, 16 Gray (Mass.), 182. 1860.

4. Eminent domain. The charter of defendant does not authorize it to take, without the consent of the owner, as a site for a warehouse, a parcel of land four hundred yards from the line of its road, and to build a narrow track from its road to such parcel of land, although the whole quantity of land required would not exceed five acres. *Bird v. Wilmington and Manchester R. R. Co.*, 8 Richardson's Eq. (So. Car.), 46. 1855.

5. An injunction will issue to restrain such unlawful act. *Ib.*

6.—And where the court can restrain an injury, it can grant compensation for the injury already committed. *Ib.*

7. Fire. When goods are shipped to be carried by successive connecting lines, they are to be considered as in transit until they reach their final destination. They will be considered as in transit when deposited in the warehouse of one of such carriers awaiting transportation. The carrier having the goods in possession at the time of the loss, will be liable as a common carrier to the owner of the goods. *Wood v. Milwaukee and St. Paul R. R. Co.*, 27 Wis., 541, 1871, overruled; *Conkey v. Milwaukee and St. Paul R. R. Co.*, 31 ib., 619, 1872; *Wood v. Same*, 32 ib., 398, 1873.

8.—Where defendant, after transporting cotton, stored the same in its yard, where it was burned the next evening, the company without proof of how the fire occurred, was held liable, the jury having found it so, under instructions which regard it as a warehouseman and liable only for negligence. It is proper to require the company to show how the fire occurred, and in the absence of such proof it may well be held liable. *Wardlaw, Walker & Burnside v. South Carolina R. R. Co.*, 11 Richardson's Law (So. Car.), 337. 1858.

9.—Warehousemen are not responsible for neglect of their servants to rescue goods in the warehouse from destruction by fire in the night when such servants are present, but not in the course of their employment. *Aldrich v. Boston and Worcester R. R. Co.*, 100 Mass., 31. 1868.

10. Liability of warehouseman. A warehouseman is liable only for negligence in preserving the property deposited with him. *Mc*

Lien — Theft.

Carty v. New York and Erie R. R. Co., 30 Penn. St., 247. 1858.

11. **Lien.** A warehouseman, with whom goods carried by a railroad company are stored, may retain possession of the same, when so instructed by the company, until the "back charges" thereon are paid. *Alden & Co. v. Carver*, 13 Iowa, 253. 1862.

12. **Mistaken delivery.** In an action brought against a railway company as a warehouseman, for a failure to deliver property received by it, the judge instructed the jury, among other things, "that if the property was taken by mistake from the defendant's depot, and defendant had exercised ordinary care in the matter, it would not be liable; but if the defendant's agent delivered it by mistake to a wrong person, it would be answerable." *Held*, that such instructions taken together were no cause for a new trial. *Lichtenhein v. Boston and Providence R. R. Co.*, 11 Cushing (Mass.), 70. 1853.

13. — Trover lies against a warehouseman who has by mistake delivered goods to the wrong person. *Alabama and Tennessee Rivers R. R. Co. v. Kidd*, 35 Ala. N. S., 209. 1859.

14. **Parol license to build; ratification.** A tenant in common conveyed an undivided moiety of his land; a railroad company afterwards erected a warehouse on it; the other tenant then conveyed his half to the same grantee, reciting that the company had erected a warehouse, and in consideration thereof, was to allow a passage over its ground to other land of the grantors, their heirs and assigns; the grantee used the right of way. *Held*, that this was evidence for the jury of ratification by the grantee of the license to the company. *Camberland Valley R. R. Co. v. McLanahan*, 59 Penn. St., 23. 1868.

15. — Valuable improvements having been made on the faith of the license, it was not within the statute of frauds, and a subsequent ratification by parol was equivalent to precedent authority. *Ib.*

16. — The warehouse was burned down and reerected on the same site. If the plaintiff, knowing of the fact, gave the company no notice of his claim, he was estopped from afterwards asserting it. *Ib.*

17. **Place of delivery of goods.** Under § 22 of the act of Feb., 1867, entitled "warehousemen," railway companies are positively

inhibited from making delivery of any grain which they have received for transportation, into any warehouse other than that into which it is consigned, without the consent of the owner or consignee thereof. *Vincent v. Chicago and Alton R. R. Co.*, 49 Ill., 33, 1868; see *People ex rel. v. Chicago and Alton R. R. Co.*, 55 ib., 95, 1870.

18. — Independent of the statute, the duty to make a personal delivery to the consignee, in cases where such delivery is practicable, is required by the common law. *Ib.*

19. **Refusal of carrier to deliver goods.** Where the carrier refuses to make a personal delivery to the consignee, in such case, the party injured is not confined to the statutory redress; he may resort to the restraining powers of a court of chancery, to prevent an injury to his business which might ensue, and which could not be compensated for at law. *Ib.*

20. **Side track.** Where the owner of property adjacent to a railway had, with the consent of the company, for a valid consideration, been permitted to lay down a side track, connecting with the track of the company, and such owner has erected thereon a warehouse, which is in readiness for the receipt of such freight, such side track is to be considered as a part of the line of the company, for the purposes of delivery under the statute. *Ib.*

21. **Storage charges.** Railway companies have a right to charge a reasonable compensation for warehouse services, and may retain possession until such charges thereon shall have been paid. *Illinois Central R. R. Co. v. Alexander*, 20 Ill., 23. 1858.

22. **Theft.** Where, in an action against a railroad company to recover the value of goods deposited in its depot and alleged to have been lost through its neglect, and the plaintiff proves that the goods were stolen from the depot, he must also show a want of ordinary care on the part of the defendant. *Lamb v. Western R. R. Co.*, 7 Allen (Mass.), 98. 1863.

23. — Where a railway agent received goods into the company's warehouse, at a country station, which was an ordinary wooden house, which he kept fastened in the night time with iron locks, bolts and bars, also in the day time in the same manner, it appearing that the agent resided two hundred yards from the warehouse, it was *held*, to be ordinary care, and that the company was not liable for the

Confiscation of Railway Property — Morgan's Raid.

loss of the goods by theft. *Neal v. Wilmington and Weldon R. R. Co.*, 8 Jones' Law (N. C.), 482. 1862.

24. — Where a railway company had posted in its warehouse a notice that storage would be charged on all goods after they had remained in the warehouse for two days, and the plaintiffs had left their goods remain there after their arrival in the cars, with the request that they should be permitted to remain several days, the company was entitled to charge storage for the goods, whether the plaintiffs knew of the notice or not. The company was, therefore, a bailee for hire, and liable for negligence in caring for the goods. *Dimmick v. Milwaukee and St. Paul R. R. Co.*, 18 Wis., 471. 1864.

25. — And where evidence was introduced to show that there had been robberies at the town where the goods were stored, but the evidence did not show an unusual number of such robberies, and the court instructed the jury that the defendant was required to exercise the care that a prudent man would exercise in respect to things of like nature in that locality, a new trial will not be granted on account of such evidence. At most, it was error without prejudice. *Ib.*

WAR OF 1861.

See CARRIAGE OF MERCHANDISE; CONFISCATION; INJURIES TO EMPLOYEES.

1. **Confiscation of railway property.** Where the complainants claimed title to fifty shares of Central R. R. stock, purchased from those who derived their title thereto under proceedings upon a judgment of the district court of "the Confederate States of America, for the southern district of Georgia," confiscating said railroad stock as the property of citizens of another of the United States, as being alien enemies, *held*, that the purchasers of said railroad stock, deriving their title as aforesaid, did not acquire a legal and valid title thereto, so as to defeat the title of the original owners of the stock. *Central R. R. Co. v. Ward*, 37 Ga., 515. 1868.

2. **Debt due a state.** The payment of money due to the state of Mississippi, during the

war, made to the government of the state under the Confederacy, will not discharge a debt due to the state. The government of the state during the war was revolutionary in its character. *Texas v. White*, 7 Wall., 700, cited and approved. *Mississippi Central R. R. Co. v. The State*, 46 Miss., 157. 1871.

3. **Laws passed to aid rebellion.** All laws passed by the several states at war with the United States, to aid in its prosecution, are void. *Mississippi Central R. R. Co. v. The State*, 46 Miss., 157. 1871.

4. — The true test of the validity of such law is its intent and effect. *Ib.*

5. **Military authority.** Kent & Co. cut wood for the military railroad of the United States, under a military order, upon the land of complainant, and sold the wood to the military authorities, who sold it to the Nashville and Chattanooga R. R. Co., when the road was turned over by the military authorities to the company. Respondents commenced removing the wood from complainant's land; he filed this bill asking an injunction, etc., against respondents, claiming the wood as his own. *Held*, that the military authorities of the United States, having appropriated the wood, and sold it to the railroad company, complainant has no title to it; but the title by such purchase was vested in respondent. *Taylor v. Nashville and Chattanooga R. R. Co.*, 6 Coldwell (Tenn.), 646. 1869.

6. **Morgan's raid.** The late rebellion in this country had matured into a civil war on the 10th of May, 1862. *Bell v. Louisville and Nashville R. R. Co.*, 1 Bush (Ky.), 404. 1866.

7. — The admitted laws of all civilized warfare entitle each party in a civil war to the same right of capture or destruction of enemies' property, and show that when either the capture or destruction of property by one of such belligerents is lawful, it is equally lawful by the other, and if unlawful by one, it would be equally so by the other. *Ib.*

8. — One who, acting under the orders of Gen. John H. Morgan, burned the cars of the Louisville and Nashville Railroad at Cave City, in May, 1862, is not liable to a civil action for damages. *Ib.*

9. — The act of the Kentucky legislature, approved February 22, 1862, "to provide a remedy for injuries done by disloyal persons," does not apply to such cases as this. *Ib.*

Miscellaneous.

10. — The rights of belligerents were regulated as to all alike, by the national law and the national will, which Kentucky could neither modify nor control. *Ib.*

11. **Property taken to repair railway.** The title to personal property taken by authority of the United States for public use, vests in the United States, and if such property, after it was seized, was used for the repair of the Western and Atlantic Railroad for military purposes, the person from whom it was taken must look to the United States, and not to the state, for compensation, unless the state has subsequently assumed the responsibility. *Wallace, Sup't, v. Alford*, 39 Ga., 609. 1869.

12. **Purchase of property under an illegal judgment.** A confederate officer may maintain an action for the value of the use of his real estate, against one who acquired and held possession thereof during and after the war, through the form of a purchase under an illegal judgment. *Louisville and Nashville R. Co. v. Buckner*, 8 Bush (Ky.), 277. 1871.

13. — War only suspends the relative rights of antagonistic enemies. *Ib.*

14. — When the war ceases, the one is permitted to his remedies against the other as if no suspension had occurred, and may maintain his action for the recovery of property or wrongs committed thereon, or for the use and occupation thereof. *Ib.*

15. — A citizen or corporation in one country or section of country, at war with another, is responsible for an unauthorized appropriation of an enemy's private property, whether the possession be acquired by a mere trespass or through the form of a purchase under an illegal judgment. *Ib.*

16. — In such a case, the plaintiff's right to recover is not limited to the rents which the defendant may have received, but he is entitled to recover what the use of the property was reasonably worth. *Ib.*

WARRANTY.

See CONVEYANCE.

1. **Implied.** It is only where an article is contracted for to be applied to a particular purpose, and in such manner that the buyer

necessarily trusts to the judgment or skill of the manufacturer or dealer, and not to his own, that there is an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied. *Charlotte, etc., R. Co. v. Jesup*, 44 Howard's Pr. (N. Y.), 447. 1871.

WATERCOURSES.

See BRIDGES; EMINENT DOMAIN.

1. **Bay.** The fact that some kinds of water craft can, at some times, pass near to the shore of a curve in the stream, does not constitute such a bay as by § 15 of the charter of the Hudson River R. R. Co., the company is bound to furnish with a drawbridge. *Getty v. Hudson River R. R. Co.*, 21 Barbour (N. Y.), 617, 1856; see *Same v. Same*, 6 Howard's Pr. (N. Y.), 269, 1851; 8 ib., 177, 1852.

2. **Boundaries of land.** A deed conveyed land, giving the bank of Connecticut river as one of the boundary lines. *Held*, that the bank at ordinary water mark was the boundary. *Daniels v. Cheshire R. R. Co.*, 20 N. H., 85. 1849.

3. — If land is conveyed, described as bounding on an artificial watercourse, such watercourse will be regarded, as between those parties, as a natural stream. *Dunklee v. Wilton R. R. Co.*, 24 N. H., 489. 1852.

4. **Bridges.** Railroad corporations must provide suitable bridges and culverts for the natural flow of water crossed by their roads. *March v. Portsmouth and Concord R. R. Co.*, 19 N. H., 372. 1849.

5. — A railway company, building a bridge across a stream, is liable for the damage thereby occasioned to the owner of a saw mill above, by the obstruction of a stream so as to prevent the water from passing off from his mill as freely as it had previously; but is not liable for the damage suffered by him by being impeded and put to increased expense in getting logs up the stream to his mill, whether the stream be navigable for boats and rafts or not. *Blood v. Nashua and Lowell R. R. Co.*, 2 Gray (Mass.), 137. 1854.

6. **Change of banks.** In ejectment for land bounded by a river which has changed its bed and formed a new channel since the date

Damages — Navigable Streams.

of the survey, it is proper for the court to let the jury find whether the land in controversy is within the tract surveyed and granted. *Bates v. Illinois Central R. R. Co.*, 1 Black, 204. 1861.

7. — The river boundary is held to be where the plat of the survey and field notes designate it, though the waters generally flowed through another channel at time of the survey. *Ib.*

8. — The officer making the survey had the right to fix and declare the place of the river for purposes of survey and sale of lands. *Ib.*

9. **Damages.** A railway company, although authorized by the legislature to construct its road across a stream, if done in such a manner as not to impair its usefulness, is liable for resulting damages done to lands not situate upon the stream. *Brown v. Cayuga and Susquehanna R. R. Co.*, 12 N. Y., 486. 1855.

10. **Diversion of stream.** A railway company which, in the construction of its road, necessarily diverts a stream of water from its natural channel, is bound to restore and preserve the stream in its former state of usefulness as far as practicable, in respect to the owners of real property on such stream. *Cott v. Lewiston R. R. Co.*, 36 N. Y., 214, 1867; *Same v. Same*, 34 Howard's Pr. (N. Y.), 222, 1867; *Robinson v. New York and Erie R. R. Co.*, 27 Barbour (N. Y.), 512, 1858.

11. — It was the duty of the Rock River Valley R. R. Co. to so construct its road bed across a stream as not to divert the water from its channel without the consent of the land owner. The defendant, as successor to said company, is under the same obligations. *Young v. Chicago and Northwestern R. R. Co.*, 28 Wis., 171. 1871.

12. — One riparian proprietor cannot maintain an action against an upper proprietor for a diversion of part of the water of a natural watercourse flowing through their lands, unless such diversion causes the plaintiff actual perceptible damage. *Elliott v. Fitchburg R. R. Co.*, 10 Cushing (Mass.), 191. 1852.

13. — Under a charter conferring on a railway company the power to acquire by condemnation, land for the construction of its road, the company has the right to divert, if it sees fit to do so, a stream of water flowing across the line of its road. *Baltimore and Potomac R. R. Co. v. Magruder*, 34 Md., 79. 1870.

14. — Where a railroad company has right-

fully and properly turned a stream of water, it is not obliged thereafter to observe the action of the water and so protect the banks, or take other timely measures, as to prevent the encroachment of the stream upon neighboring lands. *Norris v. Vermont Central R. R. Co.*, 28 Vt., 99. 1855.

15. — One who, without legislative authority, interferes with the current of a running stream, is responsible, absolutely and without regard to actual negligence, for the damages sustained in consequence of his interposition by those who are entitled to have the water flow in its natural channel. *Ballinger v. New York Central R. R. Co.*, 23 N. Y., 42. 1861.

16. — But where such act is done under legislative authority for a public purpose, the party constructing the work is only liable for want of skill and care. *Ib.*

17. — In an action to recover damages for injuries done to the plaintiff's land by water, in consequence of the diversion of a stream from its channel by the defendant, in constructing a culvert, the legal rule of damages has no reference to the cost of removing a bar of gravel carried there by the flood. The measure of damages in that class of cases is the depreciation in the value of the plaintiff's premises occasioned by the injury resulting from the defendant's acts. *Easterbrook v. Erie R. R. Co.*, 51 Barbour (N. Y.), 94. 1865.

18. **Easements.** In the case of easements connected with running water, "if the owner of two estates between which there exist the apparent marks of an easement, dispose of one of the estates without his conveyance containing any stipulation or reservation relative to the easement, it continues to exist, actively or passively, in favor of the estate sold, or upon that estate," approving the rule of the Civil Code of the French law. *Dunklee v. Wilton R. R. Co.*, 24 N. H., 489. 1852.

19. **Limitations.** The fact that suit was not brought for eighteen years after the culvert was built would not defeat the right of action, where it appeared that the plaintiff had, from time to time, expressed to the agents of the company his objections to the diversion. *Young v. Chicago and Northwestern R. R. Co.*, 28 Wis., 171. 1871.

20. **Navigable streams.** The Mississippi river is a navigable stream, and a riparian proprietor thereon owns the fee of the soil only to

Injury to Cattle by Flood — Overflow.

ordinary high water mark. *Tomlin v. Dubuque, B. and M. R. R. Co.*, 32 Ia., 106. 1871.

21. — The owner of lands along such river has no private right in the waters thereof, or in the shore between high and low water mark, and he cannot recover damages for being deprived of access to the stream by reason of the construction of a railroad along its banks, between such marks. *Ib.*

22. — The waters of the Hudson river, and the land under the waters thereof, up to high water mark, belong to the people of the state, and not to the owner of the upland. *Hudson River v. Loeb*, 7 Robertson (N. Y.), 418. 1868.

23. Injury to cattle by flood. Where the flow of water was obstructed in some degree by the filling up of a trestle work with earth, it was held, that any damages that might have accrued by reason of flooding cattle pens above would accrue to the owner of the realty, and that the owner of such pens, having taken some cattle to feed therein, under a contract, there was no cause of action in favor of the owner of the cattle for any injury to the cattle, growing out of the flooding of the pens, the cattle having been placed in the pens after the trestle work had been filled up. *Toledo, Wabash and Western R. R. Co. v. Hunter*, 50 Ill., 325. 1869.

24. Mills and mill power. A railway company has the right to drain the surface water from its lands, through ditches dug therein, into a stream which is the natural outlet, although the quantity of water in the stream is thereby increased in time of high water, and diminished at other times, to the damage of a riparian proprietor below. *Waffle v. New York Central R. R. Co.*, 53 N. Y., 11, 1873; *Same v. Same*, 58 Barbour (N. Y.), 413, 1870.

25. — The owner of an island bounded by a river and a branch thereof, agreed with the owners of mills supplied with water from the branch, that it should be closed and an artificial race through the island substituted therefor. Held, that in the absence of any provision to that effect, the mill owners had no right to have a waste-weir in the race in the place of one that had existed in the natural channel. *Packer v. Rochester and Syracuse R. R. Co.*, 17 N. Y., 283. 1858.

26. — Where a railway company, in consideration of a license to change the course of a stream, agreed with the owner of a mill fed by said stream, to dig a new channel and to con-

struct certain levees, and after a breach on the part of the company, in failing to make the channel and levees in the manner agreed upon, the mill was conveyed to another, it was held, that the latter could not maintain an action against the company on the agreement. *Junction R. R. Co. v. Suyers*, 28 Ind., 318. 1867.

27. — Where an erection in a water course is the immediate cause of injury to the possession of a mill, and, without further interference by the hand of man, would, in the ordinary course of things, continue to be so on the determination of the tenancy, the reversioner has a right of action, on the ground that the encroachment on the inheritance may, by lapse of time, ripen into a right, where he has notice or knowledge of it. *Tinsman v. Belvidere and Delaware R. R. Co.*, 1 Dutcher (N. J.), 255. 1855.

28. Obstructions. In this case, a verdict against a railway company for damages arising from obstructions to a stream was set aside as against the evidence. *Southwestern R. R. Co. v. Lee*, 47 Ga., 880. 1872.

29. — Whether a town receives such special damage from obstructions in a stream, causing injury to public bridges and highways within the town (which it is by the statutes bound to keep in repair), as gives it a separate right of action to remove or retain such obstructions, *quære?* *Sheboygan v. Sheboygan and Fond du Lac R. R. Co.*, 21 Wis., 667. 1867.

30. — When it is not clear that the acts of the company in obstructing the stream are not authorized by its charter, that question must be determined against it by an action at law before it will be restrained by injunction. *Ib.*

31. Overflow. If a railway company, in the original construction of its road, open up a supply of underground water, which after some years inundates its track, and the company thereupon conducts the same by an artificial channel upon the land of another, not included within its location, it may be held liable in an action of tort therefor, provided such mode of discharging the water is not reasonably necessary to the maintenance of the railroad; and whether it is reasonably necessary is a question for the jury. *Curtis v. Eastern R. R. Co.*, 14 Allen (Mass.), 55. 1867.

32. — An action at law, and not an application to the county commissioners under Rev. Sts., ch. 39, § 56, is the proper remedy to re-

Route of Railway fixed by law—Washing away of Lands.

cover damages of a railway company, for filling up the bed of a natural watercourse with its embankment, and thereby flowing the land of a riparian proprietor above, which is not adjoining the railway; it not appearing that such filling up was necessary for the construction of the road, nor that a sufficient new canal could not be made. *Eastabrooks v. Petersborough and Shirley R. R. Co.*, 12 Cushing (Mass.), 224. 1853.

33.—A conveyance of the land which will be overflowed, and which is made for the purpose of enabling the grantee to erect a dam, will not be a waiver of the grantor's right to, or prevent his recovering such damages as he may sustain upon his premises below the dam on account of its defective construction. *Jones v. Western Vermont R. R. Co.*, 27 Vt., 399. 1855.

34.—The Pennsylvania R. R. Co., after the purchase of the public works, raised a dam on the Susquehanna; in an extraordinary flood, the land of F. was overflowed, the injury being increased by the rising of the dam. Held, that under the act of May 16, 1857, the company had a right to raise the dam and was not liable to F. *Freeland v. Pennsylvania R. R. Co.*, 66 Penn. St., 91. 1870.

35.—The condition in which the commonwealth had maintained the works was not to be the standard for the future. *Ib.*

36.—The act conferred upon the company the right to exercise the state's eminent domain, and exempted it from liability for consequential damages. *Ib.*

37.—The company is not bound to erect guardwalls to confine the stream to fixed limits and prevent overflow in high floods. *Ib.*

38. Route of railway fixed by law. An act authorizing a railway company to construct its road along a river, does not authorize it to construct it in or upon the river, but alongside of it. The word "along" does not mean "upon" unless the context shows that it is used in the sense of upon and along. *Stevens v. Erie R. R. Co.*, 6 C. E. Green's Ch. (N. J.), 259. 1871.

39. Sewers. Any unusual or improper use of sewers, by an individual, is not protected by the sanction which the legislature has given for their construction. And if, in any unusual or peculiar use of them by an individual, the full and free navigation of a public stream is obstructed, such obstruction becomes

a common nuisance. *Hudson River R. R. Co. v. Loeb*, 7 Robertson (N. Y.), 418. 1868.

40. Sloughs. The navigable sloughs of the Mississippi river that are not required by the interests of commerce to be preserved for the purposes of navigation, are not covered by the ordinance of 1787, declaring certain waters public highways. *Ingraham v. Chicago D. and M. R. R. Co.*, 34 Ia., 249. 1872.

41.—It was therefore held that it was competent for the city of Dubuque to authorize a slough of the Mississippi river at that place, which had formerly been used for purposes connected with navigation, to be filled, and railroad tracks to be built over or along the same. *Ib.*

42. State lands. A statute giving a railway company a right to lay its road along a river, and to acquire the rights of the shore owners, will not be construed to give, by implication, the right to take the land of the state lying below high water line. *Stevens v. Paterson and Newark R. R. Co.*, 5 Vroom (N. J.), 532. 1870.

43. Washing away of lands. A riparian proprietor, whose land has been gradually washed away by a change in the course of the current of the stream, occasioned by necessary erections made above him in the stream by a railway company, has no claim for damages against the company, whether such erections have been made in a careless and unskillful manner or not. *Aliter*, with one who has been injured by backwater occasioned by such erections below him. *Henry v. Vermont Central R. R. Co.*, 30 Vt., 638. 1858.

44.—A judgment against a railway company for damages not limited to those actually suffered at the date of the writ, for locating and constructing its road on the bank of a river so as to divert its course and cause it to wash away the plaintiff's land, is a bar to a like action by him for subsequent damages from the same cause. *Fowle v. New Haven and Northampton R. R. Co.*, 107 Mass. 352. 1871.

WAY BILL.

See CONNECTING LINES.

WEIGHT AND MEASUREMENT.

See CARRIAGE OF MERCHANDISE.

Agent and Principal — Tolls.

WELLS AND SPRINGS.

See DAMAGES; EMINENT DOMAIN; INJUNCTION.

1. Excavations. If the owner of land make an excavation within his own premises, and thereby drain the well or subterranean spring of another, it is *damnum absque injuria*, and no action will lie. *New Albany and Salem R. R. Co. v. Peterson*, 14 Ind., 112. 1860.

WHARVES.

See EMINENT DOMAIN; INJUNCTION; INJURIES TO PASSENGERS.

1. Agent and principal. The general rule is, that when an injury has been sustained by the negligent manner in which a wharf or other work has been constructed or protected, the principal is liable for the acts and negligence of the agent in the course of his employment, although he did not know of or authorize the acts complained of. *Railroad Co. v. Hanning*, 15 Wallace, 649. 1872.

2. — Where a contractor agreed to repair a wharf under the direction of a railway company's engineer, it was *held*, that the contractor was the agent of the company. *Ib.*

3. Construction of railways — damages. The owner of wharves, in front of which a railway is located according to law, cannot recover of the railway company, as damages under R. S., ch. 39, § 56, the anticipated depreciation of the wharf property because the access thereto is made dangerous and inconvenient. *Boston and Worcester R. R. Co. v. Old Colony R. R. Co.*, 12 Cushing (Mass.), 605. 1853.

4. Distress for wharfage. The power to distrain for wharfage under the statute does not apply to a case of damage arising from an obstruction of the use of a wharf. *Camden and Amboy R. R. Co. v. Finch*, 5 Sandford (N. Y.), 48. 1851.

5. Eminent domain. A railway company organized under the act of February 11, 1848, is not authorized to condemn private property to its exclusive use, solely for the purposes of a wharf. *Iron R. R. Co. v. City of Ironton*, 19 Ohio St., 299. 1869.

6. — Under the statute authorizing the ap-

propriation of private property for a public wharf by a municipal corporation, the discretion of determining the quantity of ground required for such purpose is vested in the corporation; and where such discretion is exercised in good faith, the action of the municipal authorities is final. *Ib.*

7. Municipal corporations. Where it appeared that a resolution had been passed by the common council of Jersey City reciting that the wharves, etc., were controlled by private individuals, and directing the street commissioner to remove all obstructions therefrom; it was *held*, on *certiorari*, that as by the admissions of the resolution the wharves were in possession of private parties, therefore the city should proceed at law to obtain possession. *State, etc. v. Jersey City*, 5 Vroom (N. J.), 31. 1869.

8. — dedication. A municipal corporation, unless specially restricted, may make an irrevocable dedication of property to the use of the public as a wharf. *Illinois and St. Louis R. R. Co. v. St. Louis*, 2 Dillon (U. S. C. C.), 70. 1872.

9. Obstructions. Sheds, buildings, gates and fences upon piers or bulkheads in the port of New York, whether consisting of loose materials, or built upon and affixed thereto, are obstructions incumbering such piers or bulkheads, and interfering with their free use, within the meaning of § 8 of the statute of 1857, as amended by § 5 of the act of 1858. *Board of Commissioners of Pilots v. Erie R. R. Co.*, 5 Robertson (N. Y.), 366. 1868.

10. Railway bridge. The owners of a wharf upon which rests the end of a railway bridge, built across navigable water, by authority of the legislature, cannot recover damages of a railway company under Rev. Sts., ch. 39, § 56, for occupying with its bridge, the space over the navigable channel, which would otherwise serve as a vessel's berth at such wharf. *Boston and Worcester R. R. Co. v. Old Colony R. R. Co.*, 12 Cushing, (Mass.), 605. 1853.

11. Tolls — ferriage. Where a ferry company, for the benefit of a railway company, leased certain wharves in San Francisco for ferriage purposes only, and used them, not only for the landing of goods, but also for the transportation of goods over said wharves to consignees in the city; it was *held*, that the business of ferriage ends at the wharf, and

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that the carriage of freights by the company by way of the ferry over the wharves subjects it to the same liability for wharfage tolls for such freights as are paid by other persons. That the company is exempt from charges only so far as the wharf is required for a landing for boats. *People v. San Francisco and Alameda R. R. Co.*, 35 Cal., 606. 1868.

12. **Trespass.** Where it was left for the jury to say whether a wharf was a public place or not, and the evidence is not contained in the record, this court will not say that the action of the jury was erroneous. *Railroad Co. v. Hanning*, 15 Wallace, 649. 1872.

13. — Until notice has been given of the changed character of the place, one passing over a wharf or platform over which the public has been accustomed to pass, cannot be made a trespasser for so passing, although the wharf or platform is now no longer used for the purposes of passage. *Id.*

WHISKY.

See CARRIAGE OF MERCHANDISE.

WHISTLE.

See SIGNALS.

WILLS.

1. **Construction.** A will construed, with relation to certain investments in railway stocks made by the executors. *Clarkson v. Clarkson*, 18 Barbour, (N. Y.), 646. 1855.

2. — **railway stock.** A will bequeathing certain railroad stock — construed with reference to the dividends. *Brundage v. Brundage*, 65 Barbour (N. Y.), 397. 1873.

WILLFUL ACTS.

See INJURIES TO PASSENGERS; INJURIES TO EMPLOYEES; INJURIES TO DOMESTIC ANIMALS; TRESPASS.

WINE.

See CARRIAGE OF MERCHANDISE.

WOOD YARD.

See FIRES.

WOOL WASTE.

See CARRIAGE OF MERCHANDISE.

WRIT OF ASSISTANCE.

1. **Judgment.** The rights of a party cannot be concluded by an order or judgment of a court made in a cause in which such party has not a strict right to appear and defend such rights without leave of the court. *Gelpeke v. Milwaukee and Horicon R. R. Co.*, 11 Wis., 454. 1861.

2. — A writ of assistance will be granted against a party to a judgment, but not against a person not a party to the record, who is claiming adversely and independently of the parties to the record; and who cannot, as a matter of strict right, appear and defend his rights before the court. *Id.*

WRIT OF ERROR.

See APPEAL; PLEADING.

1. **Bill of exceptions.** The bill of exceptions must be authenticated by the certificate of the clerk. *Georgia R. R. Co. v. Shorter*, 13 Ga., 300. 1853.

2. — Where, in a proceeding before a judge, under § 404 of the Code, to examine a person alleged to have in his hands property belonging to the judgment debtor, an order is made, after the examination, discharging such person as having no property in his hands subject to the satisfaction of the judgment; without some exception taken at the time, and some

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step to suspend the effect of the order, and on a petition in error to which the judgment debtor alone is a party, the action of the judge cannot be reviewed. *Welch v. Pittsburgh, Ft. Wayne and Chicago R. R. Co.*, 11 Ohio St., 569. 1860.

3. Bond. The writ may issue without a bond where no *supersedeas* is sought. *Tombigbee R. R. Co. v. Bell*, 4 Smedes & Marshall (Miss.), 685. 1843.

4. Decree pro confesso. As a general rule, a defendant cannot complain of errors to which he did not object in the court below, but the plaintiff must first make out a case for the relief he seeks before the defendant is required to make a defense, and a failure to make a defense will not entitle the plaintiff to a decree *pro confesso*, where he is not, upon his own showing, entitled to it. And the party aggrieved had the right to sue out a writ of error. *West Feliciana R. R. Co. v. Stockett*, 27 Miss., 739. 1854.

5. Judgment. A common law case was dismissed in the court below, and no final judgment rendered. An affidavit was filed that the omission was accidental. *Held*, insufficient to sustain a motion to annul the order of dismissal. *Rice v. Minnesota and Northwestern R. R. Co.*, 21 Howard, 82. 1858.

6. After the judgment of this court was passed upon the case and the term was closed, the function of the writ of error was over. *Ib.*

7. Mortgage. Under an *ex parte* proceeding in the circuit court of the United States, under the civil code of Louisiana, an order was made to a mortgagor to pay a certain sum of money in three days, and in default of payment, the sale of the mortgaged property was ordered. The appellant filed a petition in said court in the nature of an *audita querela* asking that the sale might be restrained. His petition was dismissed. *Held*, that the dismissal of the petition was a final judgment to which writ of error would lie. *New Orleans R. R. Co. v. Morgan*, 10 Wallace, 256. 1869.

8. Parties. The writ of error must contain the same parties as were served in the court below. *Cox v. Macon and Western R. R. Co.*, 12 Ga., 270. 1852.

9. Records. Where the records of the cases were not sent up, but the causes were tried upon paper books only, and the judgment is affirmed, and the remission of the record is

ordered, it is the duty of the court below to proceed the same as if there had been an actual remission of the record instead of a constructive one. *Pennsylvania R. R. Co. v. Commonwealth*, 39 Penn. St., 403. 1861.

10. — The absence from the record of the petition for a writ of error will not be sufficient ground for the dismissal of the writ. The presumption is, that the clerk acted correctly. *Tombigbee R. R. Co. v. Bell*, 4 Smedes & Marshall (Miss.), 685. 1843.

11. Where the record contained an entry of satisfaction of the judgment, the propriety of which entry the plaintiff therein sought to revise; *held*, that the entry would not of itself be sufficient ground to dismiss the writ of error. *Ib.*

12. — Notes used in evidence in a case constitute no part of the record, and cannot be regarded in case error should be brought to reverse the judgment in which they were offered. *Buckfield Branch R. R. Co. v. Benson*, 43 Me., 374. 1857.

13. Supreme Court of the United States. Where a mortgagee on a bill of foreclosure filed in an inferior state court, against his mortgagor and certain trustees holding collateral securities, obtains in that court a decree against the mortgagor personally, and against the trustees as such, and the mortgagor alone appeals to the supreme court of the state, to which, on affirmance of the decree, he alone takes a writ of error to the supreme court of the United States, it is no ground to dismiss the writ that the trustees are not joined with him as plaintiffs in error in this court. *Railroad Cos. v. Johnson*, 15 Wallace, 8. 1872.

14. — A defendant is not entitled to a stay of execution while writs of error to the final judgments in the state court are pending in the supreme court of the United States, where, under the practice of that court, and the acts of congress, the writs of error were not delivered in time. *Pennsylvania R. R. Co. v. Commonwealth*, 39 Penn. St., 403. 1861.

15. — The state supreme court cannot exercise an equitable control over executions upon judgments affirmed therein, by staying them on the ground that they were issued after the writs of error from the supreme court of the United States were served; for the legal effect of those writs, depending upon federal law, would be altered if the equity doctrines

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of the state, not admitted by the United States courts, and not subject to review there, were allowed to control them. *Ib.*

16. — Where less than one-half the claims against the defendants were affected by the writs of error, the defendants should first pay that portion undisputed, before taking the writs of error or asking equitable indulgence from the state courts. *Ib.*

17. When a writ will lie. Where an appeal is allowed by law, no writ of error will lie until the appeal has been tried, and the final judgment of the court has been entered thereon. *Horner and Roberts' Lateral Railroad*, 37 Penn. St., 333. 1860.

18. — If there be no express prohibition in the statute, a writ of error will lie to revise the judgment of the circuit court. *New Orleans, Jackson and Great Northern R. R. Co. v. Hemphill*, 35 Miss., 17. 1858.

19. — administrator. Where the plaintiff in the court below dies after the rendition of the judgment in his favor, a writ of error will lie against the administrator, to revive the judgment, without its having been revised in his name. *Same v. Rollins*, 36 ib., 384. 1858.

20. When a writ of error will not lie. The reasons of the court below, or depositions

there read, on a rule to show cause why an execution should not be set aside on the ground that a conditional verdict rendered in the case had been complied with, cannot be inquired into by this court on a writ of error. *Moyer v. Germantown R. R. Co.*, 3 Watts and Sergeant (Penn.), 91. 1841.

21. — A writ of error does not lie in any case where an appeal is given to the supreme court by statute. *Sacramento, Placer and Nevada R. R. Co. v. Harlan*, 24 Cal., 334. 1864.

22. — An appeal lies from the final judgment of a court upon a proceeding to condemn land for railway purposes, and therefore such causes cannot be reviewed upon writ of error. *Ib.*

23. — A writ of error does not lie from the circuit court to the county court, or court having probate jurisdiction, with respect to matters exclusively of a probate character. The proper remedy is by an appeal taken in accordance with the statutes (R. C. 1855, p. 1295, § 2). *North Missouri R. R. Co. v. Green's Adm'r*, 34 Mo., 159. 1863.

24. — nonsuit. The refusal to direct a nonsuit is not the subject of review on a writ of error. *Bavinton v. Pittsburgh and Steubenville R. R. Co.*, 34 Penn. St., 358. 1859

CASES OVERRULED.

- Adams v. Saratoga and Washington R. R. Co.**, 11 Barbour (N. Y.), 414, 1851. Dictum overruled — *Davis v. New York*, 14 N. Y., 506, 1856. Doubted — *Hughes v. Providence, etc.*, R. R. Co., 2 R. I., 508, 1853; see *Eitz v. Daily*, 20 Barbour (N. Y.), 32, 1854; *Williams v. New York Central R. R. Co.*, 16 N. Y., 97, 1857.
- Aiken v. Western R. R. Co.**, 30 Barbour (N. Y.), 305, 1857. Reversed — 20 N. Y., 370, 1859.
- Alden v. New York Central R. R. Co.**, 26 N. Y., 102, 1862. Overruled — *McPadden v. Same*, 44 N. Y. 478, 1871.
- Alton and Sangamon R. R. Co. v. Carpenter**, 14 Ill., 190, 1852. See *Hayes v. Ottawa, etc.*, R. R. Co., 54 Ill., 373, 1870.
- Aurora Branch R. R. Co. v. Grimes**, 13 Ill., 585, 1852. See *Chicago and Alton R. R. Co. v. Gretzner*, 46 Ill., 74, 1867.
- Babcock v. Lake Shore and Michigan Southern R. R. Co.**, 43 Howard's Pr. (N. Y.), 317, 1872. Reversed — 49 N. Y., 491, 1872.
- Baltimore and Ohio R. R. Co. v. Gallahue**, 12 Grattan (Va.), 655, 1855. See *Same v. Same*, 14 ib., 563, 1858; *Same v. Marshall County*, 3 West Va., 319, 1869.
- Bangor and Piscataquis R. R. Co. v. Harris**, 21 Me., 533, 1842. Overruled — *Cumberland Marine R. R. Co. v. Portland*, 37 Me., 444, 1854.
- Baltimore and Susquehanna R. R. Co. v. Nesbit**, 10 Howard 395, 1850. See *Graff v. Baltimore R. R. Co.*, 10 Md., 544, 1857.
- Bancroft v. Boston and Worcester R. R. Co.**, 97 Mass., 275, 1867. See *Mayo v. Boston, etc.*, R. R. Co., 104 ib., 137, 1870.
- Banet v. Alton and Sangamon Branch R. R. Co.**, 13 Ill., 504, 1851. See *Witter v. Mississippi and Ohio R. R. Co.*, 20 Ark., 463, 1859.
- Bass v. Chicago, Burlington and Quincy R. R. Co.**, 28 Ill., 9, 1862. See *Illinois Central R. R. Co. v. Frazier*, 47 Ill., 595, 1863.
- Bates v. New Orleans R. R. Co.**, 13 Howard's Pr. (N. Y.), 516; 4 Abbott's Pr., 72, 1856. Doubted — *Cumberland Coal and Iron Co. v. Hoffman Steam Coal Co.*, 30 Barbour (N. Y.), 159, 1859.
- Beekman v. Saratoga, etc., R. R. Co.**, 3 Paige Ch. (N. Y.), 45, 1831. Denied — *Newcomb v. Smith*, 1 Chandler (Wis.), 71, 1849; see *Giesy v. Cincinnati, etc., R. R. Co.*, 4 Ohio St., 308, 1854; *Coster v. Tidepater Co.*, 3 C. E. Green's Ch. (N. J.), 54, 1866.
- Bellinger v. New York Central R. R. Co.**, 23 N. Y., 42, 1861. Denied — *Eaton v. Boston, etc., R. R. Co.*, 51 N. H., 504, 523, 1872.
- Bissell v. New York Central R. R. Co.**, 25 N. Y., 442, 1862. Denied — *Hooper v. Wells*, 27 Cal., 11, 1864; see *Pierce v. Milwaukee and St. Paul R. R. Co.*, 23 Wis., 397, 1868.
- Blood v. Nashua and Lowell R. R. Co.**, 2 Gray (Mass.), 137, 1854. See *Enos v. Hamilton*, 27 Wis., 256, 1870.
- Bloodgood v. Mohawk and Hudson River R. R. Co.**, 14 Wendell (N. Y.), 52, 1835. Reversed — 18 ib., 9, 1837.
- Boody v. Rutland and Burlington R. R. Co.**, 24 Vt., 660, 1853. See *Barker v. Troy and Rutland R. R. Co.*, 27 Vt., 766, 1855.
- Booe v. Railroad Co.**, 10 Ind., 93, 1857. See *Kenosha, etc., R. R. Co. v. Marsh*, 17 Wis., 13, 1863.
- Bradley v. Boston and Maine R. R. Co.**, 3 Cushing (Mass.), 539, 1843. See *Beisiegel v. New York Central R. R. Co.*, 40 N. Y., 9, 1869.
- Brand v. Schenectady and Troy R. R. Co.**, 8 Barbour (N. Y.), 368, 1850. Overruled — *Johnson v. Hudson River R. R. Co.*, 6 Duer (N. Y.), 633, 1857; 20 N. Y., 65, 1859; see *New Orleans, Jackson, etc., R. R. Co. v. Bailey*, 40 Miss., 395, 1866.

- Brewer v. Boston and Worcester R. R. Co.**, 5 Metcalf (Mass.), 478, 1843. Doubted — *Dolde v. Vodicka*, 49 Mo., 98, 1871.
- Bridgeport v. Housatonic R. R. Co.**, 15 Conn., 475, 1843. Denied — *Rich v. Flanders*, 39 N. H., 304, 1859.
- Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.**, 32 Barbour (N. Y.), 358, 1860. See *Brooklyn and Newtown R. R. Co. v. Coney Island and Brooklyn R. R. Co.*, 35 ib., 364, 1861.
- Brown v. Buffalo and State line R. R. Co.**, 22 N. Y., 191, 1860. Doubted — *Jetter v. New York and Harlem R. R. Co.*, 2 Keyes (N. Y.), 154, 1865.
- Brown v. Cayuga and Susquehanna R. R. Co.**, 12 N. Y., 486, 1855. Doubted — *Beltinger v. New York Central R. R. Co.*, 23 N. Y., 42, 1861.
- Brown v. Milwaukee and Prairie du Chien R. R. Co.**, 21 Wis., 39, 1866. See *Fisher v. Farmers' Loan and Trust Co.*, 21 Wis., 73, 1866.
- Brown v. New York Central R. R. Co.**, 31 Barbour (N. Y.), 385, 1860. Contra — *Knapp v. Dagg*, 18 Howard's Pr. (N. Y.), 165, 1857; *Colegrove v. New York and Harlem R. R. Co.*, 6 Duer (N. Y.), 382, 1857; *Chapman v. New Haven R. R. Co.*, 19 N. Y., 341, 1859; *Lannen v. Albany Gas Light Co.*, 46 Barbour (N. Y.), 264, 1865.
- Brown v. New York Central R. R. Co.**, 32 N. Y., 597, 1865. See *Webster v. Hudson River R. R. Co.*, 38 N. Y., 260, 1868.
- Brown v. New York Central R. R. Co.**, 34 N. Y., 404, 1866. See *Beisiegel v. New York Central R. R. Co.*, 40 N. Y., 9, 1869.
- Buffalo and New York R. R. Co. v. Dudley**, 14 N. Y., 336, 1856. Denied — *Zabriskie v. Hackensack and New York R. R. Co.*, 3 C. E. Green's Ch. (N. J.), 178, 1867.
- Bureau County v. Chicago, Burlington and Quincy R. R. Co.**, 44 Ill., 229, 1867. See *Chicago and Northwestern R. R. Co. v. Lee County*, 44 Ill., 248, 1867.
- Button v. Hudson River R. R. Co.**, 16 N. Y., 248, 1858. See *Milwaukee and Chicago R. R. Co. v. Hunter*, 11 Wis., 160, 1860.
- Carroll v. New York and New Haven R. R. Co.**, 1 Duer (N. Y.), 571, 1853. See *Spooner v. Brooklyn City R. R. Co.*, 31 Barbour (N. Y.), 419, 1860.
- Caswell v. Boston and Worcester R. R. Co.**, 98 Mass., 194, 1867. See *Forsythe v. Boston, etc., R. R. Co.*, 103 Mass., 510, 1870.
- Central Military Tract R. R. Co. v. Rockafellow**, 17 Ill., 541, 1856. Overruled — *Illinois Central R. R. Co. v. Middleworth*, 46 Ill., 494, 1868.
- Chamberlain v. Milwaukee and Mississippi R. R. Co.**, 11 Wis., 238, 1860. Overruled — *Moseley v. Chamberlain*, 18 Wis., 700, 1861. Denied — *Ohio and Mississippi R. R. Co. v. Hammersley*, 28 Ind., 371, 1867; see *Pittsburgh, Ft. Wayne and Chicago R. R. Co. v. Devinney*, 17 Ohio St., 197, 1867.
- Chapman v. New Haven R. R. Co.**, 19 N. Y., 341, 1859. Denied — *Lockhart v. Lichten-thaler*, 46 Penn. St., 151, 1863. Doubted — *Mooney v. Hudson River R. R. Co.*, 5 Robertson (N. Y.), 548, 1868.
- Chicago v. Rock Island R. R. Co.**, 20 Ill., 286, 1858. See *Chicago v. Colby*, 20 Ill., 614, 1858.
- Chicago and Mississippi R. R. Co. v. Patchen**, 16 Ill., 198, 1854. Overruled — *Illinois Central R. R. Co. v. Middleworth*, 46 Ill., 494, 1868.
- Chicago and Northwestern R. R. Co. v. Boone County**, 45 Ill., 240, 1867. See *Chicago and Northwestern R. R. Co. v. Lee County*, 44 Ill., 248, 1867.
- Chicago and Rock Island R. R. Co. v. Still**, 19 Ill., 499, 1858. See *Chicago, Burlington and Quincy R. R. Co. v. Canffman*, 38 Ill., 424, 1865.
- Chicago, Burlington and Quincy R. R. Co. v. George**, 19 Ill., 510, 1858. See *Chicago and Alton R. R. Co. v. Gretzner*, 46 Ill., 74, 1867.
- Chicago, Burlington and Quincy R. R. Co. v. Hazzard**, 26 Ill., 373, 1861. See *Illinois Central R. R. Co. v. Simmons*, 38 Ill., 242, 1865.
- Chicago, Burlington and Quincy R. R. Co. v. Triplet**, 38 Ill., 482, 1865. See *Chicago and Rock Island R. R. Co. v. McKean*, 40 Ill., 218, 1866.
- Cincinnati, etc., R. R. Co. v. Calvert**, 13 Ind., 489, 1859. See *Cochnowar v. Cochnowar*, 27 Ind., 253, 1866.
- Clark v. Syracuse and Utica R. R. Co.**, 11 Barbour (N. Y.), 112, 1851. Denied — *Jackson v. Rutland and Burlington R. R. Co.*, 25 Vt., 150, 1853.
- Clarkson v. Hudson River R. R. Co.**, 12 N. Y., 304, 1855. See *Staats v. Hudson River R. R. Co.*, 3 Keyes (N. Y.), 196, 1866.
- Coe v. Columbus, etc., R. R. Co.**, 10 Ohio St.,

- 372, 1859. See *Dinsmore v. Racine, etc., R. R. Co.*, 12 Wis., 649, 1860.
- Coggill v. Hartford and New Haven R. R. Co.**, 3 Gray (Mass.), 545, 1854. See *Hall v. Hinks*, 21 Md., 406, 1863.
- Colgrove v. Harlem R. R. Co.**, 6 Duer (N. Y.), 382; 20 N. Y., 492, 1859. Doubted — *Lockhart v. Lichtenthaler*, 46 Penn. St., 151, 1863.
- Colgrove v. New York and New Haven R. R. Co.**, 20 N. Y., 492, 1859. Doubted — *Moonney v. Hudson River R. R. Co.*, 5 Robertson (N. Y.), 548, 1868.
- Connecticut Mutual Life Insurance Co. v. New York and New Haven R. R. Co.**, 25 Conn., 265, 1856. See *Peoria Insurance Co. v. Frost*, 37 Ill., 333, 1865.
- Craig v. Rochester etc., R. R. Co.**, 39 N. Y., 404, 1868. Denied — *Hobart v. Milwaukee City R. R. Co.*, 27 Wis., 194, 1870.
- Conger v. Hudson River R. R. Co.**, 12 N. Y., 190, 1854. Denied — *Chicago and Michigan Lake Shore R. R. Co. v. Sanford*, 23 Mich., 418, 1871.
- Contra Costa R. R. Co. v. Mass.**, 23 Cal., 324, 1863. See *Lake Merced W. Co. v. Cowles*, 31 Cal., 215, 1866; *San Francisco and A. W. Co. v. Alameda W. Co.*, 36 Cal., 639, 1869.
- Corwin v. New York Central R. R. Co.**, 13 N. Y., 42, 1855. See *Pittsburgh, etc., R. R. Co. v. Methuen*, 21 Ohio St., 586, 1871.
- Costigan v. Mohawk and Hudson R. R. Co.**, 2 Denio (N. Y.), 609, 1846. Denied — *Pond v. Wyman*, 15 Mo., 175, 1851.
- Danner v. South Carolina R. R. Co.**, 4 Richardson's Law (So. Car.), 329, 1851. See *North-eastern R. R. Co. v. Sineath*, 8 ib., 185, 1855.
- Darling v. Boston and Worcester R. R. Co.**, 11 Allen (Mass.), 295, 1865. See *Nashua Lock Co. v. Worcester etc., R. R. Co.*, 48 N. H., 339, 1869.
- Davenport v. Mississippi and Missouri R. R. Co.**, 12 Ia., 539, 1861. See *Faxon v. McCosh*, 12 ib., 527, 1861.
- Davis v. La Crosse and Milwaukee R. R. Co.**, 12 Wis., 16, 1860. See *Vilas v. Milwaukee and M. R. R. Co.*, 15 Wis., 233, 1862.
- Delaware, Lackawanna, etc., R. R. Co. v. Burson**, 61 Penn. St., 369, 1869. See *McClinton v. Pittsburgh, etc., R. R. Co.*, 66 ib., 404, 1870.
- Denny v. New York Central R. R. Co.**, 13 Gray (Mass.), 481, 1859. Denied — *Read v. Spaulding*, 30 N. Y., 630, 1864.
- Drake v. Hudson River R. R. Co.**, 7 Barbour (N. Y.), 508, 1849. Dictum overruled — *Davis v. New York*, 14 N. Y., 506, 1856.
- Dry Dock, etc., R. R. Co. v. New York and Harlem R. R. Co.**, 30 Howard's Pr. (N. Y.), 39, 1865. Reversed — 54 Barbour (N. Y.), 388; 32 Howard's Pr., 193, 1866.
- Dubuque County v. Dubuque and Pacific R. R. Co.**, 4 G. Greene (Iowa), 1, 1853. Overruled — *Stokes v. Scott County*, 10 Ia., 166, 1859; see *State v. Wapello County*, 13 ib., 388, 1862.
- Dunn v. North Missouri R. R. Co.**, 24 Mo., 493, 1857. See *Hill v. La Crosse and Milwaukee R. R. Co.*, 11 Wis., 214, 1860.
- Dunnigan v. Chicago and Northwestern R. R. Co.**, 18 Wis., 28, 1864. See *Fisher v. Farmers' L. and T. Co.*, 21 Wis., 73, 1866.
- Durfee v. Old Colony R. R. Co.**, 5 Allen (Mass.), 230, 1862. Denied — *Zabriskie v. Hackensack and New York R. R. Co.*, 3 C. E. Green's Ch. (N. J.), 178, 1867.
- Eames v. Salem, etc., R. R. Co.**, 98 Mass., 360, 1868. See *Keliher v. Connecticut River R. R. Co.*, 107 Mass., 411, 1871.
- Ellis v. Portsmouth and Roanoke R. R. Co.**, 2 Iredell's Law (N. C.), 138, 1841. See *Herring v. Wilmington and Raleigh R. R. Co.*, 10 ib., 402, 1849.
- Elmore v. Naugatuck R. R. Co.**, 23 Conn., 457, 1855. See *Nashua Lock Co. v. Worcester and Nashua R. R. Co.*, 48 N. H., 339, 1869.
- Enfield Toll Bridge Co. v. Hartford and New Haven R. R. Co.**, 17 Conn., 40, 1845. Denied — *Bridge Co. v. Hoboken Land Co.*, 2 Beasley's Ch. (N. J.), 81; ib., 503; 1 Wallace, 116, 1863; *Lake v. Virginia and Truckee R. R. Co.*, 7 Nev., 294, 1872; *Commissioners of Fisheries v. Holyoke Water Power Co.*, 104 Mass., 446, 1870.
- Erie and Northeast R. R. Co. v. Casey**, 26 Penn. St., 287; 1 Grant's Cases (Penn.), 274, 1856. See *Baltimore v. Pittsburgh, etc., R. R. Co.*, 1 Abbott (U. S. C. C.), 9, 1865.
- Ernst v. Hudson River R. R. Co.**, 32 Barbour (N. Y.), 159; 19 Howard's Pr. (N. Y.), 205, 1860. Reversed, 24 ib., 97, 1862.
- Evansville, etc., R. R. Co. v. Cochran**, 10 Ind., 560, 1858. Overruled — *Jeffersonville, etc., R. R. Co. v. Bowen*, 40 Ind., 545, 1872.
- Evansville and Crawfordsville R. R. Co. v.**

- Duncan**, 28 Ind., 441, 1867. See *Memphis and Charleston R. R. Co. v. Whitfield*, 44 Miss., 466, 1870.
- Evansville, Indiana, etc., R. R. Co. v. Evansville**, 15 Ind., 395, 1860. See *Snyder v. Studebaker*, 19 ib., 462, 1862.
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- Galena, etc., R. R. Co. v. Fay**, 16 Ill., 558, 1855. See *Chicago and Alton R. R. Co. v. Gretzner*, 46 Ill., 74, 1867.
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- Great Western R. R. Co. v. Bacon**, 30 Ill., 347, 1863. See *Same v. Hanks*, 36 ib., 281, 1865.
- Great Western R. R. Co. v. Thompson**, 17 Ill., 131, 1855. Overruled — *Illinois Central R. R. Co. v. Middlesworth*, 46 ib., 494, 1868.
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- Hamilton v. New York and Harlem R. R. Co.**, 9 Paige's Ch. (N. Y.), 171, 1841. See *Savannah, etc., R. R. Co. v. Shiels*, 33 Ga., 601, 1863.
- Hanson v. Vernon**, 27 Ia., 28. Overruled — *Stewart v. Board of Supervisors of Polk County*, 30 Ia., 9, 1870; *McGregor and Sioux City R. R. Co. v. Birdsall*, ib., 255.
- Harriot v. New Jersey R. R. and T. Co.**, 2 Hilton (N. Y.), 262, 8 Abbott's Pr. (N. Y.), 284, 1859. Reversed — 1 Daly (N. Y.), 377, note, 1860; see *King v. Poole*, 36 Barbour (N. Y.), 242, 1862.
- Hartford and New Haven R. R. Co. v. Crosswell**, 5 Hill (N. Y.), 383, 1843. See *Schenectady, etc., Plankroad Co. v. Thatcher*, 11 N. Y., 102, 1854.
- Hartford and New Haven R. R. Co. v. Kennedy**, 12 Conn., 499, 1838. Doubted — *Kennebec, etc., R. R. Co. v. Kendall*, 31 Me., 470, 1850; *Carson v. Arctic Mining Co.*, 5 Mich., 288, 1858; see *Buffalo and New York City R. R. Co. v. Dudley*, 14 N. Y., 336, 1856.
- Hays v. Pennsylvania R. R. Co.**, 17 Penn St., 9, 1851. See *Commonwealth v. Morris*, 1 Philadelphia Rep. (Penn.), 411, 1852.
- Hegeman v. Western R. R. Co.**, 16 Barbour (N. Y.), 353; 13 N. Y., 9, 1853. See *Brehm v. Great Western R. R. Co.*, 34 Barbour (N. Y.), 256, 1861; *Murray v. Hudson River R. R. Co.*, 47 ib., 196, 1866.

- Henry v. Dubuque and Pacific R. R. Co.**, 2 Ia., 288, 1855. See *Frederick v. Shane*, 32 Ib., 254, 1871.
- Henry v. Rutland and Burlington R. R. Co.**, 27 Vt., 435, 1855. See *Hodges v. Same*, 29 Ib., 220, 1857.
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- Hester v. Memphis, etc., R. R. Co.**, 32 Miss., 378, 1856. See *Ellison v. Mobile, etc., R. R. Co.*, 36 Miss., 572, 1858.
- Hibbard v. New York and Erie R. R. Co.**, 15 N. Y., 455, 1857. See *Higgins v. Watervliet, etc., R. R. Co.*, 46 N. Y., 23, 1871.
- Hickey v. Boston, etc., R. R. Co.**, 14 Allen (Mass.), 429, 1867. See *Mayo v. Boston, etc., R. R. Co.*, 104 Mass., 141, 1870.
- Hinchman v. Paterson Horse R. R. Co.**, 2 C. E. Green's Ch. (N. J.), 75, 1864. See *Higby v. Camden and Amboy R. R. Co.*, 5 Ib., 435, 1870.
- Hoagland v. Hannibal, etc., R. R. Co.**, 39 Mo., 451, 1867. Overruled — *House v. Lowell*, 45 Mo., 381, 1870.
- Hood v. New York, etc., R. R. Co.**, 22 Conn., 1, 502, 1852. Denied — *Bissell v. Michigan Southern and Northern Indiana R. R. Co.*, 22 N. Y., 258, 1860. See *Nashua Lock Co. v. Worcester, etc., R. R. Co.*, 48 N. H., 339, 1869; *Wheeler v. San Francisco, etc., R. R. Co.*, 31 Cal., 46, 1866; *Converse v. Norwich and New York Transportation Co.*, 33 Conn., 166, 1865.
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- Imlay v. Union Branch R. R. Co.**, 26 Conn., 249, 1857. See *Elliot v. Fair Haven, etc., R. R. Co.*, 32 Conn., 579, 1860.
- Indiana and Illinois R. R. Co. v. Williams**, 22 Ind., 198, 1864. See *Davis v. Clark*, 26 Ind., 424, 1866.
- Indiana Central R. R. Co. v. Oakes**, 20 Ind., 9, 1863. Overruled — *Graham v. Columbus, etc., R. R. Co.*, 27 Ind., 260, 1866.
- Indianapolis, etc., R. R. Co. v. Renner**, 17 Ind., 135, 1861. See *Indianapolis, etc., R. R. Co. v. Solomon*, 23 Ind., 534, 1864.
- Indianapolis, etc., R. R. Co. v. Shimer**, 17 Ind., 295, 1861. See *Bartlett v. Dubuque and Sioux City R. R. Co.*, 20 Ia., 188, 1866.
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- Johnson v. Albany, etc., R. R. Co.**, 40 Howard's Pr. (N. Y.), 193, 1870. Reversed — 5 Lansing (N. Y.), 222, 1871.
- Johnson v. Hudson River R. R. Co.**, 6 Duer (N. Y.), 633, 1857. See *Beisiegel v. New York Central R. R. Co.*, 40 N. Y., 9, 1869.
- Jones v. New York and Erie R. R. Co.**, 29 Barbour (N. Y.), 633, 1859. Dictum denied — *Ward v. New York Central R. R. Co.*, 47 N. Y., 29, 1871.
- Kent v. Hudson River R. R. Co.**, 22 Barbour (N. Y.), 278, 1856. Doubted — *Jones v. New York and Erie R. R. Co.*, 29 Ib., 633, 1859; *Wibert v. New York and Erie R. R. Co.*, 12 N. Y., 245, 1855; 19 Barbour (N. Y.), 36, 1854.
- King v. Paterson and Hudson River R. R. Co.**, 5 Dutcher (N. J.), 504, 1861; overruling *Same v. Same*, Ib., 82, 1860.
- Kirkpatrick v. Southwestern Railroad Bank**, 6 Humphreys (Tenn.), 45, 1845. See *Lowry v. Brown*, 3 Sneed (Tenn.), 17, 1855.
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- Lamb v. Camden and Amboy R. R. Co.**, 2 Daly (N. Y.), 454, 1869. Reversed — 46 N. Y., 271, 1871.
- Lamb v. Western R. R. Co.**, 7 Allen (Mass.), 98, 1863. See *Cass v. Boston and Lowell R. R. Co.*, 14 ib., 448, 1867.
- Lexington and Ohio R. R. Co. v. Applegate**, 8 Dana (Ky.), 289, 1839. Denied — *Davis v. New York*, 14 N. Y., 506, 1856.
- Little Miami R. R. Co. v. Stephens**, 20 Ohio, 415, 1851. See *Ponton v. Wilmington and Weldon R. R. Co.*, 6 Jones' Law (N. C.), 245, 1858; *Moss v. Johnson*, 22 Ill., 633, 1859.
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- Louisville, etc., R. R. Co. v. Burke**, 6 Coldwell (Tenn.), 45, 1868. Overruled — *Nashville and Charleston R. R. Co. v. Prince*, 2 Heiskell (Tenn.), 580, 1871.
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- McGrath v. Hudson River R. R. Co.**, 19 Howard's Pr. (N. Y.), 211, 1860. See *Ernst v. Hudson River R. R. Co.*, 35 N. Y., 9, 1866; 39 N. Y., 61, 1868; 32 Barbour (N. Y.), 159, 1860; 32 Howard's Pr. (N. Y.), 262, 1862; 24 ib., 97, 1862.
- McPadden v. New York Central R. R. Co.**, 47 Barbour (N. Y.), 247, 1866. Reversed — 44 N. Y., 478, 1871.
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- Marion and Logansport R. R. Co. v. Lomax**, 7 Ind., 648, 1856. Overruled — *Indiana and Illinois Central R. R. Co. v. Davis*, 20 Ind., 6, 1863.
- Marion, etc., R. R. Co. v. Dillon**, 7 Ind., 404, 1856. Overruled — *Indiana and Illinois Central R. R. Co. v. Davis*, 20 Ind., 6, 1863.
- Marion, etc., R. R. Co. v. Hodge**, 9 Ind., 163, 1857. Overruled — *Indiana and Illinois Central R. R. Co. v. Davis*, 20 Ind., 6, 1863.
- Marsh v. New York and Erie R. R. Co.**, 14 Barbour (N. Y.), 364, 1852. Overruled — *Corwin v. New York and Erie R. R. Co.*, 13 N. Y., 42, 1855.
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- Michigan Central R. R. Co. v. Ward**, 2 Mich., 538, 1853. Overruled — *Michigan Central R. R. Co. v. Hale*, 6 Mich., 243, 1859. See *Angle v. Mississippi and Missouri R. R. Co.*, 18 Ia., 555, 1865.
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- Miller v. New York and Erie R. R. Co.**, 21 Barbour (N. Y.), 513, 1856. Overruled — *Albany Northern R. R. Co. v. Brownell*, 24 N. Y., 345, 1862.
- Millered v. Lake Ontario, Auburn and New York R. R. Co.**, 9 Howard's Pr. (N. Y.), 238, 1854. Overruled — *Kent v. New York Central R. R. Co.*, 12 N. Y., 628, 1855.
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- Pearce v. Madison and Indianapolis R. R. Co.**, 21 Howard, 441, 1858. Denied — *Bissell v. Michigan Southern and Northern Indiana R. R. Co.*, 22 N. Y., 258, 1860.
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- People v. Albany and Susquehanna R. R. Co.**, 1 Lansing (N. Y.), 308, 1869. Reversed — 5 ib., 25, 1871.
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- Perkins v. New York Central R. R. Co.**, 24 N. Y., 196, 1862. Denied — *Hopper v. Wells*, 27 Cal., 11, 1864.
- Perkins v. Portland, etc., R. R. Co.**, 47 Me., 573, 1859. See *Nashua Lock Co. v. Worcester, etc., R. R. Co.*, 48 N. H., 339, 1869.
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- Philadelphia and Trenton R. R. Co. v. Stimpson**, 14 Peters, 448, 1840. Denied — *Campan v. Dewey*, 9 Mich., 381, 1861.
- Philadelphia, etc., R. R. Co. v. Philadelphia, etc., Towboat Co.**, 23 Howard, 209, 1859. Denied — *Stanton v. Metropolitan R. R. Co.*, 14 Allen (Mass.), 485, 1867.
- Phillips v. Rensselaer and Saratoga R. R. Co.**, 57 Barbour (N. Y.), 644, 1870. Reversed — 49 N. Y., 177, 1872.
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- Portland, etc., R. R. Co. v. Graham**, 11 Metcalf (Mass.), 1, 1846. See *Kennebec and Portland R. R. Co. v. Jarvis*, 34 Me., 360, 1852.
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